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## 19. Transitional justice, transitional constitutionalism and constitutional culture

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This chapter discusses the theoretical challenges that legal regulation of transitional justice in transitional constitutions raises when it attempts to reconcile past abuses of constitutionalism. The broader implications of the topic are the challenges that transitional constitutionalism faces when it regulates transitional justice measures. But for both transitional constitutionalism in general, and transitional justice in particular, a certain preexisting constitutional culture is required. Hence, before dealing with the specific constitutional regulations of transitional justice, I discuss the role of constitutional culture in transitional constitutionalism in the specific case of transitional justice. Since transitional constitutionalism usually challenges the constitutional canon<sup>1</sup> and can essentially change basic constitutional principles,<sup>2</sup> it is essential that the main elements of the canon and the basic traditional constitutional principles are known to both the state actors and the addressees of their actions. When discussing the distinct constitutional and legal approaches of transitional justice, it is important to find out how much preexisting constitutional culture the particular forms require, and whether certain approaches are better to help to develop this culture, and through this they are more effective tools of reconciliation of formerly authoritarian societies and of consolidation of constitutional democracy.

The main case studies throughout this chapter are the two major types of democratic transitions and approaches to transitional justice in Eastern and Central Europe after 1989–90: rupture and negotiated transition. 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.<sup>3</sup> For instance, East Germany, Czechoslovakia and its successor

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<sup>1</sup> Ruti Teitel, *The Constitutional Canon: The Challenge Posed by A Transitional Constitutionalism*, 17 Const. Comment. 237 (2000). About challenging *Marbury v. Madison*, probably the most important American constitutional canon, see Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553 (2003). Levinson argues that *Marbury* can only present a desirable model for judicial behavior taking into account the transitional period of 1800 to 1804 in the American constitutional history. This is the reason he only teaches it to Eastern European students, who are much more immediately familiar with the problems that face “transitional” polities.

<sup>2</sup> See Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger, *Approaching Transitional Constitutionalism*, in *Transitional Constitutionalism* 9, 23 (Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger eds., 2007).

<sup>3</sup> There is a third type of transition, called by scholars transformation, in which 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

states represent the ‘rupture-type’ transition with an immediate constitution-making approach, while Poland and Hungary represent the “negotiated transitions” with a “post-sovereign” constitution-making process.

The concept of transitional justice refers to a range of “processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.<sup>4</sup> From the point of view of constitutional theory, the most interesting transitional justice measures are criminal prosecutions and the retroactive application of criminal law, since these are closely related to the principle of the rule of law, emphasized in the texts of new transitional constitutions.

## TRANSITIONAL CONSTITUTIONALISM AND CONSTITUTIONAL CULTURE

In order for constitutional transitions to successfully result in consolidated constitutional systems, some degree of normative commitment to constitutionalism in general and to the specific rules and procedures of the country’s constitutional system in particular, on a behavioural and attitudinal level is required.<sup>5</sup> These elements reveal the extended nature of the constitutional consolidation process: it is related not only to the development, strengthening and good functioning of constitutional institutions, but also to the entrenchment and deepening of certain attitudes, both by the elites and by the masses.<sup>6</sup> Consolidation of constitutional democracy thus implies, and indeed requires, the emergence of a certain political and constitutional culture, which is a central factor

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elections. In this type of transition, members of the old elite remain politically powerful even after democracy is introduced, as happened in Bulgaria. Very few efforts of transitional justice occurred here, which is the reason this type is not discussed here. See this categorization of transitions in Noel Calhoun, *Dilemmas of Justice in Eastern Europe’s Democratic Transitions*, at ch. 1 (2004).

<sup>4</sup> U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 4, U.N. Doc. S/2004/616 (23 August 2004).

<sup>5</sup> In the political science literature on consolidated democracies, Larry Diamond construes consolidation as “the process of achieving broad and deep legitimation, such that all significant political actors, at both the elite and mass levels, believe that the democratic regime is the most right and appropriate for their society, better than any other realistic alternative they can imagine.” Larry Diamond, *Developing Democracy: Toward Consolidation* (1999). Linz and Stepan explicitly mention the commitment to the constitution as a special dimension of consolidation. See Juan J. Linz and Alfred Stepan, *Toward Consolidated Democracies*, 7 *J. Democracy* 14, 15–16 (1996).

<sup>6</sup> Some political scientists are even inclined to believe that constitutions themselves and their institutional structures are much less important in the distortion of liberal constitutionalism than political culture. Such is the argument that says that the reasons for the ungovernability of the United States lie deeper than the institutional structure of the country. See Thomas L. Friedman and Michael Mendelbaum, *That Used to be Us: How America Fell Behind in the World it Invented and How We Can Come Back* 33 (2011).

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in the consolidation of democracy.<sup>7</sup> Political culture—both among the masses and especially among the elites—is a crucial issue in post-communist East Central Europe. Indeed, there is no doubt that the countries in East Central Europe are consolidated on the procedural level, but full consolidation on the substantive level has yet to be achieved mainly because the political and constitutional culture in these countries is not strong enough. In the beginning of the democratic transition of these new democracies preference was given to general economic effectiveness over mass civic and political engagement.<sup>8</sup> The satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that not even constitutions really did make a difference.<sup>9</sup> Between 1989 and 2004 all political forces accepted a certain minimalistic version of a “liberal consensus” understood as a set of rules and laws rather than values, according to which NATO and EU accession was the main political goal. But as soon as the main political goals were achieved, the liberal consensus has died,<sup>10</sup> and the full democratic consolidation is still better viewed as having always been somewhat illusory.<sup>11</sup>

The behavioral element of consolidation is adherence to constitutional patriotism.<sup>12</sup> Jürgen Habermas, who argues for an ideal of “constitutional patriotism”, adds here that constitutional values inevitably differ from state to state, depending on the historical traditions of the country in question: the expression “constitutional patriotism” (*Verfassungspatriotismus*) refers to the notion that citizens share not only the abstract understanding of constitutional principles, but also make its prevailing specific meaning—which emerges from the context of their own national history—their own.<sup>13</sup> In several of his writings, Shlomo Avineri also emphasizes the key significance of national history in the context of the Central and Eastern European transformation. He emphasizes the importance of pre-1939 authoritarian Polish and Hungarian politics, but also refers to the more democratic Czech traditions before 1948.<sup>14</sup>

For instance in Hungary there was no real parliamentary democracy until 1990. Only elements of a representative system existed before WWII during Governor Horthy's

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<sup>7</sup> Larry Diamond, *Introduction: Political Culture and Democracy*, in *Political Culture and Democracy in Developing Countries* (Larry Diamond ed., 1994).

<sup>8</sup> Dorothee Bohle and Béla Greskovits state that East Central European democracies had a ‘hollow core’ at their inception. See Dorothee Bohle and Bela Greskovits, *Capitalist Diversity on Europe's Periphery* (2012).

<sup>9</sup> See Ulrich K. Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress* 3 (1995).

<sup>10</sup> See Ivan Krastev, *Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus*, 18 *J. Democracy* 56, 56–63 (2007).

<sup>11</sup> James Dawson and Seán Hanley, *What's Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus*, 27 *J. Democracy* 20, 20–34 (2016).

<sup>12</sup> After Dolf Sternberger's and Jürgen Habermas' conceptions of constitutional patriotism in the end of 1970s and 1980s respectively, both of which have been answers to particular German challenges, Jan-Werner Müller developed a new theory of the term, concentrating on universal norms and constitutional culture. See Jan-Werner Müller, *Constitutional Patriotism* (2007).

<sup>13</sup> See Jürgen Habermas and Joseph Ratzinger, *The Dialectic of Secularism* (2005).

<sup>14</sup> See Shlomo Avineri, *Two Decades After the Fall: Between Utopian Hopes and the Burdens of History*, *Dissent* (29 September 2009), [https://www.dissentmagazine.org/online\\_articles/two-decades-after-the-fall-between-utopian-hopes-and-the-burdens-of-history](https://www.dissentmagazine.org/online_articles/two-decades-after-the-fall-between-utopian-hopes-and-the-burdens-of-history).

regime, with strong nationalism and anti-Semitism, and without any kind of human rights culture. According to the political theorist, István Bibó, who also served as the Minister of State in the government of Imre Nagy during the Hungarian revolution of 1956, pre-WWII Hungary was a prime example of a “deformed political culture”, where “nationhood had to be made, re-fashioned, fought for and constantly protected not only from the predations of imperial powers but also from the indifference and fluctuating sense of national identity as a part of the people themselves”.<sup>15</sup>

This constitutional awareness means that citizens have to endorse what John Rawls once called “constitutional essentials”; they have to be attached to the idea of a constitution, and from the debates about it a “constitutional identity” or “constitutional culture” can emerge. According to Rawls, the core of this kind of constitutional patriotism is a constitutional culture centered on universalist liberal-democratic norms and values, refracted and interpreted through particular historical experiences. It is of course possible to find oneself confronted with unconstitutional patriotism. For instance, one can observe the kind of nationalism that violates constitutional essentials in the name of “national interest” or “national constitutional identity” in the cases of the recent Hungarian and Polish constitutional “counter-revolutions”.<sup>16</sup> In such situations, as Jan-Werner Müller argues, the normatively substantive theory of constitutional patriotism would counsel dissent or even civil disobedience, all in the name of the very constitutional essentials that are being violated and the constitutional culture that is being damaged.<sup>17</sup>

So, there is a dialectic relationship between constitutional law and constitutional culture: the first is based on the latter, and it also influences it.<sup>18</sup> This means that it is very hard to make legitimate constitutional law accepted by the people without a preexisting constitutional culture.<sup>19</sup> In such situations the constitutional law must necessarily be an elitist project with the hope that it contributes to the development of constitutional law. Exactly this happened in East-Central Europe during the democratic

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<sup>15</sup> See Bibó István, *Kelet-Európai Kis-Népek Nyomorúsága* [The Misery of the Small States of Eastern Europe] (1946).

<sup>16</sup> In 2016 the Hungarian government argued with Hungary’s “national constitutional identity” to defy the resolution of European Council to relocate asylum seekers within the Member States of the EU, and the packed Constitutional Court in its decision 22/2016 AB on the interpretation of Article E (2) of the Fundamental Law of Hungary rubberstamped the government’s constitutional identity defence. See Gábor Halmai, *From a Pariah to a Model? Hungary’s Rise to an Illiberal Member State of the EU*, *European Yearbook of Human Rights*, 35–45 (2017).

<sup>17</sup> See Müller, *supra* note 12, at 142.

<sup>18</sup> See Robert C. Post, *The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 7 (2003). Here Post uses the term “constitutional culture” referring to the beliefs and values of non-judicial actors, most of all the people, while the term “constitutional law” according to Post refers to constitutional law as it is made from the perspective of the judiciary.

<sup>19</sup> Ulrich Preuss, explaining the difficulties to import constitutions after the political transition into this region, argues that constitutionalism was a minor element of the political culture at best. See Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 *N.Y.L. Sch. L. Rev.* 467 (2006).

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transition in 1989–90. In the “notable absence of constitutional constituent assemblies”<sup>20</sup> the constituent power was effectuated by the “active revolutionary minority”.<sup>21</sup>

This approach has been harshly criticized with the argument that the potential of democracy following the transition in Hungary and also in the other new democracies of Central and Eastern 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.<sup>22</sup> This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of constitutionalism of creating the structure of the state and setting boundaries between the state and citizens, risks the possibility of creating participatory democracy.<sup>23</sup> In other words, these authors think that legal constitutionalism falls short, reducing the constitution to an elite instrument, especially in countries with weak civil societies and weak party political systems which undermine a robust constitutional democracy based on the idea of civic self-government.<sup>24</sup>

The concept of civic or participatory constitutionalism is based on “democratic constitutionalism”,<sup>25</sup> emphasizing that structural problems in new democracies include the relative absence of institutions of popular participation, which is also related to “counterdemocracy”,<sup>26</sup> as well as robust institutional linkages of civic associations and citizens with formal politics. I think that this approach does not sufficiently take into account the lack of civic interest in constitutional matters, based on the poor constitutional culture.<sup>27</sup>

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<sup>20</sup> Ruti Teitel, *Post-Communist Constitutionalism: A Transnational Perspective*, 26 Colum. Hum. Rts. L. Rev. 167, 172 (1994).

<sup>21</sup> See Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe, in The Paradox of Constitutionalism: Constituent Power and Constitutional Form* 216 (Martin Loughlin and Neil Walker eds., 2007). Preuss argues that the limited role played by the idea of constituent power in the region is explained by the significant emphasis on national liberation instead of constitutions of liberty.

<sup>22</sup> See this argument in Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania, and Slovakia* (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 Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in *Rethinking the Rule of Law After Communism* 9–24 (Adam Czarnota, Martin Krygier and Wojciech Sadurski eds., 2005).

<sup>23</sup> See Richard Albert, *Counterconstitutionalism*, 31 Dalhousie L.J. 1, 4 (2008).

<sup>24</sup> Cf. Sadurski, *supra* note 21, at 23.

<sup>25</sup> James Tully, *Public Philosophy in a New Key, Volume I: Democracy and Civic Freedom* 4 (2008).

<sup>26</sup> Pierre Rosenvallon, *Counter-Democracy: Politics in the Age of Distrust* (2008).

<sup>27</sup> Other critics also mention the rise of populism, the elite disdain for participatory institutions, and the increasing irrelevance of domestic constitutionalism due to the tendencies of Europeanization and globalization. See the reviews on Blokker’s book by Jiri Priban and Bogusia Puchalska in ICONnect. Paul Blokker, Jiri Priban and Bogusia Puchalska, *Book Review/Response: Paul Blokker, Jiri Priban and Bogusia Puchalska on Civic Constitutionalism*, Int’l J. Const. L. Blog (10 September 2013), <http://www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>.

In discussing the relationship between legal and civic constitutionalism, or constitutional law and constitutional culture, one has to investigate the question of how far (constitutional) courts stand apart from society in different legal systems. This question is highly relevant in the new democracies of East-Central Europe. The very notion of the “countermajoritarian difficulty”; termed by Alexander Bickel,<sup>28</sup> presupposes that courts stand apart from society, which is called the canonization of courts.<sup>29</sup> This means that judges usually decide cases according to their beliefs and values, using legalistic forms of constitutionalism, and producing constitutional law. Many of these decisions do not match the constitutional culture (or the lack thereof) of the non-judicial actors, most importantly, the beliefs of the people. Some cases were decided on a correct legal basis even though the general public opposed the decisions.<sup>30</sup> Other decisions were wrongly decided according to the current views of both constitutional lawyers and ordinary citizens.<sup>31</sup> Legal scholarship overwhelmingly identifies such decisions as belonging to a constitutional law “anticanon”. Taking a closer look shows us that this and other anticanonical decisions respect, rather than ignore, the role of popular agency in constructing legal meaning.<sup>32</sup> In other words, the justices in these cases followed the constitutional culture (or rather their perception of it) at the time, rather than constitutional law.

## TRANSITIONAL CONSTITUTIONS AND APPROACHES TO TRANSITIONAL JUSTICE

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 that the past will be repeated.<sup>33</sup> 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>34</sup>

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<sup>28</sup> Alexander Bickel, *The Least Dangerous Branch* 16–17 (1962).

<sup>29</sup> See Keith Whittington, *Political Foundation of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* (2007).

<sup>30</sup> This happened in 1990 in Hungary when the Constitutional Court abolished the capital punishment based on the Constitution’s human dignity clause, despite the fact that the majority of Hungarians were in favor of the death penalty.

<sup>31</sup> In a decision of the Hungarian Constitutional Court from 2008, the judges declared the institution of registered partnership for heterosexual partners only as unconstitutional.

<sup>32</sup> See Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379 (2011). Greene lists three decisions of the U.S. Supreme Court as anticanonical: *Dred Scott v. Sanford* (chattel slavery from 1857), *Plessy v. Ferguson* (“separate but equal” from 1896), and *Lochner v. New York* (labor exploitation from 1905).

<sup>33</sup> András Sajó, *Limiting Government: An Introduction to Constitutionalism* 3 (1999).

<sup>34</sup> See Ruti Teitel, *Transitional Justice and Transformation of Constitutionalism*, in *Comparative Constitutional Law* 57 (Rosalind Dixon and Tom Ginsburg eds., 2011).

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Transitional justice processes usually take place within the interim legal framework of transitional constitutions.<sup>35</sup> The transitional constitutionalism represented in these provisional constitutions as opposed to the conventional understanding of constitutionalism features transitory constitutional arrangements, unconventional constitutional adjudication and quasi-constitutional statutes. Unlike the classical limiting functions of traditional constitutions, transitional constitutionalism functions to manage reform agendas, substitute violent revolutions and facilitate social and political integration.<sup>36</sup> These “fancy” or “exceptional” theories insist that democratic transitions involve social, political and legal transformations, which have unprecedented, sui generis aspects, hence the ordinary institutions and predicates about law simply do not apply.<sup>37</sup> These transformations may give rise to a new variety of constitutionalism characteristic of societies in transition from authoritarian to democratic rule, which Teitel terms “constitutionalism of transition.”<sup>38</sup>

The more sceptical perspectives on transitional constitutionalism do not appreciate the transitory and flexible features of transitional developments, and urge the relatively quick return to the discourse of normalcy of traditional constitutionalism after the period of transition.<sup>39</sup> The “simplistic” or linear theories take phenomena such as rule of law, democracy, constitutionalism, to have settled meanings, and tend to assess local developments in the light of existing successful models. Regarding the East-Central European transition the basic idea of this theory is that although this change of regime represents an intermediary stage between the sham communist constitutionalism, and the Western, liberal democratic one, it is not in the sense of being an interim space between the two.<sup>40</sup>

It is an open question, whether the best way to establish a consolidated constitutional democracy is to act in accordance with its values from the start. The different types of transitions, even within East-Central Europe, may require distinct solutions. In this sense both the “simplistic” and the “fancy” theories contain insights.<sup>41</sup>

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<sup>35</sup> The best known transitional constitution is the 1993 South African Interim Constitution, but there are several similarly provisional and transformative documents. See a list starting with the Provisional Constitution of the Confederate States of America from 1861 to the Libyan Interim Constitutional Declaration of 2011 in Carlos Bernal-Pulido, *Transitional Justice Within the Framework of Permanent Constitution: The Case Study of the Legal Framework for Peace in Colombia*, 3 Cambridge J. Int'l and Comp. L. 1136, 1137 n.7 (2014).

<sup>36</sup> See Jiunn-Rong Yeh and Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4 Nat'l Taiwan U. L. Rev. 145 (2009).

<sup>37</sup> Ruti G. Teitel, *Transitional Justice* 6 (2000).

<sup>38</sup> Ruti G. Teitel, *Transnational Rule of Law*, in *Rethinking the Rule of Law After Communism*, *supra* note 21, at 279.

<sup>39</sup> Regarding the post-communist transition see such arguments at that time by Bruce Ackerman, *The Future of Liberal Revolution* (1992), and more recently by Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in *Rethinking the Rule of Law After Communism*, *supra* note 21, at 9–24.

<sup>40</sup> See Bojan Bugarcic, *A Crisis of Constitutional Democracy in Post-Communist Europe: “Lands-in-Between” Democracy and Authoritarianism*, 13 Int'l J. Const. L. 233 (2015).

<sup>41</sup> See Martin Krygier, *The Rule of Law: An Abuser's Guide*, in *Abuse: The Dark Side of Fundamental Rights* (Andr as Saj o ed., 2006).

The rupture type of transitions, such as the ones in East Germany and Czechoslovakia, are much more likely to use all kinds of transitional justice approaches, while in negotiated transitions, such as the Hungarian or the Polish, the old regimes retain 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 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 *ancien régime* from the new constitutional order”.<sup>42</sup> Otherwise the pursuit of revenge against those who were responsible for the oppressive regime may undermine the very idea of a democratic transition.

Similarly, Teitel argues that trials “are well suited to the representation of historical events in controversy” and are “needed in periods of radical flux”.<sup>43</sup> 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 with respect to confronting the past.<sup>44</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>45</sup> But whatever legal choices of transitional justice a state may or may not choose for dealing with the past, many academics argue that in one form or another, it is at least a moral if not necessarily a constitutional or international obligation of every state that claims 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>46</sup>

## 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

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<sup>42</sup> See Michel Rosenfeld, *Dilemmas of Justice*, 1 East Eur. Const. Rev. 20 (1992).

<sup>43</sup> See Ruti Teitel, *Transitional Justice as Liberal Narrative*, in *Out of and Into Authoritarian Law* 6 (András Sajó ed., 2003).

<sup>44</sup> András Sajó, *Erosion and Decline of the Rule of Law in Post-Communism: An Introduction*, in *Out of and Into Authoritarian Law*, *supra* note 39, at xix.

<sup>45</sup> This is the argument of Ruth Kok comparing 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 Ruth Kok, *Statutory Limitations in International Criminal Law* 210 (2007).

<sup>46</sup> See Jon Elster, *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, 1 East Eur. Const. Rev. 15, 15–17 (1992).

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a mutual amnesty, while in Greece and 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 the principles of a democratic legal order, such as *ex post facto* and *nulla poena sine lege*, which bars 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.

Crimes committed under the old systems included some of the worst violations of human rights, but these were not prosecuted before the democratic transition. Except for grave crimes of international law, which are punishable without statute of limitation, the statute of limitations had already elapsed by the time of the transition. The main question was whether the new authorities still could 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 this basis—with plainly similar fact patterns—the Czech constitutional court upheld the tolling of the statute of limitations for the crimes 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.

#### A. The Pursuit of Material Justice

In its decision from 12 November 1996 the German Federal Constitutional Court 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’s argument that the German constitution’s provision (Basic Law article 103, paragraph 2) that “[a]n act may be punishable only if it constituted a criminal offense under the law before the act was committed”, prohibited such prosecutions. This article, the Court found, did not apply to a case in which a state (the GDR) had used the 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>47</sup>

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<sup>47</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,

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”.<sup>48</sup> The Border Protections Law of the former GDR authorized soldiers to shoot in response to “acts[s] of unlawful border crossing”.<sup>49</sup> Such acts were very broadly defined and included border crossings attempted by two people together or those committed with “particular intensity.”<sup>50</sup> The custom at the border was to enforce the law strictly: soldiers respectedly were given the general command during “guard mount” that “breach of the border should be prevented at all costs.”<sup>51</sup> The German trial courts relied on precedents of the Federal Constitutional Court elevating the principle of material justice<sup>52</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 cases the opportunity must be given for one to value the principle of material justice more highly than the principle of legal certainty”.<sup>53</sup> But critics rightly add an important detail to the border guards’ cases, namely that the prosecution’s campaign led to the conviction of many low level border guards, while except for the case of *Streeletz and others* there was almost no accountability for the shootings at higher levels,<sup>54</sup> likely because West German political leaders were reluctant to pursue “victors” justice regarding East Germany and its constitutional system, which did not exclude punishing some unknown soldiers of the GDR.

The Czechoslovak Constitutional Court during its brief existence before the split of the Czechoslovak Federation delivered a widely held judgment regarding the Czechoslovak lustration law, in which the judges argued that legal continuity would result in the persistence of the old values system which would undermine the new democratic

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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*, App. Nos. 34044/96, 35532/97 and 44801/98, 33 Eur. H.R. Rep. 31 (2001).

<sup>48</sup> Alkotmánybíróság (AB) [Constitutional Court] March 5, 1992, MK 53/1992 (Hung.).

<sup>49</sup> Strafgesetzbuch [StGB] [Penal Code of the German Democratic Republic], January 12, 1968, Article 213.

<sup>50</sup> *Id.*

<sup>51</sup> See *Germany: Trial of Border Guards*, in 3 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Laws, Rulings, and Reports* 578 (N.J. Kritz ed., 1995) [hereinafter 3 *Transitional Justice*].

<sup>52</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 “retributive justice”. In the context of inflicting a punishment for a crime, material justice means a punishment for 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 John Rawls, *A Theory of Justice* 50–52 (Harv. Univ. Press rev. ed. 1999).

<sup>53</sup> Cited by Teitel, *supra* note 33, at 16–17.

<sup>54</sup> See *id.* at 45; Peter Quint, *The Imperfect Union: Constitutional Structures of German Unification* 196–205 (1997).

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rule of law.<sup>55</sup> The Constitutional Court of the Czech Republic in its decision of 21 December 1993 on the Act on the Illegality of the Communist Regime rejected a challenge filed by a group of deputies in the Czech Parliament to 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>56</sup> The Court concluded that the democratic state could use exceptional methods to protect its foundational principles and values.<sup>57</sup>

### B. Rule of Law as Legal Continuity

In *Hungary* the first elected parliament passed a law concerning the prosecution of criminal offenses committed between 21 December 1944 and 2 May 1990.<sup>58</sup> The law provided that the statute of limitations starts over again as of 2 May 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 then 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>59</sup>

<sup>55</sup> Nález Ústavní soud České republiky ze dne 31.1.2012 (ÚS) [Judgment of the Constitutional Court of January 31, 2012], sp.zn. Pl. ÚS 1/92 (Czech).

<sup>56</sup> Zákon o protiprávnosti komunistického režimu a o odporu proti němu [Act on Illegality of the Communist Regime and on Resistance Against It], Zákon č 198/1993Sb (Czech); Nález Ústavní soud České republiky ze dne 21.12.1993 (ÚS) [Judgment of the Constitutional Court of December 21, 1993], sp.zn. Pl. ÚS 19/93 (Czech). English translation is in 3 *Transitional Justice*, *supra* note 47, at 620–27.

<sup>57</sup> For further discussion of the judgment, see Jiri Priban, *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of Social Contract* 111 (2002).

<sup>58</sup> Law adopted by the Parliament on November 4, 1991.

<sup>59</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* 214–28 (2000).

In the reasoning of the decision the Court expressed its optimistic, and probably never materialized vision, of a future constitutional culture, which could result in a new constitutional law, including decisions of the Constitutional Court themselves expressed early in the transition process: “It is not only legal statutes and the operations of state organs that need to be in strict compliance with the Constitution, but the Constitution’s conceptual culture and values that need to fully suffuse society.”<sup>60</sup>

To circumvent the concerns of the Constitutional Court on retroactive effect, in early 1993 the Parliament opted to rely on crimes under international law. It enacted another law, which penalized a mixture of international and common crimes, including violation of personal freedom and terrorist acts, as common crimes,<sup>61</sup> whose retroactive application had already been found unconstitutional by the Constitutional Court. 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. However, 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 1989 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>62</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>63</sup> As Hungary had 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 that fell 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, and quashed it, but declared that:

[W]ith 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>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> Law on the procedures regarding the crimes committed during the 1956 Revolution. Adopted by the Parliament on 16 February 1993.

<sup>62</sup> Alkotmánybíróság (AB) [Constitutional Court] October 13, 1993, MK 147/1994, s. V (Hung.).

<sup>63</sup> *Id.*

<sup>64</sup> Alkotmánybíróság (AB) [Constitutional Court] April 9, 1996, MK 75/1996, s. II(1) (Hung.).

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As a result of the Constitutional Court's interpretations the prosecutors investigated 40 potential cases of shootings into crowds by the regime's armed forces during the 1956 Revolution and finally issued indictments in nine of them. In the end, 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. Although it became an undisputed fact 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>65</sup> but the Review Bench of the Supreme Court overturned this decision by holding that "during this time, the armed forces waged war against the overwhelming majority of the population".<sup>66</sup> This interpretation became the basis 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 regarded as a crime against humanity. Therefore, the statute of limitation did not apply.

But after one of these decisions was challenged before the European Court of Human Rights (ECtHR), the Court determined that the judgment 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 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>67</sup>

Although the Review Bench of the Hungarian Supreme Court revisited the case, it 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 referred 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 shows that the direct use of customary international law in domestic criminal proceedings, as the Constitutional Court envisaged, is highly problematic, especially if the provisions of the same crime are different in their wording.<sup>68</sup>

<sup>65</sup> Legfelsőbb Bíróság [Supreme Court] November 5, 1998, No. 1344/1998/3 (Hung.).

<sup>66</sup> Legfelsőbb Bíróság [Supreme Court] June 28, 1999, No. X 713/1999/3 (Hung.).

<sup>67</sup> Korbély v. Hungary, App. No. 9174/02, 50 Eur. H.R. Rep. 48 (2008).

<sup>68</sup> One of the possible explanations for this can be the continental 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*, 4 Non-St. Actors and Int'l L. 25, 31–32 (2004).

This failure to apply international criminal law to the events of 1956 by Hungarian courts to punish ordinary soldiers let alone communist political leaders may be the reason why the government elected in 2010 to change course in dealing with the past, and return to a political justice approach through ordinary national criminal law.<sup>69</sup> Unlike the 1989 constitution, the 2011 Fundamental Law of Hungary, which systematically dismantled the guarantees of rule of law,<sup>70</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 is in breach of the prohibition on retroactive effect emphasized in earlier decisions of the Hungarian Constitutional Court, discussed earlier, classified as having no statute of limitations on criminal acts for which the limitation period has already expired.

In April 2013 the government majority with its two-thirds 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. The 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 indicate 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 have at all times in the past 100 years 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. 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.

These constitutional rules 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

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<sup>69</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 Tamás Hoffmann, *Trying Communism Through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials*, in *Histories of War Crimes Trials* 227, 245 (K. Heller and G. Simpson eds., 2013).

<sup>70</sup> About the "constitutional counter-revolution" in Hungary after 2010, see Gábor Halmai, *Perspectives on Global Constitutionalism* 121–76 (2014).

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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 Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution.<sup>71</sup> The law, which was 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 introduced the category of “communist crimes” and declared 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 a 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 by the new Fundamental Law of Hungary, there were no petitions filed to the Court.

Based on the new law Béla Biszku was the only person convicted 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 shootings in December 1956 of unarmed people in Budapest and the town of Salgótarján. The second one was especially bloody, with 46 victims. In May 2014 the first instance court found Biszku guilty of aiding and abetting war crimes, and denying crimes committed by the communist regime in an interview prior to the criminal procedure, and sentenced the 92 year old man to five years and six months in prison, with the possibility of appeal.<sup>72</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>73</sup>

The new first instance court decision, issued in December 2015, acquitted the defendant regarding the most serious charge. According to the verdict Biszku is responsible neither for the shootings in Budapest nor in Salgótarján. He was found guilty only of complicity and two unrelated petty crimes: abuse of ammunition and the denial of the crimes of the communist regime. For these minor crimes he was sentenced for two years’ imprisonment suspended for three years. In the reasoning the judge emphasized that the subject of the charge was the defendant’s responsibility regarding

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<sup>71</sup> The Prosecution argued that the acts alleged committed by Biszku did not amount to grave breaches of the Convention and therefore were subject to the statute of limitations. Legfőbb Ügyészség [Office of the General Prosecutor] December 17, 2010, No. NF. 10718/2010/5–I. (Hung.).

<sup>72</sup> *Hungary 1956 Revolt: Béla Biszku Jailed for War Crimes*, BBC News, (13 May 2014), <http://www.bbc.com/news/world-europe-27398373>.

<sup>73</sup> *The Béla Biszku Case*, Hungarian Spectrum (1 June 2015), <http://hungarianspectrum.org/2015/06/01/the-bela-biszku-case/>.

the two demonstrations, and his role as Minister of Interior in the revenge actions of the Kádár-regime based on public perceptions. During the proceedings, the court did not find any evidence of a central fire order to shoot into the masses.<sup>74</sup>

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>75</sup> These distinct approaches seemed to correspond to the very type of their transition, which reflected the character of the previous regime. Due to the relatively mild character of the communist regime and the negotiated nature of its transition, in Hungary the majority of the population did not demand material justice measures, while the repressive dictatorship in East Germany and in Czechoslovakia after 1968 required this solution. The two approaches of formal and material (substantive) justice tell nothing about the correctness of doing justice efforts, and also nothing about public perception of the approaches primarily developed by the political and the legal elite. Since the Hungarian population seemed not to be receptive towards legal constitutionalism in general, 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 a “bad” political type of justice<sup>76</sup> and revenge. But there is no evidence that, for instance, the Czech general public was more receptive towards the material justice approach supported by their political, and especially legal, elite. Later I’ll return to the question, how much “legalism” and “good” politics is needed in transitional justice in general, and in Central Europe in particular.<sup>77</sup>

## CONCLUSIONS

The chapter tried to answer the following questions: what role have transitional constitutional reforms played in dealing with the past and how have transitional justice measures helped to reconcile society and consolidate democracy in two distinct types

<sup>74</sup> The verdict was still not final, because the prosecution appealed for a heavier judgment, while the defendant asked for total acquittal, but after the verdict was made public the defendant died.

<sup>75</sup> About the different approaches of the interpretation of rule of law in Central Europe, see Jiri Priban, *From “Which Rule of Law?” to “The Rule of Which Law?”: Post-Communist Experiences of European Legal Integration*, 1 Hague J. on Rule L. 337 (2009).

<sup>76</sup> Here I refer to “bad” political justice, using the terminology of Ellen Lutz and Caitlin Reiger, who citing Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (1964), 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 Ellen L. Lutz and Caitlin Reiger, *Introduction, in Prosecuting Heads of State* 10–11 (Ellen L. Lutz and Caitlin Reiger eds., 2009).

<sup>77</sup> This question was raised regarding truth commissions and special criminal court by Duncan McCargo. See Duncan McCargo, *Transitional Justice and Its Discontents*, 26 *J. Democracy* 5 (2015).

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of transitions in the countries of Central Europe. In the rupture type of democratic transition demonstrated by East Germany, Czechoslovakia and its successor states, rapid constitutional reforms occurred, while in Hungary and Poland representing the countries of negotiated transition, amendments to the old constitutions were only later followed by an entirely new document. Taking the entire region into account it was rather exceptional that constitutional reforms have dealt explicitly with transitional justice, even if this happened in our two main case studies. But in Germany it was the amendment to the West German Basic Law of 1949, and in Hungary it occurred in 2011, mostly for the purposes of political justice. The default solution has rather been that legislators and consequently constitutional courts addressed these issues interpreting differently the general principles of constitutionalism, especially the rule of law. In this respect, even though the 1989 comprehensive amendment to the Hungarian Constitution formally represented transitional constitutionalism, in its substance the early decisions of the Constitutional Court implemented the traditional constitutional canon, relying on international law. In contrast, the Fourth Amendment to the 2011 Fundamental Law with the introduction of political justice into the already not transitional but permanent constitution can be considered as a sign of “abusive constitutionalism”,<sup>78</sup> which undermined the rule of law, fundamental rights and democracy in the country.

There are different assessments of the Hungarian Constitutional Court’s procedural approach to the rule of law. David Robertson in his book goes as far as saying that the backsliding of constitutionalism in Hungary is traceable to the above mentioned 1992 retroactive justice decision, because when legal stability is prioritized over substantive justice, constitutional culture may not develop as it should.<sup>79</sup> This argument would be valid if people had paid proper attention to substantive justice, but this was not the case in Hungary after the transition. Unfortunately, the opposite position, represented by Carlos Bernal-Pulido, has also been called into question by subsequent development. Bernal-Pulido argues that the Hungarian Constitutional Court’s adherence to the rule of law—and especially the decision of 1993—protected the essential principles of the constitution, and defended democracy against “abusive constitutionalism.”<sup>80</sup> As we know by now it did not, but it certainly did not cause the end of constitutionalism either.

In the more repressive East-German and Czechoslovak regimes of Central Europe with their rupture-type transitions the law and the courts’ interpretation supported the concept of material justice, while Hungary’s and Poland’s milder suppression, followed by a negotiated transition and post-sovereign constitution-making resulted in a more

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<sup>78</sup> The term is used also with regard to the Hungarian “counter-revolution” after 2010 in David Landau, *Abusive Constitutionalism*, 47 U. Cal. Davis L. Rev. 189 (2013).

<sup>79</sup> David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* 115–18 (2010).

<sup>80</sup> The author compares the Hungarian decision to the Colombian Constitutional Court’s judgments C-579/2013 and C-577/2014 about Act 1/2012 on the peace process with the Armed Revolutionary Force of Colombia revising the Court’s “constitutional replacement doctrine”. The Colombian judges found that this amendment is in accordance with the permanent constitution. See Bernal-Pulido, *supra* note 31, at 1155–63.

formalistic interpretation of the rule of law that emphasized legal continuity.<sup>81</sup> 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.

Finally, if we compare the German and the Hungarian case studies the conclusion seems to be too obvious that while the first approach of dealing with the past is a success story, the latter failed in almost every respect. But this judgement 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, based on a strong constitutional patriotism, which forced the East German society to overcome the lack of constitutional culture and readiness to come to terms with the past, which was present in all countries of Central Europe. The strong presence of radical political actors in the Eastern part of Germany is an indication of the imposed character of East-German constitutional culture. 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>82</sup> It seems to be that at least one of the reasons for the failures not only of transitional justice, but also transitional constitutionalism altogether in all of the other countries of Central Europe, irrespective of their type of transition and consequent approach of transitional justice, is the lack of preexisting constitutional culture.

As we have seen, one of the possible explanations is the legalistic form of constitutionalism (or legal constitutionalism), which while consistent with the objective purpose of constitutionalism to create 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. Neither concepts of the rule of law used by the constitutional courts involved participatory democratic elements. The only difference between the formalistic and the substantive justice approaches consisted in approving the will of the legislator in the Czech and the German case as opposed to overruling it in the case of Hungary. But neither legislator enjoyed public support regarding the questions of justice. In this respect neither the material justice nor the legal stability concept of the rule of law created cultural conditions. Hence, the formalistic approach of the rule of law cultivated by the

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<sup>81</sup> About the formal and substantive conceptions of the rule of law see Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 Pub. L. 466, 467–87.

<sup>82</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 the 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 Elizabeth Kolbert, *The Last Trial: A Great-Grandmother, Auschwitz, and the Arc of Justice*, *The New Yorker* (16 February 2015), <http://www.newyorker.com/magazine/2015/02/16/last-trial>.

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Hungarian Constitutional Court is not responsible for the lack of democratic consolidation in this country, but several other elements, such as the too easy way to get constitution-making majority. If we look at the attitude of the “Visegrád countries” toward respect for the values of the European Union, including that of the rule of law, we realize that there is no significant difference among them regarding constitutional culture. In other words, based on the consequences of the rule of law concepts we cannot decide the famous dispute between H.L.A. Hart and Lon Fuller, who formulated the dilemma of successor justice as part of a rich dialogue on the nature of law. The two legal philosophers’ debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law.<sup>83</sup> Fuller rejected Hart’s abstract formulation of the problem, and instead focused on post-war 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.<sup>84</sup> But we cannot find proof in the recent history of Central Europe that the demands of legal morality should be given absolute priority over the prohibition of retroactive laws as a principle of rule of law.

This means that the institutions of transitional justice functioning relatively well within an older constitutional democratic system, such as the West German, cannot be effective without the necessary constitutional culture, as it happened in the Central European countries, where the population after the very first years of the transition due to more burning economic problems was not interested enough in constitutional matters in general and in transitional justice issues in particular. Partly this made the general backsliding of democracy and rule of law in the region possible, especially in Hungary and Poland. The Hungarian government’s successful efforts after 2010, and its Polish counterpart’s in 2015, to abolish liberal constitutionalism<sup>85</sup> further undermined the rule of law guarantees of transitional justice, and made it possible in Hungary, where the governing party had the qualified majority necessary for constitution-making to

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<sup>83</sup> Defending positivism see Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

<sup>84</sup> See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958). About the debate see Teitel, *supra* note 33, at 12–14.

<sup>85</sup> In a speech, delivered in July 2014, Hungarian Prime Minister Viktor Orbán made it clear that in the previous four years he had 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: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>. As early as 2011 Kaczyński announced he wanted to create “Budapest in Warsaw.” In the same year PiS, the party led by Kaczyński published a long document, authored largely by Kaczyński himself, on the party’s and his leader’s vision of the state. The main proposition of this paper is very similar to the one Orbán described in a speech in 2009: a well-ordered Poland should have a “centre of political direction”, which would enforce the true national interest. Cf. Jan-Werner Müller, *The Problem with Poland*, *The New York Review of Books* (11 February 2016), <http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/>.

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 pasts, which 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 to achieve political justice. In Poland a similar attempt during the Law and Justice Party’s (PiS’) first term in power between 2005 and 2007 was prevented by the then Constitutional Tribunal,<sup>86</sup> and in its second term from 2015 by the lack of constitution-making majority.

However, acknowledging that courts usually cannot refuse to decide cases before them, I am more sceptical about the role criminal procedure can play in the general exploration of the past. I am rather inclined to agree with those historians,<sup>87</sup> who instead of the institutional-legal approaches emphasize the importance of historical research in processing the past, or using two German words, which best renderes what this process exactly is and what it aims to achieve, and for which no direct translations exist in English: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*.<sup>88</sup>

Courts are unable to make final judgments about a nation’s past. This does not mean that they should not do their best within the framework of their authority to explore the historical circumstances of the case before them, and based on this render justice for the victims. As Hannah Arendt argues about the difference between the personal and political accountability in connection with the Eichmann trial: the aim of the judicial process is to decide about the responsibility of the accused person, and not to judge history, a given system of government, or ideology.<sup>89</sup> In other words, trials can contribute to coming to terms with former regimes, but cannot do this job instead of society, and especially not against its perceptions about constitutionalism.

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If we put the fate of dealing with the past in Central and Eastern Europe into a broader context we can argue that just as happened in Latin America, also here transitional justice became a substitute idealism for trying to invigorate new democratic regimes without strong democratic prehistory relatively quickly after transitions.<sup>90</sup> The Central and East European experience shows that it is relatively easy to introduce institutions of

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<sup>86</sup> This one of the reasons that after coming back to power in 2015 PiS’ first target attack have been the constitutional judges.

<sup>87</sup> See, e.g., Tony Judt, *Postwar: A History of Europe Since 1945*, at 830 (2005).

<sup>88</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>89</sup> See Hannah Arendt, *Was heisst persönliche Verantwortung unter einer Diktatur?*, in 1 *Nach Auschwitz: Essays und Kommentare* 83 (1989).

<sup>90</sup> Samuel Moyn uses this argument regarding Latin American development in the final years of the cold war and immediately after. See Samuel Moyn, *Of Deserts and Promised Lands: The Dream of Global Justice*, *The Nation* (29 February 2012), <https://www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/>.

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constitutional law, such as those of transitional justice, but they cannot work without constitutional culture. Consolidation needs time, and constitutions and their institutional frameworks cannot come to terms with the past without political culture and “good politics” accepted by a population, which is willing to overcome this past.