

# The Role of Constitutionalism in Transitional Justice Processes in Central Europe

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This paper discusses how new constitutions in Central European democratic transitions dealt with the problem of transitional justice, and how these different approaches influenced reconciliation and democratic consolidation in the given countries. I differentiate three types of democratic transition and approach to transitional justice: rupture, negotiated transition, and transformation. A rupture occurs when the authoritarian regime weakens to the point of collapse, at which time the opposition seizes power. In a negotiated transition, the regime and opposition negotiate arrangements for a democratic transition. In a transformation, the incumbent authoritarian leaders try to transform their regime into a democracy inaugurating and directing the process of democratization, slowly guiding political change that culminates in free elections. In this type of transition, members of the old elite remain politically powerful even after democracy is introduced, as happened in Bulgaria, which is not discussed here.<sup>1</sup> The main case studies throughout are East Germany, representing the 'rupture-type' transition with immediate constitution-making approach on the one hand, and Hungary as a 'negotiated transition' with a 'post-sovereign' constitution-making process on the other. Czechoslovakia and its successor states, and Poland are also examined as control cases for the first and the second category respectively.

Comparing the two major case studies the conclusion seems to be too obvious that while the German approach of dealing with the past is a success story, Hungary failed in almost every respects. But the paper argues that this judgment is unjust from the perspective of both countries. The success of the former GDR is in no small part due to the fact that the country became part of an already consolidated democratic regime with a well-functioning constitutional system, which helped the East German society to overcome the lack of readiness to come to terms with the past, present also in all countries of Central Europe. It is hard to tell what part of the failure of Hungary is thanks to the failed transitional measures, and what role the general backsliding of democracy played here. The Hungarian government after 2010 certainly wanted to abolish liberal constitutionalism, including the rule of law guarantees of their new transitional justice measures for political justice laid down in the text of the Fundamental Law.

## **Transition and Constitution-making**

The common characteristic of the system-changes in the former members of the Soviet block of Central Europe in the early 1990s was that these countries had to achieve an independent nation-state, a civil society with a private economy, and constitutional structure at the same time. In other words the democratic transition and its constitution-making process here was part of a change to both a Western model of democracy and a market economy. This 'triple transition' scenario is significantly different from the scenario of 'single transition', where the only aim to achieve was a transition from a quasi-democratic or authoritarian regime to democracy, as happened in the middle of the 1970s in Southern Europe (Greece 1975, Portugal 1976, and Spain 1978), or in South Africa with the making of the interim Constitution in 1993 and the final one in 1996, and even more different from constitutional

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<sup>1</sup> See this categorization of transitions in N. Calhoun, *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, Palgrave, 2004. Chapter 1.

reforms that have been neither accompanied by nor the result of any apparent fundamental changes in political or economic regimes, like in the case of Israel.<sup>2</sup>

In order to compare the role of constitutions in transitional justice processes in different Central European countries first we should discuss the most useful typology of these transitions for the purposes of our topic. One of the most well known categorization is that of Samuel Huntington's, studying thirty-five so-called third wave transitions that had occurred or that appeared to be underway by the end of the 1980s. Huntington uses three categories: replacement for the overthrow of the regime, and two less radical types of transition, between which the line is fuzzy, transformation and transplacement.<sup>3</sup> The problem with this kind of categorization starts when we try to put the different countries, representing unique solutions of transition into one of the categories. Evaluating the Central European transitions, Huntington for instance puts Hungary into the category of transformation, while the events in Poland and Czechoslovakia are characterized as transplacements.

Comparing the Central European countries Timothy Garton Ash in his book, the Magic Lantern, keeping alive 'the revolution of '89' as he witnessed in Warsaw, Budapest, Berlin and Prague has coined the term 'refolution' for the events of Warsaw and Budapest, because they were in essence reforms from above in response to the pressure for revolution from below, though he uses revolution freely for what happened in Prague, Berlin, and Bucharest.<sup>4</sup> The changes in Hungary and Poland were not triggered by mass demonstrations like in Romania, in the former GDR or in Czechoslovakia, and reforms of revolutionary importance interrupted the continuity of the previous regime's legitimacy without any impact on the continuity of legality. Ralf Dahrendorf another Western observer, argues that „the changes brought about by the events of 1989 were both extremely rapid and very radical (which is one definition of revolutions), at the end of the day, they led to the delegitimation of the entire ruling class and the replacement of most of its key members, as well as a constitutional transformation with far-reaching consequences”.<sup>5</sup>

For our purposes the most useful typology is the one used by Claus Offe, which takes into account three modes of macro-social integration at the level of national societies, namely the economic, the political and the national cultural modes.<sup>6</sup> On the basis of seventeen variables Offe provides three category of six post-Communist countries in East and Central Europe. There are two cases in each category of societies integrated primarily through economic success, namely the German Democratic Republic (GDR) and Czechoslovakia (CSR); then

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<sup>2</sup> The terms 'single' and 'dual' transitions were used by A. Przeworski (*Democracy and the Market. Political and Economic Reform sin Eastern Europe and Latin America*, Cambridge University Press, Cambridge, 1991.) Later Claus Offe broadened the scope of this debate by arguing that postcommunist societies actually faced a 'triple transition', since many postcommunist states were new or renewed nation-states. See C. Offe, *Varieties of Transition: The East European and East German Experience*, MIT Press, 1997. Chapter 3.

<sup>3</sup> See S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1991.

<sup>4</sup> See T. G. Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague*, Random House, 1990. In principle, the same terminology is used by János Kis regarding the Hungarian system change. Kis reasons that in the case of a reform, legality and legitimacy is unchanged; in the case of a revolution they both fracture; while in the case of a system change legality remains to exist while legitimacy ceases to exist. See J. Kis, 'Between Reform and Revolution: Three Hypotheses about the Nature of System Change', *Constellations*, 1995. Vol. I. No. 3.

<sup>5</sup> Ralf Dahrendorf, *Reflections on the Revolution in Europe*, Random House, 1990. p.8.

<sup>6</sup> See Offe, 1997. Chapter 2. In this chapter Offe argues that the changes of these three modes were being unleashed at ones, and this is the reason the use the mentioned term of 'triple transition'.

there are Poland and Hungary, which are integrated through national identity; and lastly Romania and Bulgaria, which are above all integrated by means of repressive political rule.<sup>7</sup> Due to this complex set of variables these categories has been shaped more by the specific history of the previous five hundred years than by the far-reaching joint ‘bloc membership’ of the prior forty years.

The result of Offe’s typology is very similar to the one provided by Noel Calhoun considering the politics of transitional justice. Calhoun based on the modality of the transition and the distribution of power differentiates also three types of democratic transition and approach to transitional justice: rupture, negotiated transition, and transformation.<sup>8</sup> A rupture occurs when the authoritarian regime weakens to the point of collapse, at which time the opposition seizes power, like it happened in Czechoslovakia, East Germany, but also in Romania. In a negotiated transition, the regime and opposition negotiate arrangements for a democratic transition, as it was the case in Poland and Hungary. In a transformation, the incumbent authoritarian leaders try to transform their regime into a democracy inaugurating and directing the process of democratization, slowly guiding political change that culminates in free elections. In this type of transition, which happened in Bulgaria, members of the old elite remain politically powerful even after democracy is introduced.

As we can see there is only Romania in the typology of Offe and Calhoun, which was categorized differently, and also this difference can be explained by the fact that Calhoun’s typology is based on a snapshot of the transition in 1989/90. Already after the first free election members of the elite of the old regime were returned to positions of power, and after the second one, held on 26 September 1992 President Iliescu has been re-elected as president. Therefore after the bloody December 1989, which was the only example of this type of violence in the region, Romania followed the Bulgarian route of transformation.

Constitutions play an important role as future oriented instrument of transition in the process of change of system in most post-communist countries, illustrating how constitutions were exclusively political documents before 1989, and how newly established constitutions and institutions, like constitutional courts can serve as both political and legal instruments of change. History shows that while laws change, written constitutions containing fundamental values must remain, contravening the notion that “Higher Law” is not law at all. Basically this doctrine lies at the root of all natural law theories. Such theories continually revive, especially in moments of acute crisis, such as the collapse of both fascism and communism. When the Nazi-Fascist era shook their faith in legislatures, people began to reconsider the judiciary as a check against legislative disregard of principles that had customarily been considered immutable, and sought to realize those principles. As Mauro Cappelletti formulated in his book,<sup>9</sup> this process took place in three stages. The first was the adoption of a written constitution. The second was the “rigid” character accorded to modern constitutions. The final stage was the provision of a means for implementing the guarantees contained in the constitution, separate from the legislative power; this would be made operational by the judiciary — in some systems, by a special constitutional court. Through modern constitutionalism, natural law, placed on a historical and realistic footing, has found a new place in legal thought.

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<sup>7</sup> *Ibid*, 138-143.

<sup>8</sup> N. Calhoun, *Dilemmas of Justice in Eastern Europe’s Democratic Transitions*, Palgrave, 2004. Chapter 1.

<sup>9</sup> M. Cappelletti, *Judicial Review in the Contemporary World*, New York, 1971.

The same process occurred in 1989-90, when the communist system changed in Eastern and Central Europe, including the countries of the former Soviet-Union. In almost all of these countries, new constitutions were enacted and separate constitutional courts were established. Latvia was the only state in post-communist Europe to return to independence while retaining its pre-World War II constitution of 1922.<sup>10</sup> As Eivind Smith states, the different forms of constitution-making that took place in the early 1990s can only be understood as expressions of these countries' will to rid themselves of the past and enter a new era. In countries such as Estonia, Latvia and Lithuania, the constitution was evidently regarded as an instrument of transformation of their status from having been Soviet republics. In countries with a less painful past, it was rather seen as a symbol of past achievements, as in Norway, or as an expression of how the polity sees itself being governed, shown by the example of Sweden.

A better-designed constitution has many advantages, among others it can indeed bring political stability.<sup>11</sup> As a counter-example one can mention the case of Latvia, where a large number of formal amendments to its 1922 constitution could be enacted in a short period of time, due to the procedural ease of adopting amendments in the Parliament. The same concern can be raised about the stability of the Hungarian and the Polish constitution, the latter at least until 1997. A very paradoxical aspect of the whole history of East-Central Europe is, that those two countries, i.e., Hungary and Poland, which were the most developed countries, did not enact a new constitution. Poland did it in 1997. But those countries where the obstacles of a new democracy were seemingly more present, enacted new constitutions very rapidly, e.g. Russia, Bulgaria, Romania.

A common negative consequence of the frequent amendments to the constitution both in Latvia and Hungary are the temptations to harness constitutional changes to a popular cause and to exploit both for partisan gain, as for instance the ongoing agitations in both countries for a president elected by "all the people", which involves the risk that a "strong hand" will solve the endless problems of today's politics.<sup>12</sup>

One of the well-known examples of the old dilemma of amending or adjusting a constitution, and the rigidity of constitutional amendment procedures is that of Norway, where the constitution dates back to 1814. It is the people's foremost piece of national and political heritage. In some important aspects the wording seems at odds with what is actually going on; therefore one often has to refer to "constitutional customs," some of which seem to stand in direct contradiction to the written constitution.

The way of constitution-making very much depends on the power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; there is then a clear victory of the new forces over the old order. Democracy can also arrive at the initiative of reformers inside the forces of the past, or as a result of joint action by and the negotiated settlement between governing and opposition groups. The different forms of constitution-making that took place in the early 1990s can be understood as expressions of these countries' will to rid themselves of the past and enter a new era, but through different ways.

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<sup>10</sup> See E. Smith (Ed.), *The Constitution as an Instrument of Change*, SNS Förlag, 2003. p. 87.

<sup>11</sup> See J. Penekis, 'Amend or Adjust the Constitution', in, Smith (Ed.), *ibid*, 82.

<sup>12</sup> See Penekis, *ibid*, 96.

# Types of Constitution-making and Approaches to Transitional Justice

The process of constitutionalization in Central Europe after the democratic transition represents three different types of constitution-making.

1. The earliest, even too early closure with significant legitimation problems happened in Bulgaria and Romania, where the first freely elected parliaments have been elected as a sovereign constituent assembly, like the French one in 1789-1791 and in 1945, or the Weimar Assembly in 1918. These completely new constitutions not to be discussed here were approved by plebiscite.

2. In the Czech and the Slovak Republics the constitution making was carried out in 1993 after the collapse of the federal state by democratically elected normal legislative bodies, but without the classification of a constituent assembly.<sup>13</sup> In the case of the GDR the method of constitutional change has been an amendment to the (West) German Basic Law, to which the six new Laender joined after the unification. In other words the joint characteristic of these two constitution-making processes was that both countries developed their own constitutional systems after the establishment of the new (in the case of the GDR, territorial) order.<sup>14</sup>

3. In both Poland and Hungary the new constitutional order has been generated within by the illegitimate legislatures, which after the peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition enacted comprehensive modifications of the old constitutions. Similar 'post-sovereign'<sup>15</sup> or 'pacted constitution-making'<sup>16</sup> process happened in Spain in the end of the 70s and in South Africa from the beginning through the middle of the 90s. While in Poland the constitution-making process was closed in 1997 by a final constitution, in Hungary this second phase of the post-sovereign constitution-making process failed in 1996, when a new constitution was rejected by parts of

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<sup>13</sup> A. Arato, 'Dilemmas Arising Out of the Power to Create Constitutions in Eastern Europe' in M. Rosenfeld (Ed.), *Constitutionalism, Identity and Difference*, Duke University Press, 1994.

<sup>14</sup> Exactly because of this 'special path' of the transition in East Germany joining to the already consolidated democratic system of the German Federal Republic, Offe besides the straightforward 2-2-2 grouping outlined above, he also considers a 1-5 division according to which the GDR is a clearly emphasized exceptional case. Cf. C. Offe, *Varieties of Transition: The East European and East German Experience*, MIT Press, 1997 Using Jon Elster's metaphor for the Central European countries' transitions, as they had, as it were to repair their sinking ships while still at sea, Offe argues that the GDR was retrofitted in the FRG dry dock. See Offe, 1997. 151.

<sup>15</sup> The term 'post-sovereign' constitution making is used by Andrew Arato, referring to countries, where the first, interim constitution is enacted by a not democratically elected body, ideally followed by a final constitution of the legitimate *pouvoir constituant*. See A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010., p. 19. The extensive database of Jennifer Widner, that describes 195 constitution making processes taking place between 1975 and 2002, does not make such distinctions regarding constitution making processes. Romania and Bulgaria fall into one category in her work, because the GDP was low during negotiations; and again, for reasons related to GDP, the Czech Republic, Hungary, Poland and Slovakia fall into another group. Within this group, Hungary is placed into a different category than the other Visegrád countries, because the rights restriction was harsher at the time of the constitutional preparatory work, in 1989 in Hungary then in the Czech Republic and Slovakia in 1992, and in Poland in 1997 when the final constitution was enacted. Because of this categorization, Widner's conclusion that the preparatory procedures are not of utmost importance in constitution making, does not come as a surprise. See: J. Widner, 'Constitution Writing in Post-Conflict Settings: An Overview', *William and Mary Law Review*, 2008, Vol. 49, p. 1513, 1532.

<sup>16</sup> The term referring to a deal between the representatives of the old regime and its opposition movements is used by M. Rosenfeld, 2009.

the governing Socialist party fraction, and the 2011 new Fundamental Law breaks with the principles of liberal constitutionalism of the 1989 transition altogether.

Constitutions are usually created during periods of transition following political repression. As András Sajó argues in his book *Limiting Government*, constitutions in general, and the constitutions of the transitions from communism especially reflect fears from the past to be repeated.<sup>17</sup> Also Ruti Teitel claims that the content of contemporary constitutionalism is a systematic response to the wrongs of the prior regime, and thus it is being shaped through developments in transitional justice.<sup>18</sup>

Transitional societies necessarily face with the past in general, and the legacy of human rights violations in the previous regime in particular. This paper contends that the full consolidation of democracy can only be successfully completed if there is political will to tackle the necessary process of dealing with the undemocratic past. What this process exactly is and what it aims at is best rendered by two German words, for which no direct translations exist in English: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*.<sup>19</sup>

The way of dealing with the past very much depends on the power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; there is then a clear victory of the new forces over the old order. Democracy can also arrive at the initiative of reformers inside the forces of the past, or as a result of joint action by and the negotiated settlement between governing and opposition groups.

But for the purposes of our topic, the more important question is, how the differences in the type of transition affect efforts to deal with the past. Huntington gives the following guidelines for democratizers dealing with authoritarian crimes: a) If replacement (revolution) occurred and it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year coming into power) while making clear that you will not prosecute middle- and lower-ranking officials. b) If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations, because the political costs of such an effort will outweigh any moral gains. c) Recognize that on the issue of „prosecute and punish vs. forgive and forget”, each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget.<sup>20</sup>

Also using the mentioned similar typology of Offe and Calhoun one can argue that the rupture type of transitions, such as the one in East Germany (and Czechoslovakia) much more likely use all kinds of transitional justice approaches, while in negotiated transitions, such as the Hungarian (or the Polish) the old regime retains sufficient power to avoid punishment of members of the former regime, even though other ways of dealing with the past are not excluded. As Michel Rosenfeld argues, as opposed to peaceful, negotiated transitions in cases

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<sup>17</sup> A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, Central European University Press, 1999. 3.

<sup>18</sup> See R. Teitel, 'Transitional Justice and Transformation of Constitutionalism', in R. Dixon and T. Ginsburg (eds.), *Comparative Constitutional Law*, Edward Elgar, 2011. 57.

<sup>19</sup> These expressions have normative connotations, as they not only describe a process, but also imply the positive effects this process will entail. The former may be translated by 'working through' or 'treating' history; the latter by 'coping, dealing, coming to terms with' or, even more precisely, 'overcoming' the past.

<sup>20</sup> See S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1991. 231.

of a violent rupture “the demands of political justice might be reconciled with those of constitutionalism by confining the operation of political justice to the revolutionary period separating the ancime regime from the new constitutional order”.<sup>21</sup> Otherwise the pursuit of revenge against those who were responsible for the oppressive regime may undermine the very idea of a democratic transition. But when a new democracy is introduced by a process of transformation, where some actors of the previous regime were able transform their power, like we saw in the case of Bulgaria and later Romania it is unlikely to use any type of transitional justice measures<sup>22</sup>. This lack of serious transitional justice efforts is the reason not discussing Romania and Bulgarian in this paper.

Similarly, Ruti Teitel argues that trials „are well suited to the representation of historical events in controversy” and are „needed in periods of radical flux”.<sup>23</sup> András Sajó observes that if Teitel is right then perhaps there was no radical flux, especially in the ‘negotiated transitions’ of Poland and Hungary, at least not radical regarding the past.<sup>24</sup> The lack of radical change is also due to the fact that in these countries the repression was less severe than in either East Germany from the very beginning or in Czechoslovakia after 1968.<sup>25</sup> But whatever legal choices of transitional justice a state may or may not choose dealing with the past, many academics argue that in one form or in another is at least a moral if not necessarily a constitutional or international obligation of every state claimed to be governed by the rule of law. But there are of course also arguments against every kind of post-communist restitution and retribution. The most radical among them concludes that one should target everybody or nobody, and because it is impossible to reach everybody nobody should be punished and nobody compensated.<sup>26</sup>

Transitional justice is a set of methods through which communities that have suffered gross and systemic violations of fundamental human rights seek to distance themselves from the past and move forward in a manner consistent with the need for justice for those who have suffered.<sup>27</sup> The main complementary rationals for defending a transitional justice policy by new democracies are to provide recognition to victims, as right bearers on the one hand, and to foster civic trust in the other.<sup>28</sup> Using a narrow definition, Jon Elster defines transitional justice as „the legal and administrative process carried out after a political transition for the purpose of addressing the wrongdoings of the previous regime”.<sup>29</sup> Garrett uses a broader definition when he writes that, „[a]t its core, transitional justice might be said to be concerned

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<sup>21</sup> See M. Rosenfeld, ‘Dilemmas of Justice’, *East European Constitutional Law Review*, 1. 1992, 20.

<sup>22</sup> About the lack of any attempt to hold anyone to account (apart from the execution of Ceausescu without any due process guarantees) and open the archives of the former security services in Romania see Emma Graham-Harrison, ‘Twenty-five years after Nicolae Ceausescu was executed, Romanians seek a ‘revolution reborn’, *The Guardian*, 6 December 2014.

<sup>23</sup> See R. Teitel, ‘Transitional Justice as Liberal Narrative’, in A. Sajó (ed.), *Out of and Into Authoritarian Law*, Kluwer Law International, 2003. 6.

<sup>24</sup> András Sajó, ‘Erosion and Decline of the Rule of Law in Post-Communism: An Introduction’, in Sajó (ed.), *ibid*, xix.

<sup>25</sup> This is the argument of Ruth Kok compering Hungary with its ‘Gulash-communism’ as the ‘happiest barrack in the camp’ on the one hand and Czechoslovakia and Eastern Germany on the other. See R. Kok, *Statutory Limitations in International Criminal Law*, Martin Nijhoff, 2007. 210.

<sup>26</sup> See J. Elster, ‘On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution’, *East Eur. Const. Rev.* Vol. 1, no. 2. (Summer 1992), 15-17.

<sup>27</sup> See ‘What is Transitional Justice?’, International Center for Transitional Justice, 2010.

<sup>28</sup> P. de Greiff, ‘Vetting and Transitional Justice’, in: A. Mayer-Rieckh and P. de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. 524.

<sup>29</sup> Jon Elster, *Memory and Transitional Justice*, available at [http://web.mit.edu/rpeters/papers/elster\\_memory.pdf](http://web.mit.edu/rpeters/papers/elster_memory.pdf), 2007, page 1

above all with the politics and principles of memory. For a new democratic government, and equally, if not more so, for its citizenry, the essential questions are what to remember of the past, how to define the past, what to 'do' about the past, and how may (or will) all these matters affect both the present and the future of society?"<sup>30</sup> To formulate it differently, the new states must strive to fulfill different obligations that it owes both to the victims of human rights violations and to the society.<sup>31</sup> These possible obligations are the followings:

1. to do justice, that is to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature;
2. to grant victims the right to know the truth; this implies the ability to investigate any and all aspects of a violation that still remain shrouded in secrecy and to disclose this truth to the victims of justice, to their relatives, and to the society as a whole;
3. to grant reparations to victims in a manner that recognizes their worth and their dignity as human beings; monetary compensation in appropriate amounts is certainly a part of this duty, but the obligation should also be conceived as including nonmonetary gestures that expresses recognition of the harm done to them and an apology in the name of society;
4. states are obliged to see to it that those who have committed the crimes while serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies.

In other studies, Méndez especially emphasizes two of these obligations : a) to tell the truth and distill an authoritative account of the history of the conflict, and b) to conduct institutional reform to dismantle extant systems which promote the perpetration of abuse.<sup>32</sup> Not all of these four obligations are necessarily fulfilled in every transition. As was suggested by Huntington, in cases of transformations and transplacements, to prosecute is not well advised. The way „justice” is defined depends wholly on who holds effective political power. As Roger Errera puts it: „Memory is the ultimate form of justice.”<sup>33</sup> In this sense truth-telling can be an alternative of prosecution and punishment. But there are also other legitimate grounds for failing to prosecute. One of the legitimate reasons why a successor government may be unable to prosecute those responsible for human rights abuses during the tenure of the prior regime is, if the security forces under the control of, or loyal to the previous regime may be so powerful that any attempt to prosecute them or their political allies could lead to events dangerous to the transition. Another reason can be, if the state is facing with insuperable practical difficulties that make it impossible to punish: absence of evidence, a dysfunctional criminal justice system, economic crisis, enormous amount of time to prepare.<sup>34</sup> Also disqualification as a penalty, which can serve the means of decommunization is not a necessary element of the transition. Many academics argue that decommunization is based on the incoherent idea of collective guilt, and is not a process which a sovereign nation willingly inflicts upon itself, but rather an elite power game.<sup>35</sup> With very few exceptions, in Central

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<sup>30</sup> Stephen Garrett, *Models of Transitional Justice: A Comparative Analysis*, Columbia International Affairs Online, June 2000, available at <http://www.ciaonet.org/isa/gas02/>

<sup>31</sup> See J. E. Méndez, 'In Defense of Transitional Justice', in: A. J. McAdams (ed.): *Transitional Justice and Rule of Law in New Democracies*, University of Notre Dame Press, 1997. 11-12.

<sup>32</sup> See J.E. Méndez, 'Accountability for Past Abuses', 19 *Human Rights Quarterly*, 1997. 255., and lately 'Constitutionalism and Transitional Justice', in M. Rosenfeld and A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012. 1272-1273.

<sup>33</sup> See Roger ERRERA: *Dilemmas of Justice*, 1 *East Eur. Const. Rev.* 21,22 (Summer 1992)

<sup>34</sup> See Paul van ZYL: *Justice without Punishment: Guaranteeing Human Rights in transitional Societies*, in: SAJÓ (ed.): *Ibid*, pp. 54-60.

<sup>35</sup> See Stephen HOLMES: *The End of Decommunization*, *East Eur. Const. Rev.* Vol. 3, nos. 3-4. (Summer/Fall 1994), pp. 33-36.

Europe ordinary citizens care more about personal security and day-to-day survival, and popular clamoring for revenge was very rarely to be heard.

But the new governments answered these calls for purge, „lustration”, or at least for information about those who had committed human rights violations differently. Under pressure from former Eastern dissidents, the German government responded by opening the files and purging the past through publicity trials. The that time Czechoslovak Republic, with perhaps the harshest approach, required nearly everyone to be checked against the records of the secret police and to be presumed guilty if listed there. Poland wrestled with the question and in the end did not ask it too loudly in public. Hungary has adopted the view that the best way to deal with the past is to do better now; in other words, for the new Hungarian state, „living well is the best revenge”.<sup>36</sup>

Fulfilling their obligations the successor states seemed to find two ways to demonstrate a clear break between the old regime and the new order: a) dealing with those who participated in, or benefitted from; b) adhering to the new governments pronounced commitments to principles of democracy and the rule of law.<sup>37</sup> The first way is about the repression of the past, while the second one is focusing on the future. The traditional term of transitional justice means the ways of dealing with the past, while institutional reforms, including constitutional ones, as mentioned earlier, are more future oriented issues of the transition.

Timothy Garton Ash lists „four ways to the truth”: a) legal procedures, court trials; b) vetting and lustration of public officials; c) truth and reconciliation commissions; d) access to the files of the previous secret police.<sup>38</sup> This list of approaches is completed by many authors with a fifth way of dealing with the past, namely restitution of property or material compensation to victims. It is clear that there is a growing consensus in international law that the state is obligated to provide compensation to victims of egregious human rights abuses perpetrated by the government, and if the regime which committed the acts in question does not provide compensation, the obligation carries over to the successor government.<sup>39</sup>

Since historical commissions of inquiry, which were set up in South-Africa, Latin-America, and in some cases performed by wholly international bodies, such as the truth commission for El Salvador or the UN war crimes tribunal for Rwanda, were not used in Central Europe, I won't deal with this approach here.<sup>40</sup> But of course most of the functions of these commissions, establishing a full, official accounting and acknowledging of the past are fulfilled by the provided access to the files of the previous regime. Therefore in this paper I will concentrate on four different approaches of dealing with the past in the Central European constitutional systems: prosecutions, reparations, lustrations, and access to the files of the previous regime.

In this paper I will concentrate exclusively on the criminal prosecutions, and with the retroactive application of criminal law, since this is closely related to the rule of law, the most important principle of the new transitional constitutions.

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<sup>36</sup> See G. Halmai and K. L. Scheppele, 'Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past', in A. J. McAdams (ed.), *ibid*, 155-184.

<sup>37</sup> N. J. Kritz, 'The Dilemmas of Transitional Justice', in Kritz (ed.), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*. Volume I, US Institute of Peace Press, Washington, DC. 1995. xix.

<sup>38</sup> See T. G. Ash, 'The Truth About Dictatorship', *The New York Review of Books*, February 19, 1998.

<sup>39</sup> See for instance Kritz, *ibid*, xxvi-xxvii.

<sup>40</sup> Several variations of the truth commissions are covered at length in each of the three volumes of Kritz (ed.), *Transitional Justice*.

But before going into the details of the distinct transitional justice methods in the national constitutions' regulations, let us see what these constitutional documents say about the transition and the need to deal with the past in general.

## Germany

Considering constitutional reforms and their impact on German transition and transitional justice one has not only take into account the Unification Treaty and the consequent amendments to the Basic Law of the old Basic Law of the Federal Republic, but prior to this also the amendments to the 1968/1974 GDR constitution<sup>41</sup> in 1989-1990. Transition to democracy and coming to term with the past was already prominent on the political agenda from the public demonstrations in fall 1989 onwards, through the Round Table talks between seven opposition groups, and the SED and the former bloc parties of that winter, and the six month in which the Volkskammer functioned after the free election in March 1990.

Since the initial negotiations between the government of the FRG and the GDR haven't yet aimed at unification, but were proposing a 'treaty community', the first act of the Round Table was to establish a committee to draft a proposed new constitution for the GDR as an independent country. The text of the Round Table draft emphasized the goal of reconciliation with all the peoples „who were oppressed and persecuted by the Germans” during World War II, referring for instance to communists. Moreover, the preamble of the document, written by the GDR's most famous novelist, Christa Wolf, also invokes „the responsibility of all Germans for their history and its consequences”, a statement that is absent in the Basic Law of the FRG.<sup>42</sup>

But, for the case of a possible continuation of the GDR urgent changes were necessary to the Stalinist constitution. In the first in a series of constitutional changes the Volkskammer at the beginning of December 1989 deleted the reference in Article 1 of the constitution to the leading role of the Communist Party. The amendments were to characterize the events of 1989-90 as a 'legalistic' revolution, transforming society and government through revised legal norms rather than a resort to violence.<sup>43</sup> After a tumultuous but still peaceful demonstration before the central Stasi office a citizens committee was formed to keep watch over the Stasi files and prevent tempering or destruction. During winter 1989-90, members of the citizens committees agitated in favor of opening the Stasi files, but in the spring, the movement's leadership publicly opposed that step. In November 1989, it was the GDR Volkskammer, still controlled by the Communist Party (SED) that established a committee to investigate criminal activities such as abuses of power, corruption and election frauds. This led to a brief imprisonment of a number of the SED Politbüro in December 1989. After the

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<sup>41</sup> When the GDR was created in 1949, the new government adopted a national constitution, which purported to be the constitution for the entire 'German nation'. In 1968 the GDR adopted a new, more clearly Stalinist constitution, which was again significantly amended in 1974. The amendments of 1974 comprehensively expunged the remaining national elements of the constitution, which might have looked towards a future unification with the west..

<sup>42</sup> Peter Quint, *The Impertect Union: Constitutional Structures of German Unification*, Princeton University Press, 1997. 30.

<sup>43</sup> See P. Quint, 1997, *ibid*, 18-19.

democratic elections all political parties represented in the Volkskammer supported this policy of criminal justice and prosecutions<sup>44</sup>.

The newly elected Volkskammer also revoked the entire preamble of the constitution with its references to 'the revolutionary traditions of the German working class', 'the developed socialist society', 'the path of socialism and communism', and 'this socialist constitution'. In a parallel declaration of the Volkskammer recognized the responsibility of the Germans in the GDR for the actions of the Nazi tyranny and for persecution of the Jews in Eastern Germany even after 1945, as well as responsibility for East German participation in the invasion of Czechoslovakia in 1968. The freely elected Volkskammer also passed laws facilitating the lustration of its own deputies, members of the government and judges, but it did not have time to carry out these procedure properly.

In June 1990, the new Volkskammer issued other amendments to the old constitution of the GDR, proclaiming a series of new general principles. Article 1, section 1 proclaimed the GDR a 'free, democratic, fedareal, social and ecologically oriented state based on the rule of law'. Section 2 of the same Article declared that rules „binding individuals or state organs to the socialist state and legal order, the principle of democratic centralism, socialist legality, the social legal consciousness, or the views of individual groups of the population or parties, are revoked”.

As in the March 1990 elections the majority of GDR voters wanted complete political unification as quickly as possible, there remained two methods under the Basic Law of FRG. Article 146 conceived the Basic Law as a provisional document that foresaw steps towards eventual unification to be accomplished by the adoption of a new constitution by the people of both German states. But the prevailing conservative coalition sought unification in a manner that would extend the Basic law in its existing form over the newly united country, with as few changes as possible. The method to achieve this goal was set forth in Article 23 of the Basic Law, which provided the possibility to the Eastern states to join the Federal Republic. This accession required dissolution of the GDR and revocation of its constitution, and a vote to accede to the Federal Republic also required a two-third majority vote of the Volkskammer. This decision was made on August 23. Before the actual unification on October 3, the Volkskammer also adopted two important statutes that sought to settle accounts with the GDR's past, without indicating whether these will be incorporated into the new Basic Law. The first of these extended to victims of the SED regime the right to 'rehabilitation' and a measure of compensation. The second set forth regulations for the preservation and handling of the Stasi files.

Chapter II of the Unification Treaty entered into force by the Federal Republic and the GDR sets forth provisions that expressly amend the Basic Law. Among those was the amendment of Article 146 in a manner indicating that the provision retains its validity even after unification under Article 23, providing the mere opportunity for the adoption of a new basic document. Another provision deleted Article 23 itself suggesting that there exist no other parts of Germany outside the present territory of the united country, which accede to Germany at a later point. But the treaty negotiators ignored or rejected proposals for broader changes emanating from the ranks of the GDR reform movement, even though those except the two mentioned earlier had nothing to do with the past. For example the preamble was not

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<sup>44</sup> See J. Priban, 'Constitutional Justice and Retroactivity of Laws in Postcommunist Central Europe', in J. Priban – P. Roberts – J. Young (Eds.), *Systems of Justice in Transition. Central European Experiences since 1989*. Ashgate, 2003. 43

amended to include a statement recognizing that the division of Germany was a result of the National Socialist dictatorship.

As the East German transition to democracy can be categorized as a rupture, in those early period the East Germans set a relatively retributive course for coming to terms with the past. But after unification, many East Germans began to believe that as „the West Germans have conquered the GDR in a colonial style”<sup>45</sup>, the West also had taken over their indiginous process of coming to terms with the past. With the unification, the dynamics of East Germany’s transition no longer provide a helpful explanation for the united country’s approach to transitional justice. The German Bundestag was inclined to view transitional justice as a set of technical problems that demanded legal solutions, such as vetting, compensation and access to the Stasi files to the legacy of East German communism that had already been worked out within the framework of the Basic Law in the postwar West German state.<sup>46</sup> Therefore the constitutional framework of transitional justice of the former East Germany presented an exceptional situation, since the country was incorporated into another one with a fully developed ’western’ constitutional and legal system. In a way this transitional justice was the outsiders’ justice, namely that of the former West Germany, which in many way did not recon with its own past, but eventually prosecuted and punished communist political crimes such as the border killings.

Article 4(5) also inserted a new Article 143 in the Basic Law, which allows deviations from the Basic Law. The otherwise timely limited deviations in the case of Article 41 of the Unification Treaty on the settlement of property issues shall remain valid in so far as they provide for the irreversibility of interferences with property in the former territory of the GDR, making an exeption from the general constitutional rules for the sake of the transition. As we will see this special authorization made it possible to use special constitutional rules for the land reform, which relates to compensation for lost proterties. Article 143 represents one of the cases, when transitional constitutions create interim periods.<sup>47</sup>

## **Czechoslovakia, the Czech Republic and Slovakia**

After the (velvet) revolutionary events on the streets of Prague in November 1989 the new regime sufficed to abolish some constitutional provisions, talking about the leading role of the Communist Party, and had for nearly three years, until the split of the Czechoslovak federation in December 1992, a Constitution passed by the communist Parliament. Another task for the new democratic government was to remedy injustices caused by deprivations of citizenship under the communist rule. In response to communist abuses of power, the Czechoslovak Federal Assembly adopted Charter of Fundamental Rights and Freedoms to stipulate among many other fundamental rights issues that, ‘no one shall be deprived of his or

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<sup>45</sup> In 1991, 63% of East Germans agreed with this statement. ’Spiegel-Umfrage’, *Der Spiegel*, 30. 1991: 28.

<sup>46</sup> Cf. Calhoun, 2004, *ibid*, 90.

<sup>47</sup> Cf. R. G. Teitel, *Transitional Justice*, Oxford University Press, 2000. 197-198. The classic example is the epilogue of the South African interim constitution providing for amnesty, which was used by the Constitutional Court in the AZAPO case as a metaphor of walking the ’historic bridge’ between past and future to describe the transition process. See R. Uitz, ’Constitutional Courts and the Past in Democratic Transition’, in A. Czarnota, M. Krygier and W. Sadurski (eds.), *Rethinking the Rule of Law after Communism*, CEU Press, 2005. 239.

her citizenship against his or her will'.<sup>48</sup> The Act on Judicial Rehabilitation abolished sentences for criminal offences to which the withdrawal of citizenship was attached, and consequently, the citizenship of the persons concerned was ex lege restored.<sup>49</sup> Another act provided for the reacquisition of the Czechoslovak citizenship by emigrants who had lost it in the period of communist rule.<sup>50</sup>

The structure and the content of the Charter was significantly influenced by the European Convention on Human Rights, but besides traditional human and political rights, it also recognized a relatively wide range of economic, social and cultural rights. After the split of the federation the Charter was incorporated into the Czech constitutional system. The basic provisions of the Charter were integrated directly into the new constitution of the Slovak Republic, which was enacted on September 1992, despite the fact that the CSFR was still existence. This constitution proclaimed the Slovak Republic as an independent, sovereign state. Article 10 of the Czech Constitution, adopted on 16 December 1992 and entered into force on the first of January 1993, formulates the recognition and incorporation of international legal documents into the Czech legal system: „International treaties concerning human rights and fundamental freedoms, which have been ratified and promulgated and by which the Czech Republic is bound, are directly applicable and take precedence over an act of Parliament”.

The Charter explicitly mentions the inviolability of the 'natural rights of man' in its preamble, and as we well see later in this paper, extra-legal, mainly political and ethical arguments based on natural rights and ethical discourse can be found in decisions of the Czech Constitutional Court.<sup>51</sup>

## Poland

The reform of the Constitution after the democratic transition started in 1989 and was finally completed in 1997. There were three separate stages to this process: enactment of the April and December Amendments (February-December 1989), writing of the 'Small Constitution' (December 1991 - October 1992), and writing of the final constitution (October 1992 - April 1997)<sup>52</sup>.

In the first stage, a provisional regulation based on the Round Table Agreement between the Communist Party and the Solidarity-led opposition was adopted quickly. It allowed partly free

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<sup>48</sup> Constitutional Act No. 23/1991 Coll. The Act amended art. 5 of Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation. The Act came into force on 8 February 1991. Later, it was transformed into art. 12(2) of the Czech Constitution.

<sup>49</sup> Act No. 119/1990 Coll.

<sup>50</sup> Act No. 88/1990 Coll.

<sup>51</sup> See J. Priban, 'Legitimacy and Legality after the Velvet Revolution', in J. Priban and J. Young (Eds.), *The Rule of Law in Central Europe*, Ashgate, 1999. 50-51.

<sup>52</sup> About the details of the constitution-making process see R. R. Ludwikowski, *Constitution-making in the Region of Former Soviet Dominance*, Duke University Press, 1996. 149-163., as well as M. F. Brezinski and L. Garlicki, 'Polish Constitutional Law', in S. Frankowski and P. B. Stephan III, *Legal Reform in Post-Communist Europe: The View From Within*, Martinus Nijhoff Publishing, 1995. 21-50.

parliamentary elections to be held in June 1989 and a constitutional dimension to the transition process to begin by the introduction of a strong presidency. In December 1989 the Sejm adopted the so-called 'December Amendments', which deleted the 1952 Stalinist constitution's preamble and its first two chapters. They also eliminated the clause on the Party's 'leading role', provided for the freedom to establish political parties (Article 4), dropped the clause describing Poland's economy as based on 'socialized means of production', and introduced the principle of the equality of various forms of ownership (Articles 6 and 7), thus providing a constitutional foundation for private property and the emerging market economy. The most important change introduced by the December Amendments was found in the new Article 1, which proclaimed that "The Republic of Poland is a democratic state, ruled by law and implementing principles of social justice."

In October 1992 the Sejm adopted the Polish 'Small Constitution', which represents a compromise between presidential and parliamentary systems of government.

The most important shortcoming of the Small Constitution was that it did not contain a bill of rights. Consequently, the rights catalogue in the 1952 Polish Constitution remained in force till 1997. But even without new fundamental rights provisions, based on the 'Rechtsstaat clause' of the December 1989 Amendment modeled on the German Grundgesetz the Constitutional Tribunal quickly developed unwritten due process standards, which as we will see were instrumental to decide on the constitutionality of transitional justice measures.

## **Hungary**

In Hungary, concepts of transforming the 1949, Stalin-inspired Rákosi-Constitution into a rule of law document were delineated in 1989 in the National Roundtable Talks by the participants in the Opposition Roundtable, and the representatives of the state-party. Afterwards, the non-democratically elected Parliament only sealed the comprehensive amendment to the Constitution. The preamble of the amended constitution calls for „a peaceful transition to the rule of law state based upon a multi-party system, parliamentary democracy and social market economy.”<sup>53</sup> Despite this constitutionalized commitment to transition, the constitution does not provide expressly for settling accounts with the past. The main reason for this is an unspoken agreement between the participants of the National Roundtable that there will be no prosecution of the communist leaders. After the first free election in spring 1990 some members of the democratically elected Parliament by terminating this agreement submitted a draft law on retroactive justice measures against the previous communist leaders and collaborators. As we will see, the Hungarian Constitutional Court by deciding this and other cases of transitional justice primarily relied on specific provisions of the constitution, especially on the rule of law and legal continuity being part of it, and not on the preamble.

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<sup>53</sup> Act No. 20 of 1949, as amended by Act No. 31 of 1989.

This approach has been charged after the 2010 parliamentary election, when the right-wing government of Fidesz led by Viktor Orbán following the failed attempts of the first democratically elected Parliament rejected by the Constitutional Court in 1992 once again returned to a political justice approach in dealing with the past through ordinary national criminal law.<sup>54</sup> Unlike the 1989 constitution the 2011 Fundamental Law of Hungary, which systematically dismantled the guarantees of rule of law,<sup>55</sup> has a lot to say about the dictatorial past of the country and the new constitution-making majority's intentions to deal with it. The preamble, entitled National Avowal starts with statements on 'inhuman crimes' and statute of limitation: "We deny any statute of limitation for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships." If "inhuman" crimes should be taken to mean war crimes and crimes against humanity, then the denial of a statute of limitations complies with effective international law – if it means something else however, then the Fundamental Law, in breach of the prohibition on retroactive effect emphasized in earlier decisions of the Hungarian Constitutional Court, discussed later in this paper, classifies as having no statute of limitations on criminal acts for which the limitation period has already expired.

At the same time, the preamble by declaring that "We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed" does not care to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents, but also between 1920 and 1944 by extreme right-wing "free troops" and the security forces of the independent Hungarian state, and not only against "the Hungarian nation and its citizens", but also against other peoples. Neither does it care to acknowledge that the continuity of Hungary's statehood was not interrupted on 19 March 1944. Restrictions were placed on the government agencies' freedom to act, but they were not shut down. The Regent remained in his office, and the parliament sat and regularly passed those bills that were introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers. With this statement the Fundamental Law only recognises the (pre-1944) glorious pages of Hungarian history, but does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the – reputed or genuine – injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples.<sup>56</sup>

In April 2013 the government majority with its two-third majority enacted the Fourth Amendment to the Fundamental Law, which supplemented detailed provisions on the communist past and statute of limitation into the body text of the constitution. This new Article U of the Fundamental Law, which, after 23 years of solid democracy and a working

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<sup>54</sup> Some commentators argue that this change is due to the fact that international criminal law offered by the Constitutional Court in the early 1990s proved a poor substitute for political justice in societies. See T. Hoffmann, 'Trying Communism through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials', in K. Heller and G. Simpson (eds.), *Histories of War Crimes Trials*, Oxford University Press, 2013. 227-247, 245.

<sup>55</sup> About the 'constitutional counter-revolution' in Hungary after 2010 see G. Halmai, *Perspectives on Global Constitutionalism*, Eleven International Publishing, 2014. 121-176.

<sup>56</sup> See a critical account the Fundamental Law of Hungary: Opinion on the Fundamental Law of Hungary, A. Arato, G. Halmai and J. Kis (eds.), with Z. Fleck, G. Gadó, G. Halmai, Sz. Hegyi, G. Juhász, J. Kis, B. Majtényi, G. A. Tóth. Available from the page of the Law and Public Affairs, Princeton University: <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>

system of the rule of law, deemed it timely and appropriate to revisit the settlements made during the immediate transition from communist dictatorship to democracy.

New Article U first states the obvious: that a government based on the principles of rule of law and separation of powers and the prior communist regime are diametrically opposed and irreconcilable. This truism is followed by a mix of (i) verbal exorcisms of the pre-1989 Hungarian Communist Party and its satellite organizations, (ii) authorization of adverse treatment of communist-period leaders, and (iii) rules that reopen the statute of limitations covering serious crimes committed during the communist period that had not been subject to prosecution on account of political motives.

New Article U(1) states that the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organizations that supported the communist ideology had been "criminal organizations" whose leaders carry a liability which is, in the words of this Article, "without statute of limitations." A few sections below this, in Sections 7 and 8, that broad statement is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for these non-prosecuted communist-period crimes.

The new Article U refers to "criminal organizations" in a way that makes it precisely not a term of art or a definition of a legal construct in Hungarian penal law. The Fundamental Law refers to a "bűnöző szervezet" but Hungarian criminal law only attaches criminal penalties to a 'bűnszervezet'. Both terms translate into "criminal organization" in English, but one carries criminal liability and the other is undefined in law. It is therefore, at a minimum, unclear what legal effects are intended by this term in the Fundamental Law.

Furthermore, a very broad and general liability is deemed to exist for a number of past deeds, which include destroying post-WWII Hungarian democracy with the assistance of Soviet military power, the unlawful persecution, internment and execution of political opponents, the defeat of the 1956 October Revolution, destroying the legal order and private property, creating national debt, "devastating the value of European civilization" and all criminal acts that were committed with political animus and had not been prosecuted by the criminal justice system for purely political motives. As with the term for criminal organization, however, the sort of "liability" referred to the new Article U(1) does not have any formal legal referent anywhere else in Hungarian law. The liability in this section, like *bűnöző szervezet* in the preceding section, *sounds* legal but does not directly reference any other provision in Hungarian law. Its purpose and meaning are undefined and so its legal effects are unclear.

A separate paragraph extends this elusive liability to all political organizations that have been deemed to be the legal successors of the pre-1989 Communist Party. This paragraph states that, because the successor parties have shared in the unlawfully accumulated assets of their predecessors, they should share the liabilities of these predecessors as well. But which parties and organizations are singled out by this designation is impossible to tell because there are no standards for determining which organizations shall count as successors.

New Articles U(2) and U(3) call for the remembrance of the communist past and create a new national committee to document national memory in this regard. New Article U(4) provides that the former communist leaders are public persons in respect to their past political actions and as such, except for deliberate lies and untrue statements, must tolerate public scrutiny and criticism. These former communist leaders must tolerate disclosure of personal data linked to their functions and actions.

New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the communist dictatorship. This provision appears to contradict Constitutional Court decision 43/1995 (VI. 30), which held that people could not be denied pension payments after they had paid as they were required to do into the state pension scheme. But that decision together with all others delivered prior to the coming into force of the Fundamental Law, has been annulled by the Fourth Amendment, too.

New Article U, Sections (6) through (8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that Article U(1) seems to say that are not time barred. There is as of yet no law that defines which crimes are serious enough to justify removal of all time limitations on prosecutions and which remaining crimes are therefore subject only to the newly reset clock for prosecutions. To be sure, there are specific crimes in the Hungarian Penal Code (crimes against humanity, genocide, etc.) to which no statute of limitations apply. Manslaughter and homicide are, however, crimes which had at all times in the past 100 years have been time-limited with regard to prosecution. The interruption and tolling relate to serious crimes that were punishable under the penal laws in effect at the time they were committed and which had not been prosecuted for political motives. But it is clear that this part of the Fourth Amendment also implies that there will be crimes newly released from a time-bar for prosecution.

If the statute of limitations ran out before May 2, 1990 (the date when the first freely elected Parliament was formed), then Article U(7) provides that the statute of limitation that was in effect at the time of the commission of the criminal act will start again from the date of the entry into effect of the new Fundamental Law on January 1, 2012. If the statute of limitations would have tolled after May 2, 1990, then Article U(8) provides that the statute of limitations' clock, which would start again on January 1, 2012, would be set only for the period of the time that the statute of limitations ran before May 2, 1990. As the reasoning explains, the extension of time to prosecute these crimes includes only the time that fell under the communist regime.

Articles U(6) and (8) might appear to be sensible and constitutionally permissible provisions when the transition from communist rule to democracy occurred. But as we will see later in this paper, the Constitutional Court had declared precisely this sort of extension of the statute of limitations unconstitutional in 1992, though the Court at that time also noted that prosecutions of internationally defined crimes, which had no statute of limitations could proceed.

The new constitutional provision, introduced by the Fourth Amendment therefore seeks directly to reverse this prior Constitutional Court decision. But, of course, since the Fourth Amendment annuls all Court decisions prior to 2012, this now-reversed decision would have been abolished anyway. But the Fourth Amendment provides that "Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings." The legal effect of the 1992 decision was to bar the statute of limitations from being reset at the time of the transition. So in this case both the legal effect and the decision itself are reversed.

That said, to reverse course after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to question the legal framework of the statute of limitations for the types of criminal

acts in question. Such provisions may not run afoul the time-honored doctrine of 'nullum crimen sine lege', but they may nonetheless constitute violations of rights to fair and timely legal process.

What could be the purpose of reopening these cases now through a removal of the statute of limitations other than weakening Fidesz's political rival, the Socialist Party as successor of the Communist Party? New Article U(9) eliminates one purpose, which is compensating the victims of the communist period. This provision specifically rules out any new laws that might provide compensation to individuals for harms caused to them during the very period that will be reexamined through these cases.<sup>57</sup>

## **Doing Justice: Retroactivity and Rule of Law**

One of the basic questions confronting all transitional governments is, whether to undertake the prosecution of the leaders of the ousted regime for the abuses they inflicted upon the nation. Some argue that the trial and punishment of these people is essential to achieve some degree of justice, while others claim that these are simply show trials unbenefitting a democracy, that they are manifestations of victor's justice. Following the death of Franco, the relatively peaceful Spanish transition was marked by a mutual amnesty, while in Greece or post-apartheid South-Africa a sweeping amnesty was impermissible.

When a decision is made to prosecute, the desire to use criminal sanctions may run directly counter to such principles of a democratic legal order, as *ex post facto* and *nulla poena sine lege*, barring the prosecution of anyone for an act which was not criminal at the time it was committed. In post-war France, for example, thousands of people were prosecuted under a 1944 law establishing the new offense of „national indignity” for acts they had committed prior to the law's adoption.

Some of the worst violations of human rights were crimes under the old system, but they obviously were not prosecuted. If the statute of limitations for these crimes has already elapsed by the time of the transition, can the new authorities still hold the perpetrators accountable for their deeds? In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes, particularly those committed to suppress dissent in 1956 and 1968 respectively had not been prosecuted for wholly political reasons, it was legitimate to hold that the statute of limitations had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly. In both countries, the matter was put to the newly created constitutional court for review. Each court handed down a decision which eloquently addressed the need to view the question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On the basis – with plainly similar fact patterns – the Czech constitutional court upheld the re-running of the statute of limitations for the crimes

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<sup>57</sup> See a detailed critical assessment of the entire amendment Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary, G. Halmai and K. L. Scheppele (eds.) with M. Bánkuti, T. Dombos, G. Halmai, A. Hanák, Zs. Körtvélyesi, B. Majtényi, L. A. Pap, E. Polgári, O. Salát, K. L. Scheppele, P. Sólyom, R. Uitz. Available: <https://sites.google.com/site/amicusbriefhungary/>

of the old regime as a requirement of justice, while the Hungarian court struck down the measure for violating the principle of the rule of law.

## The Pursuit of Material Justice

In its decision from November 12, 1996 the German Federal Constitutional Court, in upheld the convictions of former *German Democratic Republic (GDR)* officials who had helped hand down the shoot-on-sight policy that resulted in the death of 260 people trying to cross the border between East and West Germany, or East and West Berlin, between 1949 and 1989. It rejected the defense argument that the German constitution's provision that "[a]n act may be punishable only if it constituted a criminal offense under the law before the act was committed," Basic Law article 103, para. 2, prohibited such prosecutions. This article, the Court found, did not apply to a case such as this where a state (the GDR) had used its law to try to authorize clear violations of generally recognized human rights, such as right to life or right to human dignity mentioning only the most important ones.<sup>58</sup>

In the newly unified Germany, the trial of the border guards for shootings at the Berlin Wall offers another illustration of the dilemma formulated by the Hungarian constitutional judges, in their 1992 decision, whether "the certainty of the law based on formal and objective principles is more important than necessarily partial and subjective justice". The Border Protections Law of the former GDR authorized soldiers to shoot in response to "acts[s] of unlawful border crossing". Such acts were very broadly defined and included border crossings attempted by two people together or those committed with "particular intensity". The custom at the border was to enforce the law strictly: supervisors emphasized that "breach of the border should be prevented at all costs." The German trial courts relied on precedents of the Federal Constitutional Court elevating the principle of material justice<sup>59</sup> over the principle of the certainty of the law in special circumstances: "Especially the time of the National Socialist regime in Germany taught that ...in extreme case the opportunity must be given for one to value the principle of material justice more highly than the principle of legal certainty".<sup>60</sup> But critics rightly add an important detail to the borderguards' cases, namely that the prosecution campaign led to the conviction of many low level borderguards, while except the mentioned case of Streeletz and others there was almost no accountability for the shootings at higher levels<sup>61</sup>, most probably because West German political leaders were reluctant to make 'victors' justice regarding East Germany and its constitutional system.

The Czechoslovak Constitutional Court during its brief existence before the split of the

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<sup>58</sup> The leaders appealed to the European Court of Human Rights claiming that the Federal Constitutional Court's decision violated Article 7(1) of the European Convention on Human Rights, but the ECtHR held that at the time when they were committed the applicant's act constituted offences defined with sufficient accessibility and foreseeability in GDR law, therefore the applicant's conviction by the German courts after the reunification was not in breach of Article 7(1). *Streeletz, Kessler and Krentz v. Germany*, European Court of Human Rights, 33 EHRR 31 (2001).

<sup>59</sup> While formal justice, which is sometimes called 'equality before the law', requires that equal persons ought to be treated equally and unequal persons unequally, material justice concern some kind of distribution of benefits or burdens. Thus material justice can also be called 'substantive' or 'distributive justice'. In the context of inflicting a punishment for a crime material justice means such a punishment to each which corresponds to the level of her guilt and the level of harm, which her crime did to the society. In this context material justice is called 'retributive justice'. About the distinction of formal and material (substantive) justice see J. Rawls, *A Theory of Justice*, Revised Edition, Harvard University Press, 1999. 50-52.

<sup>60</sup> Cited by Teitel, 2000. 16-17.

<sup>61</sup> See Teitel, 2000. 45.; also Quint, 1997. 196-205.

*Czechoslovak federation* delivered a widely discussed judgment regarding the Czechoslovak lustration law argued that legal continuity would result in the persistence of the old values system which would undermine the new democratic rule of law.<sup>62</sup> The Constitutional Court of the Czech Republic in its decision of December 21, 1993 on the Act on the Illegality of the Communist Regime rejecting the challenge filed by a group of deputies in the Czech Parliament upheld a statute suspending limitations periods between 1948 and 1989 for criminal acts not prosecuted for “political reasons incompatible with the basic principles of the legal order of a democratic State”.<sup>63</sup> The Court concluded that the democratic state could use exceptional methods to protect its foundational principles and values.<sup>64</sup>

## Rule of Law as Legal Continuity

In *Hungary* the first elected parliament passed a law concerning the prosecution of criminal offenses committed between December 21, 1944 and May 2, 1990. The law provided that the statute of limitations start over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death - but only in those cases where the "state's failure to prosecute said offenses was based on political reasons." The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court in its unanimous decision, 11/1992 (III. 5.) AB, struck down the parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves had changed definition during that time as well). The basic principles of criminal law - that there shall be no punishment without a crime and no crime without a law - were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of the defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional.<sup>65</sup>

To circumvent the concern of the Constitutional Court on retroactive effect, in early 1993 the Parliament opting to rely on crimes under international law enacted another law, which penalized a mixture of international and common crimes, including violation of personal freedom and terrorist acts, as common crimes, whose retroactive application had already been found unconstitutional by the Constitutional Court. Therefore the Court responding to the President of the Republic's repeated request for preliminary review found again that regarding the effect of statutory limitations on common crimes the statute of limitation had run out, but

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<sup>62</sup> Judgement No. 1/92PI US.

<sup>63</sup> Act No. 198/1993Sb. and the Judgment of the Constitutional Court of the Czech Republic, No. 19/93PI US. English translation is in Kritz (ed.) *Transitional Justice*, Volume III. 620-627.

<sup>64</sup> For further discussion of the judgment, see J. Priban, *Dissidents of Law. On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of the Social Contract*, Ashgate, 2002. 111.

<sup>65</sup> The English language translation of the decision has been published in László Sólyom and Georg Brunner: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press, Ann Arbor, 2000. 214-228. (Hereafter, this book will be abbreviated as Sólyom/Brunner.)

the judges developed a possible line of argument that would enable the prosecution of international crimes. The decision relied on Article 7(1) of the Constitution, which stated that “the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country’s domestic law with the obligations assumed under international law”. According to this interpretation, customary law, *jus cogens*, and general principles of law become part of the Hungarian legal system automatically, without any implementing legislation. The Court declared that crimes against humanity and war crimes are “undoubtedly part of customary international law; they are general principles recognized by the community of nations”.<sup>66</sup> As a result, the problem of statutory limitation is resolved, since: „International law applies the guarantee of *nullum crimen sine lege* to itself, and not to the domestic law”.<sup>67</sup> As Hungary has ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, perpetrators of crimes concerning the 1956 revolution falling within the purview of the Convention could be prosecuted constitutionally.

The Parliament re-enacted the law, and the Court found the new text still contrary to the language of the Convention, hence quashed it, but declared that: „with the nullification of the law there is no obstacle preventing the state from pursuing the offender of war crimes and crimes against humanity as defined by international law...It is international law itself which defines the crimes to be persecuted and be punished as well as all the conditions of their punishability”.<sup>68</sup>

As a result of the Constitutional Court’s interpretations the prosecutors investigated forty potential cases of shootings into crowds by the regime’s armed forces during the 1956 Revolution and finally issued indictments in nine of them. Finally only three persons were found guilty. The crucial question for the court was the determination of the existence of a non-international armed conflict in 1956. It became accepted that the events following the Soviet intervention on 4 November 1956 constituted an international armed conflict, there was disagreement between the courts on the question of whether the hostilities in the period between the outbreak of the revolution on 23 October and 4 November reached the threshold of non-international armed conflict. In a case decided in 1998 the Supreme Court ruled that in this period the hostilities did not reach the level of non-international armed conflict,<sup>69</sup> but the Review Bench of the Supreme Court overturned this decision by saying that “during this time, the armed forces waged war against the overwhelming majority of the population”.<sup>70</sup> This interpretation became the bases of all further judgments of the Hungarian courts in the so called ‘volley cases’, in which every criminal act, perpetrated by the armed forces, especially shooting into crowds was to be regarded as a violation of common Article 3 of the Geneva Convention and hence a crime against humanity.

But after one of these decisions was challenged before the European Court of Human Rights (ECtHR), the Court determined that the judgement of the Hungarian Supreme Court violated the principle of non-retroactivity: “The Hungarian criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II and the question whether the victim of the applicant’s shooting

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<sup>66</sup> Decision 53/1993, section V.

<sup>67</sup> *Ibid.*

<sup>68</sup> Decision 56/1996, section II. (1)

<sup>69</sup> Decision No. 1344/1998/3, 5 November 1998.

<sup>70</sup> Decision No. X. 713/1999/3, 28 June 1999.

belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.”<sup>71</sup> Although the Review Bench of the Hungarian Supreme Court revisited the case, but did not even attempt to prove the existence of widespread and systemic attack in furtherance of state policy, holding instead that a professional soldier at the time of the revolution was necessarily engaged in the commission of crimes against humanity. In other words the Hungarian court simply deferred to Hungarian domestic law and interpreted the category of crimes against humanity as identical to the crimes defined in the Hungarian Criminal Code. The case proved that the direct use of customary international law in domestic criminal proceedings, as the Constitutional Court envisaged is highly problematic, especially if the provision of the same crime are different in their wording.<sup>72</sup>

This failure of the use of international criminal law to the events of 1956 by Hungarian courts to punish ordinary soldiers let alone communist political leaders may be the reason, which led the government elected in 2010 to change course in dealing with the past. The already describe changes in the National Avowal and Article U of the new Fundamental Law, which legitimize the circumvention of the statute of limitation were even preceded by a statutory effort to return to domestic criminal law. Law No. CCX of 2011 on the Punishability and the Exclusion of the Statute of Limitations of Crimes Against Humanity and on the Prosecution of Certain Crimes Committed During the Communist Dictatorship was not coincidentally enacted after the Office of the General Prosecutor declined to initiate proceedings against the last living communist leader, Béla Biszku, who had played a key role as a Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution.<sup>73</sup> The new law, which is called in the media ‘Lex Biszku’ translated the definition of crimes against humanity of the Nuremberg Statute into Hungarian and explicitly authorized the Hungarian courts to prosecute them, without defining the contextual elements of crimes against humanity and also criminalizing the violation of common Article 3 of the Geneva Conventions in contravention to the *nullum crimen* principle. Moreover, the law introduces the category of ‘communist crimes’ and declares that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to statute of limitations when committed on behalf, with the consent of, or in the interest of the party state. This provision clearly replicates the one that was found unconstitutional by the Constitutional Court in 1992. On this basis the law could have been challenged before the Constitutional Court, but because it entered into force on 1 January 2012, the same day when the ‘popular action’, according to which everybody without any personal interest could challenge any law was abolished, there were no petition filed to the Court.

Based on the new law Béla Biszku was convicted, as the only person under it for being a member of the interim executive committee of the communist party which set up a special armed force in order to ‘maintain order’ and act with force against civilians if need be. The most violent acts committed by this special force were the shooting in December 1956 of unarmed people in Budapest and the town of Salgótarján. The second one was especially

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<sup>71</sup> Case of Korbély against Hungary, Grand Chamber, Application No. 9174/02, 19 September 2008.

<sup>72</sup> One of the possible explanations for this can be the constitutional legal education, which focuses upon domestic and black-letter law. See J. Wouters, ‘Customary International Law Before National Courts. Some Reflections From a Continental European Perspective’, *Non-State Actors and International Law*, 4, 2004. 31-32.

<sup>73</sup> The Prosecution argued that the acts alleged to have been committed by Biszku did not amount to grave breaches of the Convention and therefore were subject to the statute of limitations. Office of the General Prosecutor, No. NF. 10718/2010/5-I., 17 December 2010.

bloody, with 46 victims. In May 2014 the first instance court found Biszku guilty of aiding and abetting war crimes, as well as for denying crimes committed by the communist regime in an interview prior to the criminal procedure, and sentenced the 92 years old man to five years and six month in prison, with the possibility of appeal.<sup>74</sup> In June 2015 the appellate court declared the original verdict null and void because "the original ruling was so unsubstantiated that no meaningful decision could be reached based on it."<sup>75</sup>

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Thus, the Hungarian Constitutional Court in the 1990s on the one hand and the German (as well as the Czech) courts on the other formulated the dilemma in a similar manner, but came down on opposite sides: the Hungarian court interpreted the rule of law to require certainty, whereas the German (and the Czech) courts interpreted it to require substantive justice.<sup>76</sup> These distinct approaches seemed to correspond to the very type of their transition, which as we saw reflected the character of the previous regime. Due to the relatively mild character of the communist regime and the negotiated way of the transition, in Hungary there was no need for harsh substantive justice measures, while the hard-core dictatorship in East Germany (and in Czechoslovakia after 1968) required this solution. As I will come back to this, the two approaches of formal and material (substantive) justice tell nothing about the success of doing justice efforts. Since the Hungarian population seemed not to be receptive towards legal constitutionalism in general<sup>77</sup>, and the very formalistic approach of rule of law in particular, which treated the legal order of the communist regime as valid, the populist government of Viktor Orbán after 2010 was able to change this approach, and seek for 'bad' political justice<sup>78</sup> and revenge. Later I'll also return to the question, how much 'legalism' and 'good'

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<sup>74</sup> Hungary 1956 revolt: Bela Biszku jailed for war crimes, *BBC News*, 13 May, 2014.

<sup>75</sup> <http://hungarianspectrum.org/2015/06/01/the-bela-biszku-case/>

<sup>76</sup> About the different approaches of the interpretation of rule of law in Central Europe, see J. Priban, 'From 'Which Rule of Law?' to 'The Rule of Which Law?': Post-Communist Experiences of European Legal Integration', *Hague Journal on the Rule of Law*, 1: 2009. 337-358. The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism see H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71, 1958. 593. Fuller rejected Hart's abstract formulation of the problem, and instead focused on postwar Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law. See L. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', *Harvard Law Review*, 71, 1958. 630. About the debate see Teitel, 2000. 12-14.

<sup>77</sup> According to some authors, the potential of democracy in Hungary following the transition in 1989-90, (and also in the other new democracies of Central Europe), was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost. See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', in A. Czarnota, M. Krygier and W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, 2005. 9-24.

<sup>78</sup> Here I refer to 'bad' political justice, using the terminology of Ellen Lutz and Caitlin Reiger, who distinguish between 'bad' political trials, in which politics gains the upper hand over justice, and 'good' political trials, which reflect a desire for public accountability. See E. L. Lutz and C. Reiger, 'Introduction', in Lutz and Reiger (eds.), *Prosecuting Heads of State*, Cambridge University Press, 2009. 10-11.

politics is needed in transitional justice in general, and in Central Europe in particular.<sup>79</sup>

## **Administrative Penalties: Vetting and Lustration**

Similarly as great a challenge to transitional democracies and the rule of law represent the different kinds of non-criminal administrative sanctions, the joint aim of which is to purg from the public sector those who served the repressive regime. The idea behind these processes is the prevention of human rights abuses through personnel reforms by excluding from public institutions persons who lack integrity, or at least by informing the general public, especially the voters about the past of those who run for a public position. In the latter cases (milder forms of lustration), the only sanction is the publication of the data on the involvement of the public officials in one of the repressive institutions, for instance the secret police of the previous regime. Besides lustration in former communist countries the processes to exclude abusive or incompetent public employees in order to prevent the recurrence of human rights abuses and build fair and efficient public institutions is a general characteristic of countries emerging from conflict or authoritarian regimes. Recent examples include UN vetting efforts in El Salvador, Bosnia and Herzegovina, Liberia and Haiti, but also the „Debaathification” process in postwar Iraq. As the Secretary General’s Report on The Rule of Law and Transitional Justice in Conflict and Postconflict Societies puts it: „Vetting usually entails a formal process for the identification and the removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary.”<sup>80</sup>

But we cannot forget that there have been many transitions in which there has been not vetting or lustration, not even of most important rule of law institutions (e.g. Spain, Chile, Argentina, Guatemala, South Africa), and also in East-Central Europe, besides the more extensive vetting and lustration procedures, as the one in the Czech Republic and East Germany (the former German Democratic Republic, GDR), there have also been transitions with very modest and sector specific vetting as in Poland, and Hungary. During the revolutionary changes in East Germany, as well as in Czechoslovakia, after the 1989 Velvet Revolution vetting and lustration has to be taken as part of the broader politics of decommunisation which targeted exactly the personal aspect of the whole process of postcommunist political and legal transformations.<sup>81</sup>

## **Rigorous Exclusion of Communist Leaders from Public Services**

*Vetting in the unified Germany* took place in two different arenas: On the one hand, elected representatives on the local, state, and federal level were frequently asked about their “first life” in the GDR. In some states (Länder), persons who had worked for the secret police could not be elected mayors. But since parliamentarians cannot be recalled or impeached for prior

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<sup>79</sup> This question was recently raised regarding truth commissions and special criminal court by Duncan MacCrago. See D. McCargo, ‘Transitional Justice and Its Discontents’, *Journal of Democracy*, April 2015, Volume 26, Number 2. 5-20.

<sup>80</sup> UN Doc. S/2004/616, p. 17.

<sup>81</sup> See J. Priban, ‘Oppressors and Their Victims. The Czech Lustration Law and the Rule of Law’, in A. Mayer-Rieckh, and P. de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. 308-346.

non-criminal misconduct, any screening conducted in parliaments was not likely to have consequences beyond public expressions of indignation by the ‘clean’ political parties. The vetting of the East German public sector, in contrast, had profound impacts on the lives of many citizens, on the legitimacy of institutions, and on the perceptions of culpability.<sup>82</sup>

The vetting of public sector employees was part of a larger process of downsizing the public sector. In 1989, there were 2.2 million public sector workers in the GDR. Through privatizations and layoffs, this number decreased to 1.2 million in Spring 1991, long before the process of personnel reduction was over. Vetting was the first step in a large-scale process of restructuring and personnel reduction. The process of questioning and screening should identify all those employees who are not suitable for continued public sector employment in a democratic state. Upon the conclusion of the vetting process, employees would be screened for their professional qualifications for the jobs they held or would hold after restructuring. And finally, those employees whose personal integrity and professional qualification were beyond legal doubt were matched with the decreasing number of jobs, resulting in even more layoffs.

Vetting was first proposed in the Fall of 1989 and started, sometimes informally, in the Spring of 1990. At that time, vetting was conceptualized simply as a response to past misconduct, and not much thought was given to how a person’s views and conduct changed after 1989. The legal basis for vetting, in contrast, framed the policy as an attempt to assess the employees’ current and future reliability in a democratic public sector. Although the vetting process was regulated by one general norm in the Unification Treaty<sup>83</sup>, the practice was uneven across sectors, states, and administrative departments. Institutions that demand higher levels of popular trust in their moral authority, such as courts and universities, generally selected more demanding procedures. Their vetting commissions were composed by insiders as well as representatives of civil society or legal professionals who were expected to ensure the impartiality and integrity of the whole process. In other parts of the public sectors, such as in the municipal administrations, the vetting process was differentiated according to the employees’ level of responsibility and public visibility. The commissions were formed from within the institution without elections. They viewed their work as purely administrative. The most significant category of misconduct examined by the vetting commissions was collaboration with the Ministry of State Security (MfS, popularly called Stasi). Available numbers suggest that on average 30% to 45% of those who were listed as MfS informers had to leave the institution. Many opted for ending the employment in mutual agreement, which saved them the embarrassment of having been dismissed but also deprived them of an opportunity to challenge the dismissal in court.

Although vetting was meant to identify various forms of non-criminal misconduct, it was widely understood to be synonymous with the search for MfS informers. This identification is a result of a narrowing of the vetting focus in response to the availability of evidence and the criteria introduced by the laws. The focus on the MfS does not reflect an initial judgment of the relative responsibility of the MfS, the communist party, the Socialist Unity Party (SED), and other organizations for injustices. However, the singular focus on unofficial MfS

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<sup>82</sup> See Christiane Wilke, ‘The Shield, the Sword, and the Party: Vetting the East German Public Sector’, in A. Mayer-Rieckh, and P. de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. 348-400.

<sup>83</sup> It was not necessary to further clarify and discuss the constitutional framework, because the Grundgesetz and the rich jurisprudence of the Federal Constitutional Court was clear both on the freedom of information and the data protection aspects of vetting.

informers for pragmatic reasons implicitly cast this group of people as the main culprits. Other forms of MfS collaboration as well as the abuse of power by the SED, the trade union federation, and other organizations receded in importance behind the character of the secret MfS informer.<sup>84</sup>

The *Czechoslovak lustration law*, as formulated in Act No. 451/1991 of the Collection of the Laws ‘determining some further conditions for holding specific offices in state bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic’ (commonly referred to as the ‘large lustration law’)<sup>85</sup> and Act No. 279/1992 of the Collection of the Laws ‘on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Correction Corps of the Czech Republic’ (commonly referred to as the ‘small lustration law’ because it only extended the lustration procedures to the police force and the prison guards service), was based on the idea that the postcommunist Czechoslovak society had to deal with its past and facilitate the process of decommunisation by legal and political means. It intended to specify a carefully selected list of top offices in the state administration which would be inaccessible to those individuals whose loyalty to the new regime could be justifiably questioned due to their political responsibilities and power exercised during the communist regime.

The law provided two lists of offices and activities to which it applied: the first list contained offices requiring a lustration procedure before individuals could take them, while the second list enumerated power positions held and activities taken during the communist regime which disqualified candidates applying for the jobs listed in the first list. Despite a wide range of public offices subjected to the lustration procedure, positions contested in the general democratic elections had not been affected by the law. Offices protected by the lustration law included: civil service, senior administrative positions in all constitutional bodies, the army positions of a colonel and higher, police force, intelligence service, the prosecution office, the judiciary, notaries, state corporations or corporations in which the state is a majority shareholder, the national bank, state media and press agencies, university administrative positions of the head of academic departments and higher, and the board of directors of the Academy of Sciences.

The disqualifying positions and activities during the former regime were: political; those within the repressive secret police, state security and intelligence forces; and linked to the collaboration with these forces. Political disqualifying positions included: Communist Party secretaries from the rank of district secretaries upwards, members of the executive boards of district Communist Party committees upwards, members of the Communist Party Central Committee, political propaganda secretaries of those committees, members of the Party militia, members of the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968, graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between January 1, 1968, and May 1, 1969, that is during the democratisation period of the ‘Prague spring ‘68’ terminated by the invasion of the Warsaw Pact armies in August 1968.

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<sup>84</sup> *Ibid.*

<sup>85</sup> English translation is in Kritz (ed.), *Transitional Justice*. Volume III, 312-321.

Regarding the security, secret police and intelligence service positions, the following ones had been enumerated by the law: senior officials of the security police from the rank of departmental chiefs upwards, members of the intelligence service, and police members with political agenda. Nevertheless, the law originally allowed the Minister of Interior, Head of the Intelligence Service, and Head of the Police Force to pardon those members of the former secret police whose dismissal would cause ‘security concerns’.

The most controversial part of the law was, which listed activities of citizens related to the secret police. They involved the secret police collaborators of the following kind: agents, owners of conspiratorial flats or individuals renting them, informers, political collaborators with the secret police, and other conscious collaborators such as trustees and candidates for collaboration. This complicated structure corresponded to the system elaborated by the communist secret police. The main issue was whether a person consciously collaborated with the police, for instance by signing the confidential ‘agent’ cooperation, or was just a target of the secret police activity and possibly non-intentional source of information gathered during police interviews.

The Constitutional Court of the Czech and Slovak Federal Republic upheld the law’s constitutionality in general and stated that the lustration in principle did not violate the International Convention on Civil and Political Rights, the International Convention on Economic, Social, and Political Rights, and the Discrimination Convention (Employment and Occupation) of 1958. Furthermore, the Court declared unconstitutional and therefore void those sections of the law, which legislated specific powers to the Minister of Defence and the Minister of Interior to exempt individuals from the lustration procedure if it was in the interest of state security. According to the Court, these sections contradicted the principles of equality and due process of law guaranteeing that the same rules apply to those in the same position.<sup>86</sup>

The law did not affect Communist Party members in general and, among communists, targeted only the Party officials and the Party Militia members. Individuals who ended up with the ‘positive lustration’ record stating that they had collaborated with the secret police could still be active in politics because the statute did not apply to any office and position contested in the general election. However, the overwhelming majority of political parties introduced a self-regulatory policy demanding all candidates to submit the ‘negative lustration’ certificate before being listed in the parliamentary election. The only parliamentary political party refusing to internally apply lustration rules has been the Communist Party. The law thus created a situation in which members of Parliament and local councils could have a secret police record while, for instance, heads of different university departments had been subjected to the lustration procedure.

Lustrations also did not apply to the emerging private economy sector. Private companies did not have access to the secret police files of its employees and therefore could not apply ‘private lustrations’. Regarding the procedure, an individual has to apply for the lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and the Ministry has a duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organisation can apply for lustration of its employee only if her job is subject of the lustration law. In the case of the ‘positive lustration’ result, an applicant can submit an administrative complaint to the

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<sup>86</sup> Decision of the Constitutional Court of the Czech and Slovak Federal Republic on the Screening Law. November 26, 1992. English translation is in Kritz (ed.) *Transitional Justice*. Volume III. 346-365.

Ministry and, if the original finding remains unchanged, file a civil suit against the Ministry demanding the protection of ‘personal integrity’.

Available figures show that around five per cent of all lustration submissions resulted in ‘positive certificates’ disqualifying the applicant from his/her office in the mid 1990s. The most recent figures indicate a decline in ‘positive lustration’ results of the screening down to approximately two-three per cent of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. About 9000 security services officers and agents and communist party officials were excluded from posts in government and public administration, the judiciary, the state media, the military and senior academic posts.<sup>87</sup> The Ministry received between 6,000 and 8,000 lustration requests per year and the total number of lustration certificates issues between 1991 and 2001 was 402,270.<sup>88</sup> Although the law had been originally enacted for a limited period of 5 years, but was subsequently extended by Parliament several times and still is being enforced in the Czech Republic.<sup>89</sup>

### **Mild Screening of Public Officials**

The *Hungarian lustration law* was adopted also after a long hesitation early in 1994, toward the end of the first elected government’s term of office, and similarly to the Polish case included a compromise solution to the issue of the secret agents of the previous regime’s police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in state universities or state-owned companies, as well as a specified list of other high government officials<sup>90</sup>). Each of these people would have to undergo background checks in which their files would be scrutinized to see whether they had a lustratable role<sup>91</sup> in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgement in the specific case. If the person accepted a judgement against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of parliament was already underway, the law was challenged by a petition to the Hungarian

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<sup>87</sup>A. Szczerbiak, ‘Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland’, *Europe-Asia Studies*, vol. 54, no. 4, June 2002. 553.

<sup>88</sup> See Priban, 2007, *ibid*, 17.

<sup>89</sup> Slovakia is an example of the opposite approach because, after the split of the Czech and Slovak Federal Republic, Mečiar’s populist Movement for Democratic Slovakia and other parties of his coalition government ignored the lustration law.

<sup>90</sup> Altogether about 10.000-12.000 posts. See K. Williams and B. Fowler, *Explaining Lustration in Eastern Europe: ‘A Post-communist politics approach*, Sussex European Institute, Working Paper No 62. 2003. 6-7.

<sup>91</sup> The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.

Constitutional Court. The Court handed down its decision in December 1994<sup>92</sup>, in which parts of the 1994 law requiring "background checks on individuals who hold key offices" were declared unconstitutional. In its decision the Court outlined key principles of the rights of privacy of the individuals whose pasts are revealed in the files as well as the rights of publicity for information of public interest. The most important declaration of principle in the decision of the Constitutional Court is the following: "The court declares that data and records on individuals in positions of public authority and those who participate in political life - including those responsible for developing public opinion as part of their job - count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same." Article 61 of the Hungarian Constitution provides an explicit right to access and disseminate information of public interest.

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the state-party regime),<sup>93</sup> but also constitutionally, because it represented the clash of two constitutional principles: the rights of informational self-determination of individuals (in this case, the spies) and the rights of public access to legitimately public data by everyone (including those who were spied on). Before the lustration case, both principles had been upheld in strong form. The lustration case, however, pitted the two principles against each other.

Taking the whole range of issues, from the constitutionality of the lustration process to the continued secrecy of the security apparatus files, the Constitutional Court attempted to balance a range of interests. First, the Court held that the maintenance of this vast store of secret records was incompatible with the maintenance of a state under the rule of law, since such records would never have been constitutionally compiled in the first place in a rule-of-law state. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as the agents. Disclosing the files to an interested public also would mean disclosing information of great personal importance to the individuals mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state. As a result, more information about such public persons may be disclosed from the security files than would be permitted in the case of persons not holding influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of persons. With this, the Court placed the problem back in the hands of the Parliament as a "political issue," with the instructions that the Parliament is free neither to destroy all the records nor to maintain the absolute secrecy of them, since much of what they contain is information of public interest.

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<sup>92</sup> 60/1994 (XII. 24) AB. See the English translation of the decision in Sólyom/Brunner, pp. 306-315.

<sup>93</sup> For example, the Prime Minister and the Speaker of the Parliament in the term between 1994-98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly got informational briefings from the secret police.

The Court also found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional muster. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionally arbitrary. In particular, the Court found that the category of journalists who were lustratable was both too broad - by including those who produced music and entertainment programs - and also too narrow - by excluding some clearly influential journalists who worked for the private electronic media. Either all journalists, and other public figures who have as part of their job influencing public opinion must be lustrated or none may be, the Court held. Parliament could choose either course. The Court did not, however, find the extension of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, "participate in the shaping of the public will" are acceptable candidates for lustration, as long as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority state-owned businesses was declared unconstitutional, however, since these persons "neither exercise authority nor participate in public affairs," according to the Court. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons because the procedures to be applied to the clergy did not include as many safeguards as those applied to others.

The decision of the Constitutional Court shows correctly that a lustration law can have two goals, depending on the historical moment. At the beginning of the transition, full lustration might have served to mark the irreversibility of the change and the ritual cleaning of the society. But more than five years after the 'rule-of-law revolution,' the better constitutional goal at least for the Constitutional Court may be found in specifying the circle of freedom of information through a rule-of-law lustration. The behavior and the past of those people who are now prominent in political public life are appropriate for the public community to know. The lustration of the prominent representatives of the state is constitutionally reasonable, but the publicity of the full agent's list is not, the Constitutional Court argued.

The new lustration law, LXII/1996, which was approved by the parliament in July, 1996 specifies that only those public officials who have to take an oath before the parliament or the president of the republic or who are elected by the parliament are to be subjected to the lustration process<sup>94</sup>. This takes care of the problem outlined by the court of an excessive scope of lustratable officials. According to the amendment ordinary court judges, public prosecutors, and mayors are excluded from the lustration with the arguments that since they are not elected, they should not be accountable for the past behaviour either. After the change of government in 1998, the centre-right conservative governing parties in 2000 adopted Act XCIII, which extended significantly the list of those who should go through lustration compared to the modification in 1996 and the original law of 1994. The amendment extended the scope of vetting of the media beyond the level of editors, to "those, who have the effect to influence the political public opinion either directly or indirectly", and was also applicable to commercial television, radio, newspapers and Internet news agencies.<sup>95</sup>

Soon after the change of the government in 2002, it was disclosed that the that time Prime Minister Péter Medgyessy had served as a top secret officer of the former III/II directorate (counterintelligence) of the communist-era Ministry of Interior. The scandal showed that the

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<sup>94</sup> The amended law concerned about 500-1000 posts. See Williams-Fowler, 2003. *Ibid*.

<sup>95</sup> See E. Barrett, P. Hack, Á. Munkácsi, 'Lustration As Political Competition: Vetting in Hungary', in A. Mayer-Rieckh and P. de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. 180-220.

legislation in force was inadequate to ensure the purity of post-transition public life, since it concentrated exclusively on the domestic surveillance unit of the Hungarian secret police (former III/III directorate). But there were other units also, that engaged in spying on Hungarians living abroad, or on foreigners living in Hungary, or on those who served in the military, and those secret police units are not covered by the law, despite a public protest by a number of leading figures insisting that the lustration law cover all spying activities. This problem was subject of a complaint before the Constitutional Court, but it was rejected in 1999. Actually the legislator used the argument, and this was accepted by the Constitutional Court that this kind of secret police activity is legitimate in every democracy as well, and only the services dealing with internal matters were acting against the principles of the rule of law. This argument seems to forget that there was no sharp division of tasks among the different secret services, and that the entire state was not governed by the rule of law. Under the weight of intense press coverage of the Prime Minister's case and opposition pressure, in 2003 the government tabled an amendment of the lustration law involving every former directorate, and also planned to extend the lustration to the churches, by arguing if media representatives are liable for lustration, there is no constitutional reason why the leaders of churches are not. But finally the draft law was rejected by the parliament with the same argument that only small fraction of the society, namely the internal secret police acted against the rule of law being responsible for all the wrongdoings.

The *Polish lustration law* adopted by the Polish Parliament in April 1997<sup>96</sup> formally became valid law in August 1997, but could not be enforced without the creation of the V Department (Lustration Court) in the Warsaw Appellate Court in December 1998. A Commissioner for the Public Interest was nominated by the Chief Justice of the Supreme Court in October 1998 and formally took office on 1 January 1999.

The statute imposes a duty on people born before 11 May 1972, which means all who were adults according to law before the transfer of power in 1989 took place, who hold or are candidates of enumerated public positions in the state to make a statement regarding their work or collaboration with secret services (organs of the state security) between 1944 and 1990. The obligation of making a positive or negative lustration statement is imposed on a broad category of people holding executive positions in the state or important positions in the state administration, including the President of the Republic, members of the parliament, senators, judges, procurators, advocates, and people holding key positions in Polish Television (public), Polish Radio (public), the Polish Press Agency, and the Polish Information Agency.

Lustration statements consist of parts A and B, as stated in the annex to the statute. Part A is simply a declaration that a person did or did not work or collaborate with organs of state security. Part B (not made public) includes details of work or collaboration in the case of a positive statement. Information of a positive statement is published in the official gazette "Monitor Polski," or in the case of the candidates for the presidency and the lower or upper houses of parliament, in electoral proclamations. That means that names of all who return positive declaration are published in the government gazette but without details of the type of collaboration. In the case of candidates for seats in the Sejm and Senate and presidency, next to their name on the electoral proclamation with the names of all candidates is mentioned that they returned a positive lustration declaration. In that way those who declared that they were members of the secret services or consciously collaborated with secret services can still be

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<sup>96</sup> Uniform text Dziennik Ustaw, 1999, Nr 42, poz.428.

candidates to the office and the decision about their future is left in the hands of the electorate. The Polish lustration law penalises only a lie about collaboration with secret services, not the collaboration itself.

Verification of a negative lustration statement is done by the Commissioner for the Public Interest. If there is suspicion of a lie in the lustration statement, the Commissioner for the Public Interest initiates a case before the Lustration Court. Court rulings confirming a lustration lie are made public. The legal effects of such court rulings are different depending on the position held by the person involved. MPs or senators will lose their seat but they can start as candidates in the next election. In the case of judges an additional ruling of the disciplinary court is required.

In the years 1999-2004 about 27,000 people have filled out lustration declarations and according to the Lustration Law all of these declarations are subject to the Commissioner's scrutiny. 278 persons declared work or collaboration with state security organs. Their names were published in "Monitor Polski". The Commissioner filed only 126 cases for the Lustration Court. By 30 April 2004, the Lustration Court made judgements in relation to 103 persons. Among those 103, in 52 cases the Court confirmed that the declaration was not true.<sup>97</sup>

In 2007 the Polish Parliament adopted a new vetting act drafted by the conservative Law and Justice (PiS) party, in a move that seems to take out a large number of groups of professions from the vetting obligation without completely derailing the ruling party's anti-communist screening plans.<sup>98</sup> Compared to the vetting act of 1997, the latest lustration law sought to increase the number of people required to submit a truthful vetting declaration before May 15, 2007. Failing to submit such declarations would result in dismissal from certain positions or legal consequences in case of submitting a false declaration. About 300,000 to 400,000 people in Poland would have to undergo a compulsory vetting process if the law was fully executed, according to the National Remembrance Institute. The opposition argued that the law was vague and unclear, introducing dubious definitions of individuals who would be required to submit statements on whether or not they collaborated with the communist secret services before 1989.

In a legally complex ruling in mid-May Poland's Constitutional Tribunal decided to partially overthrow crucial parts of the act. The tribunal said the law violated a number of articles of the constitution, but the lawmakers' definition of a collaborator, which was one of the most disputed provisions of the new law, does not violate Poland's constitution provided that the collaborator was fully aware of their status during the time of cooperation with the secret services. The Constitutional Tribunal also ruled that the vetting of university professors, all journalists, executives of publishing houses and rectors of state-run schools violated the constitution. The tribunal ruled that it would not be legal for the National Remembrance Institute (IPN) to publish lists of past communist collaborators, which was one of the goals of

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<sup>97</sup> See A. Czarnota, 'The Politics of of the Lustration Law in Poland, 1989-2006', in A. Mayer-Rieckh and P. de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. 222-258.

<sup>98</sup> See T. G. Ash, 'On Lustration in Poland' *The Guardian*, May 24, 2007.

the legislation. The tribunal also ruled that the bill's annulment of the right to file cassations to the Supreme Court in vetting cases violated the constitution.

Interestingly enough, Prime Minister Jaroslaw Kaczynski had earlier said that if the Constitutional Tribunal overthrows the bill, his party would draft a law opening up IPN archives completely in order to reveal all classified information on past communist collaborators. But this did not happen.

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In Germany the rigorous method of vetting certainly avoided those compromised during the hard core totalitarian regime entering into the public life of the united country. Even if there were some critics from parts of the population in East Germany about victor's justice, but the public more or less accepted the measures. Also the more strict lustration in Czechoslovakia and consequently in the Czech Republic can be legitimized by the though system after 1968, but probably the strick exclusion of even very low level local communist party officials from the any public offices, including from civil service went too far.<sup>99</sup>) On the other hand the soft screening, especially in Hungary without any transparency of the data on which it was based deeply divided the country. Another example is the lustration programme introduced in 2007 by the Kaczynski government in Poland<sup>100</sup>. In 2002 the Hungarian citizens despite his previous negative vetting result got to know that their Prime Minister was an agent of the former secret police, which discredited the entire institution of lustration. As we saw the constitutions played no role in designing the vetting processes, and also the influence of constitutional courts was very limited to set constitutional standards or to avoid the misuse of lustrations for 'bad' political purposes. In this respect there are no significant differences between countries experiencing different approaches of democratic transitions.

## Compensation

Democratizing regimes shall decide to offer compensation to people who were victims of the previous regime's abuses. Compensation is an attempt to restore a good or level of wellbeing which someone would have enjoyed if he had not been adversely affected by another's wrongdoing. The wrongs to be compensated can be confiscation of property, but also violation of other rights, including right to life or personal liberty. Monetary compensation in appropriate ammounts is certainly one of the forms of reparation, but also nonmonetary gestures can express recognition of the harm done. In a way, providing access to the secrets of the previous regime belongs to compensation, which will be discuss separately in the following chapter.

Since after the demise of an oppressive regime, except the relatively few beneficiaries, a huge part of the population can claim to have suffered unjustly. Yet, compensation of all would be both a meaningless act, as well as an economic drain. Therefore apart from a society's material potentials there are moral questions as well to which compensation schemes must provide an answer. The most important among them is which injustices are to be covered by

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<sup>99</sup> A critical assessment of the lustration in the Czech Republic see D. Kosar, 'Lustration and Laps of Time: „Dealing with the Past” in the Czech Republic', *European Constitutional Law Review*, 4, 2008. 460-487.

<sup>100</sup> This law rejected by the Constitutional Tribunal envisaged to radically increase the 20.000 posts originally forseen by the 1997 lustration law. See K. Williams and B. Fowler, 2003. 8.

compensation? From a different angle this is to decide which groups of people deserve compensation?

In the former Communist countries to important constitutional issue regarding compensation is the right to property. All these countries in their new constitution abolished the preferred status of state property, and provided protection, even if not unlimited one to private property. But none of these constitutions dealt especially with the problem of compensation for expropriation of private property by the communist state. This was the task of legislators and the constitutional courts assessed the constitutionality of these statutory regulations.

## Restitution with Exeptions

As we have seen the Unification Treaty provided a possibility of deviation from the West German Basic Law for the settlement of property issues in the GDR, but in the case of the millions of acres of property expropriated or placed under state administration under the Soviet occupation and the government of the GDR the question was how also this problem can be solved through the systematic extension of western constitutional and legal concepts over the east implied by Article 23 of the Basic Law.

When the Unification Treaty was adopted in the summer of 1990, the framers contemplated that property expropriated by the GDR would be returned to the original owners in most cases<sup>101</sup> and compensation would only be substituted in three categories of exceptional situations: a) for property to be used for investment in order to stimulate investment in eastern Germany, b) if the return is impossible, and c) in the case of 'honest acquisition' by third person.<sup>102</sup> But the Unification Treaty also stated that the 1945-49 expropriations under the Soviet occupation even before the establishment of the GDR were not to be returned to its former owners. This differing treatment - which was reinforced by an amendment to Article 143 (3) of the Basic Law - was justified by the government's claim that the Soviet Union and the GDR had insisted on such a provision as a condition of the unification.<sup>103</sup> In the so called Bodenreform (Land Reform) decision issued in April 1991, the Constitutional Court upheld this provision of the Treaty.<sup>104</sup> The Court argued that the legislature had not exceeded its authority in giving constitutional endorsement to the decision not to return the Bodenreform lands, since the expropriations were clearly legal under Soviet occupation law and GDR law, and the West German Basic Law did not apply at that time. However the Court added the requirement that the former owners of the property must also receive some compensation. In response to the Court's decision, the German parliament enacted the required statute, but the law generally accorded compensation at a rate much lower than market value. The disappointed former landowners tried to convince the Constitutional Court that the Soviet Union had not actually insisted on non-return of the expropriated property, as the government had argued, but the Constitutional Court rejected this new argument in a second decision in

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<sup>101</sup> The expropriations of the Soviet occupying power covered 10,000 enterprises, which represented at the foundation of the GDR, 70 percent of the entire GDR industry. After the unification 40,000 ownership claims on 17,000 enterprises were filed. See [German Unification Case Study - Restitution - Foothill College](http://www.foothill.fhda.edu/unification/restitution.html).

<sup>102</sup> About the fate of 'socialist property', restitution, and compensation see Quint, 1997. Chapter 11.

<sup>103</sup> Cf. P. Quint, 'The Constitutional and Legal Framework of German Unification', in W. Schluchter - P. Quint (eds.), *Der Vereinigungsschock. Vergleichende Betrachtungen zehn Jahre danach*, Velbrück Wissenschaft, 2001. 25.

<sup>104</sup> 84 BVerfGE 90 (1991).

1996.<sup>105</sup> Despite the lack of success of the former large landowners, other aspects of the property rules have created a large shift of control of eastern property from East to West. The federal agency called as the Treuhand, for instance engaged in massive series of sales between 1990 and 1994, 'privitizing' eastern enterprises that had come into the hands of the GDR state. These sales were made predominantly to investors from western Germany.<sup>106</sup>

In another constitutional complaint procedure the Court investigated the compatibility of the expropriations of the Bodenreform with public international law and the consequences of a potential contravention of public international law for the constitutional commitments of the Federal Republic of Germany. The Court admitted that „the state governed by the Basic Law (Grundgesetz) in principle has a duty to guarantee on its territory the integrity of the elementary principles of public international law, and, in the case of violations of public international law, to create a situation that is closer to the requirements of public international law in accordance with its responsibility and within the scope of its possibilities of action.” However, the judges argue “this does not create a duty to return the property that was seized without compensation outside the state’s sphere of responsibility in the period between 1945 and 1949”.<sup>107</sup> Therefore these constitutional complaints were also rejected as unfounded.

The Czech Constitutional Court in its decision on property restitution took a clear stand on the legal status of the ‘Benes Decrees’, which also provides an example of a constitutional court considering history in detail.<sup>108</sup>

## **Ex Gratia Reparation**

As we saw in the retroactive criminal justice cases apart from a strong pursuit of the government after 2010 to do ‘bad political justice’ there were no special provisions in the Constitution neither on transitional criminal justice nor on compensation. Hence the Constitutional Court used the ‘ordinary’ provisions of the Constitution measures to assess the constitutionality of these legislations. Despite the nationwide expectation of the population that unjust expropriations of the late 1940s and the 1950s would be retroactively undo or that at least the earlier owners would be fully compensated, the restitution or full compensation to all previous owners was not even raised by political actors, mainly because of the lack of economic and financial resources to accomplish this goal. The church was the only property owner eligible for full natural restitution. The Constitutional Court justified this special treatment with the churches’ constitutional function as institutions embodying freedom of religion. As the Court argued without getting back their property (church buildings, schools, hospitals) the churches would not be able to fulfil their duties.<sup>109</sup> The Small Holders Party, being in minority within the government coalition, stood up for a full restitution, but only for lands confiscated. But in an early decision upon the the request of the Prime Minister the Constitutional Court argued that it would violate the equal treatment clause of the constitution, if lands would be restituted while other lost proterties not.<sup>110</sup> Otherwise the Constitutional Court in another decision accepted the policy of the government on partial

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<sup>105</sup> 94 BverfGE 12 (1996).

<sup>106</sup> See, e.g. D. Kampe, *Wer uns kennelernt, gewinnt uns lieb: Nachruf auf die Treuhand*, Berlin, Rothbuch, 1993.

<sup>107</sup> Order of the Second Senate of 26 October 2004. 2 BvR 955/00, 1038/01.

<sup>108</sup> Decison Pl. U.S. 14/94.

<sup>109</sup> Decision 4/1993.

<sup>110</sup> Decison 21/1990.

compensation, which did not even require a partial restitution of the property in-kind.<sup>111</sup> The justices identified *novatio* (renewal), a concept based on Roman law as the title for compensation of harms in property. This means that the property compensation in the form of a voucher was based on the government's gesture of renewing its old obligations on new grounds, as a new title in property. In other words, this compensation takes place *ex gratia* and not as of right, and it is acceptable because of the extraordinariness of the task, that is, because of the historical circumstances. But as opposed to the situation in Germany, where the Unification Treaty has put an authorization for exceptions into the Basic Law, in Hungary this exception was provided by the Constitutional Court itself.

There is another aspect of the legislation on property compensation, namely the rights of the present owners, where the Constitutional Court's decision was also based on the exceptional nature of the situation. Those compensated could receive either the state's own property, or property of agricultural cooperatives. The persons who were entitled to receive agricultural lands were granted an 'option of purchase' which could be used to acquire arable land owned by agricultural cooperatives in the amount of compensation received in restitution bonds. The Court argued that it is not an unconstitutional limitation of the property rights of others, in this case that of the agricultural cooperatives if the state includes their property among the resources distributed in the compensation process. The reasoning of the Court's decision referred to the wide discretion of the government in reconstructing the system of ownership, arguing that this is a necessary burden of transforming the Hungarian economy.<sup>112</sup>

Critics rightly conclude that the Court by legitimizing the option of purchase of others' property, which can even consider as taking, reduced the level of constitutional protection of property in an attempt to justify a measure of correcting past wrongs, if not taking revenge for them.<sup>113</sup>

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In compensation measures Germany followed the rule of full restitution for property confiscated by the GDR government, but made an exception authorized in the Unification Treaty and also by the amendment of the Basic Law for the lands lost during the Bodenreform prior to the establishment of the GDR. The Czech Republic also followed the approach of property restitution. Hungary in this issue of transitional justice went off the road of formalistic interpretation of rule of law as legal security and continuity, and treated restitution as an *ex gratia* gesture and not as a right. Here the government had a wide discretion in determining what constitutes a ground for compensation, restitution was partial, and could be provided in installments, not even taking into account the protection of others' property. This difference can be explained by the mild nature of the communist regime in Hungary, which again determined the nature of transition as well. Notwithstanding the large proportion of agricultural cooperatives, in Hungary the role of privately owned small farms was important from the 1960s onwards.

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<sup>111</sup> Decision 16/1991.

<sup>112</sup> Decision 28/1991.

<sup>113</sup> See Uitz, 2005. 252.

## Access to the Secrets of the Previous Regime

The constitutional aspect of the access to the secret files of the Communist regime is the right to freedom of information of public interest, which is never an absolute right, because legitimate state secret or right to personal data or privacy in general can always limit this right. As the case of the Hungarian statutory regulation has shown, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. In the other countries these issues were regulated separately. Concerning the wideness of accessibility one can detect different models within the countries in Central Europe. The first Hungarian solution (as well the Polish one) provided limited access to the victims. The most important limit is the name of the spy, which in these models is not disclosed for the victims. The unified Germany, which was the very first country in the history opening the state archives of the secret police, provided unlimited access to the victims concerning the data on the agent as well, and to government agencies to request background checks on their employees. The law enacted by the Hungarian parliament in 2003 besides following the German way by providing access to victims on their spies also opened the files for the general public concerning the data of public figures. But the widest access is provided by the similar statutory regulation of the Czech Republic and Slovakia, where – with the necessary protection of third persons' personal data – the secret police files are accessible for everyone.

### Access for Victims

Even before the German unification the *East German* parliament in Summer 1990 passed a law at the urgent request of members of the civil rights movement to facilitate “the political, historical, and legal reckoning with the activities of the former Ministry for State Security.”<sup>114</sup> The West German negotiators to the Unification Treaty were opposed to give this law validity under the Treaty, but after a hunger strike by members of the citizens' movement it was agreed that the unified German parliament should pass a law on the Stasi files that respects 'the basic principles' of the August 1990 law.<sup>115</sup> Only this could guarantee the constitutional right of the former citizens of the GDR to get to know the past of their state. This was the Law on the Records of the State Security Service of the former German Democratic Republic (Stasi Records Law, Stasiunterlagengesetz, StUG).<sup>116</sup>

The law establishes a Federal Office administering, sorting, and reconstructing the files. The Federal Commissioner for the Stasi Records is elected for five years. During the first two terms, Joachim Gauck, a pastor from Rostock, today President of the Federal Republic served as commissioner. The office soon came to be known as the Gauck Authority (Gauck-Behörde). The Stasi Records Law established an elaborate system of making parts of the Stasi's files available to restricted and specified audiences. There are different access rights for the Stasi's victims, the Stasi informers, researchers, and public sector employers. Some

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<sup>114</sup> Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit/Amt für Nationale Sicherheit, August 24, 1990. GDR Official Gazette, I, 1419-1421, [www.bstu.de/rechtl\\_grundl/volkskammer/bilder/original\\_08\\_1.gif](http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_08_1.gif).

<sup>115</sup> Agreement on the Implementation and Interpretation of the Unification Treaty, September 20, 1990, Bonn. [www.bstu.de/rechtl\\_grundl/volkskammer/bilder/original\\_19\\_1.gif](http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_19_1.gif).

<sup>116</sup> Available at [www.bstu.de/rechtl\\_grundl/stug/](http://www.bstu.de/rechtl_grundl/stug/) in German and English.

people's past is more public than that of other people. Those who were spied upon can petition to see 'their' files. From 1991 to 2003, more than two million petitions for access to individual records have been filed.<sup>117</sup> Hundreds of thousands of persons have accessed the Stasi's knowledge about their personal lives. After seeing their file, people could decide whom to tell about what they read: their family, their friends, or the general public? The law had empowered them to decide with whom to share the secret knowledge created by the Stasi.<sup>118</sup> The law stipulated, however, that journalists could be penalized for using information from the files they received from unofficial sources.<sup>119</sup>

## Limited Access for the General Public

The *Hungarian* Constitutional Court's mentioned decision on the constitutionality of the 1994 lustration law also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.<sup>120</sup> The new law enacted in 1996 did create a "Historical Office," responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose is to put into effect the prior decisions of the Constitutional Court.

As a consequence of the Hungarian Prime Minister's mentioned scandal in December 2003 the parliament adopted the Act V of 2003, which established a new Public Security Services' History Archive, and brought together all the documents of all of the security service directorates in this one location. The new law creates the opportunity to reveal the personal past of individuals in public office. Anyone can request the files of those people who are currently in public office or had been in public office. The category of public office is not well defined in the law but has been taken to include anyone who serves (or served) in positions of executive power or the media. Indeed, it can be interpreted very broadly. In the case of those in public office, some very limited information found in the Archive about an individual's relationship to any of the security service directorates (not just III/III) can be published. Only since 2003 has it been possible for individuals to request that the identity of the agent (i.e., the real person behind the codename) be revealed.

In May 2005 the Hungarian parliament passed an amendment to the Act V of 2003, which intended to open all of the files of the former secret police, including the names of the agents not holding any public office. Another provision of the enacted law entitles the Archive to make a lot of information public through its website without any personal request. The President of the Republic before promulgation sent the law to the Constitutional Court for

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<sup>117</sup> Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, *Sechster Tätigkeitsbericht* (Berlin, 2003), 21, 71.

<sup>118</sup> See Wilke, 2007, *ibid*.

<sup>119</sup> Kritz (ed.), *Transitional Justice*. Volume II. Germany (after Communism), 596.

<sup>120</sup> Since this is an unusual power of the Hungarian Court, it deserves a bit of explanation. The Court can declare the Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

preliminary review. In his application the President used the argument of the Court in its 60/1994. AB decision, saying that only the past of public officials represents a data of public interest, which can be published even without the consent of the person, but to disclose information of ordinary people not holding public offices would violate their right to informational self-determination. In its 37/2005. AB decision the Constitutional Court using its previous arguments declared the law as unconstitutional, which therefore did not enter into effect.

As discussed earlier, the Fourth Amendment of the new Fundamental Law enacted in April 2013 prescribed the establishment of the Committee of National Memory “in order for the State to preserve the memory of the communist dictatorship”. Act No. CCXLI of 2013 regulates the activities and composition of the Committee, whose members were elected by the governing majority in February 2014. Neither the text of the constitution nor that of the law mentioned any change about the access to the still secret files of the previous regime.

In *Poland* the issue of access was also discussed in 1997 in connection with the lustration law, but finally the Sejm in December 1998 passed a separate Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.<sup>121</sup> The law regulates access of those persons about whom the organs of the state security collected information between 1944 and 1989.

## **Broadened Access for the General Public**

In 1996, Parliament of the *Czech Republic* enacted The Act of Public Access to Files Connected to Activities of Former Secret Police.<sup>122</sup> The law originally granted access only to persons potentially affected by secret police activities. Nevertheless, the statute was amended in 2002,<sup>123</sup> so that the main registers of secret police collaborators could be made available to the general public.<sup>124</sup> According to the current regulation, any adult person who is a citizen of the Czech Republic can file a request to access the secret police files and documents collected between February 25, 1948, and February 15, 1990.

The access, which is provided by the Ministry of Interior, therefore is not limited to the person's data and files. Nevertheless, the Ministry protects the constitutional rights of personal integrity and privacy of other individuals who might be mentioned in the files demanded by the applicant. The Ministry therefore must make all information possibly affecting those constitutional rights inaccessible to the applicant unless it is related to the activities of the secret police and its collaborators. The applicant thus can access any details regarding the identity of secret police agents but would not be able to see information related for instance to their marital life or health problems. This shift of the state policy naturally resulted in a number of legal cases in which individuals demanded their names to be removed from the registers and moral reputation re-established.<sup>125</sup>

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<sup>121</sup> Journal of Laws, 19 December 1998.

<sup>122</sup> No. 140/1996 of the Collection of Laws of the Czech Republic.

<sup>123</sup> See The Act No. 107/2002 of the Collection of Laws of the Czech Republic amending the Act No. 140/1996.

<sup>124</sup> These registers are available on [www.mvcr.iol.cz](http://www.mvcr.iol.cz)

<sup>125</sup> One of the most publicised and high profile cases has been the case of Jiřina Bohdalová – a top celebrity actress. She filed a lawsuit against the Czech Ministry of Interior and demanded her name to be removed from the register of secret police collaborators. The trial revealed how she was psychologically tortured by secret police at the age of 28 in the 1950s but never agreed to collaborate with it. In January 2004, the municipal court of Prague ruled that the actress has never been a secret police collaborator, yet failed to oblige the Ministry of

In August 2002 the National Council of the *Slovak Republic* enacted the Act on Disclosure of Documents Regarding the Activity of State Security Authorities in the Period 1939-1989 and on Founding the Nation's Memory Institute.<sup>126</sup> Besides the procedure of disclosure of documents upon the request of victims and state institutions, the law also regulates the disclosure of data by the Institute *ex officio*. According to the law, subject to being disclosed and made public shall be preserved and reconstituted documents, which were created as a result of the activity of the State Security and other security authorities in the period from April 18, 1939 to December 31, 1989. Excluded are only documents the disclosure of which might harm the interest of the Republic in international terms, its security interest or lead to a serious endangerment of a person's life. In order to exclude a document being disclosed and made public, a proposal of the Slovak Information Service or the Ministry of Defense is necessary, which was approved by an appointed committee of the National Council.

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All transitional countries of Central Europe provided more or less unlimited access to the files of the previous regime's secret police for victims, government agencies as well as for the purpose of scientific research. But it was only the Czech Republic and Slovakia, which opened the secret archives also for the general public providing a kind of 'informational compensation' for those who were not spied on, but were affected by all the decisions of the regime.

## **Conclusions: Constitutions, Transitional Justice, Reconciliation, and Democratic Consolidation**

The paper tried to answer the following questions: what role constitutional reforms played in dealing with the past and how the transitional justice measures helped to reconcile the society, and consolidate democracy in two distinct types of transition in the countries of Central Europe. In the rupture type of democratic transition demonstrated by East Germany (but also in Czechoslovakia and its successor states) rapid constitutional reforms occurred, while in Hungary, representing the countries of negotiated transition (here belongs Poland, too) amendments to the old constitutions was only later followed by an entirely new document. With the exception of Germany, and Hungary after 2010 neither the early nor the later constitutional reforms have dealt explicitly with transitional justice, but legislators and consequently constitutional courts addressed these issues interpreting differently the general principles of constitutionalism, especially rule of law. In the more repressive East-German (and Czechoslovak) regime(s) of Central Europe with their rupture-type transition this interpretation supported the concept of material justice, also requested by the population, while in Hungary's (and Poland's) milder suppression followed by a negotiated transition and post-sovereign constitutional system a more formalistic interpretation of the rule of law emphasized legal continuity. The material justice approach took the historical circumstances of the transition into account, using special constitutional standards as opposed to the legal continuity model, which considered the law of the previous regime valid, and therefore tried to be neutral towards the past. In the vetting procedure the strict German (and Czech) approach

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Interior to remove her name from the register, although Bohdalová did not aspire to a political career or positions subject of the lustration procedure. See Priban, 2007, *ibid*.

<sup>126</sup> 553/2002 Coll. Nation's Memory Act. Amendments: 110/2003 Coll, and 610/2004 Coll.

aimed at reconciling the more harmed victims of the Communist era, than the mild Hungarian and Polish approach, which assumed less hostility towards the representatives of previous regime. The same reasons can explain the different solutions of compensation: the German and the Czech road of restitution as opposed to the partial *ex gratia* approach chosen by Hungary. The issue of the access to the secret files of the previous regime did not follow this pattern, because the German regulation did not provide access for the general public, and the Hungarian one also only regarding public officials, contrary to the Czech and the Slovak as well as the Polish solution, which all did.

If we finally compare the two major case studies the conclusion seems to be too obvious that while the German approach of dealing with the past is a success story, Hungary failed in almost every respects. But this judgment is unjust from the perspective of both countries. The success of the former GDR is in no small part due to the fact that the country became part of an already consolidated democratic regime with a well-functioning constitutional system, which helped the East German society to overcome the lack of readiness to come to terms with the past, present also in all countries of Central Europe. And we should not forget that the Bundesrepublik learned a great deal from a failed transitional justice measure in the early years of its history after 1949.<sup>127</sup> It is hard to tell what is the reason for the failures of transitional justice in the other countries of Central Europe, in Hungary and Poland, but also the other rupture-type transition of the Czech and the Slovak Republic.

One of the possible explanations is the already mentioned legalistic form of constitutionalism (or legal constitutionalism), which while consistent with the purpose of constitutionalism of creating the structure of the new democratic state, including the institutions of transitional justice, risks the possibility of creating participatory democracy, involving the citizens into the process of this creation.<sup>128</sup> In other words, legal constitutionalism falls short, reducing the constitution to an elite instrument, especially in countries with weak civil society and a weak party political system, like in Central Europe which undermines a robust constitutional democracy based on the idea of civic self-government.<sup>129</sup> This means that the institutions of transitional justice well functioning in older constitutional democracies cannot be effective without the necessary constitutional culture of the Central European countries, where the population after the very first years of the transition due to more burning economic problems lost interest in transitional justice issues. Partly this made it possible the general backsliding of democracy and rule of law in the region, especially in Hungary. The Hungarian government's successful efforts after 2010 to abolish liberal constitutionalism<sup>130</sup>, further

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<sup>127</sup> The journalist Ralph Giordano called it the country's 'zweite Schuld' (second guilt) that as ordinary Germans had looked away during the Holocaust, afterwards they looked away as those who carried it out went unpunished. In the years immediately following the war, former Nazis found jobs in the civil service. One of top aides to Konrad Adenauer, West Germany's first postwar Chancellor, Hans Globke had helped shape the Third Reich's racial laws. It was not until 1958 that the Bundesrepublik created a central office for investigating crimes committed during the war. See E. Kolbert, 'The Last Trial. A Great-grandmother, Auschwitz, and the Arc of Justice', *The New Yorker*, February 16, 2015.

<sup>128</sup> About the dangers of legal constitutionalism in general see R. Albert, 'Counterconstitutionalism', 31 *Dalhousie Law Journal* 1, 2008. 4.

<sup>129</sup> Cf. Sadurski, 2005. 23.

<sup>130</sup> In a speech, delivered in July 2014 Hungarian Prime Minister Viktor Orbán made it clear that in the previous four years he has been creating an illiberal state, and proclaimed his intention also in the future to have a state that „will undertake the odium of expressing that in character it is not of liberal nature... We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world... We are . . . parting ways with Western European dogmas, making ourselves independent from them . . . This is a state organization originating from national interests.” For the full English translation of the speech, visit:

undermined the rule of law guarantees of transitional justice, and made it possible to introduce measures for ('bad') political justice laid down also in the text of the Fundamental Law.

To sum it up, with the exception of the former GDR all the other countries of Central Europe to a varying extent failed to reconcile with their totalitarian past(s), which is contributed to the lack of full consolidation of their democracies. In Hungary the failure of transitional justice measures, and the backsliding into an illiberal democracy after 2010 was escorted by new radical attempts of political justice.

The reasons for failures can be manifold. One of them is the lack of the consensus about democratic values at the time of the transition. The split of the anti-communist coalition partners after the disappearance of the danger of Communist restoration in the countries of the region demonstrate that Anti-communism does not necessarily mean commitments to democratic values and human rights. In Poland and Hungary there was no real parliamentary democracy, only elements of a representative system worked before WWII under Pilsudsky and Horthy with strong nationalism and anti-semitism. Also there has been no human rights culture in these two countries before the transition. Of course the backsliding itself has many reasons. Only one of them is the disappointment of the population after the transition in 1989-1990. The main reason for disappointment is certainly the not fulfilled hope for a speedy economic growth and reach of the living standard of the neighboring Austria, but the lack of retributive justice against perpetrators of grave human rights violations and the lack of restitution of the confiscated properties are also among the explanations.

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If we put the fate of dealing with the past in Central Europe into a broader context we can argue that just as happened in Latin America<sup>131</sup> also here transitional justice became a substitute idealism for trying to invigorate new democratic regimes without strong democratic prehistory relatively quickly after transitions. The Central European experience shows that it is relatively easy to introduce institutions of constitutional law, such as those of transitional justice, but they cannot work without constitutional culture<sup>132</sup>. But if we look at the very limited positive experiences of international tribunals' efforts, such as that of the International Criminal Tribunal for the Former Yugoslavia in The Hague (ICTY)<sup>133</sup> in the neighboring region of Central Europe, or the Special Tribunal for Lebanon in the Hague<sup>134</sup> we have to

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<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

<sup>131</sup> Samuel Moyn uses this argument regarding Latin American development in the final years of the cold war and immediately after. See S. Moyn, 'Of Deserts and Promised Lands: The Dream of Global Justice', *The Nation*, March 19, 2012.

<sup>132</sup> Robert Post uses the term referring to the beliefs and values of non-judicial actors, most of all the people. On the other hand the term 'constitutional law' according to Post refers to constitutional law as it is made from the perspective of the judiciary in the American-type of decentralized judicial review system, or in countries with a German-type centralized judicial review and constitutional courts. There is a dialectic relation between the two, as constitutional law is based on constitutional culture and is also its influencer. See R. C. Post, The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, *Harvard Law Review*, Vol. 117, 2003. 4-112, at 7

<sup>133</sup> See for instance the trial against the Serb political leader Vojislav Šešelj for acts committed between 1991 and 1993, which after the first indictment in 2007 is still awaiting a verdict.

<sup>134</sup> The United Nations established this tribunal for pursuing the investigation of various acts of terror, 22 counts of murder, including of former Prime Minister Rafik Hariri of Lebanon, and filed indictments in 2011 against four members of Hezbollah, Lebanon's most powerful militant organization, and in 2013 against a fifth member. The tribunal's five trial judges began hearing the case of *The Prosecutor v. Ayyash, Badraddine, Merhi, Oneissi*

conclude that consolidation needs time, and constitutions and their institutional frameworks cannot come to term with the past without political culture and ‘good politics’ accepted by a population, which is willing to overcome this past.

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and Sabra on January 16, 2014 in absentia. After a full year of proceedings, they have heard and seen just a fraction of the hundreds of witnesses, and thousands of exhibits the prosecutors intend to present. See R. Bergman, ‘The Hezbollah Connection’, *The New York Times Magazine*, February 15, 2015.