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and Constitutional Continuity:
Dilemmas of Transitional Justice in Central Europe**

WOJCIECH SADURSKI

BADIA FIESOLANA, SAN DOMENICO (FI)

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“Decommunisation”, “Lustration”, and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe

Wojciech Sadurski*

In a recent wide-ranging article two professors of the University of Chicago Law School, Eric Posner and Adrian Vermeule, attempt to show that there is no qualitative difference between transitional justice in post-communist (and other post-authoritarian) societies on the one hand and those manifestations of “domestic [U.S.] justice” which are eminently acceptable. They refute the claim that “transitional justice is a distinctive topic that presents a distinct set of moral and jurisprudential dilemmas” and assert that “transitional justice is continuous with ordinary justice” and as such, is not “presumptively suspect, on either moral or institutional grounds”.¹ Their general strategy is to pick some of the most controversial tenets of “transitional justice” and to show that they have some unimpeachable equivalents in domestic American law.

But this way of “normalizing” transitional justice won’t do. To be sure, an American (or more generally: Western) legal audience may perhaps obtain some help in comprehending the dramatic moral dilemmas faced by post-Communist societies when, for example, reputational problems related to “lustration” laws are compared to credit reporting rules regarding defaults on debts and bankruptcies;² retroactive extensions of statutes of limitation on crimes under Communism are compared to new U.S. deportation rules which operate ex-post facto;³ the “personnel dilemma” (related to the depletion of qualified staff as a result of purges) are compared to the personnel changes in the U.S. after the elections;⁴ the attempts to defend past crimes on the basis of ideological commitment of their perpetrators are compared to cultural defense in the US law,⁵ etc. But the price to be paid for this aid in comprehension is in a distortion

* Professor in the Department of Law, European University Institute, and in the University of Sydney, Faculty of Law.

¹ Eric A. Posner & Adrian Vermeule, “Transitional Justice as Ordinary Justice”, The University of Chicago Law School, Public Law and Legal Theory Working Paper No. 40, March 2003, <http://www.law.uchicago.edu/academics/publiclaw/resources/40.eap-av.transitional.both.pdf> at 4.

² Id. at 33.

³ Id. at 29.

⁴ Id. at 15.

⁵ Id. at 42-43.

of the fundamentally different, *sui generis* problems that the system of constitutional justice in post-communist societies had to grapple with while handling the legacy of the immediate past: the widespread violations of human rights, travesty of legality, pervasiveness of collaboration with the secret police, and often outright crimes conducted for political reasons.

The peaceful, negotiated form of transition which prevailed in the region meant that the various perpetrators of these unsavory acts have remained very much part of the society undergoing the democratic transition, and often belong to the political elite which was (co-)responsible for the move away from the very political system in which they had been active participants. How to reconcile legal tolerance towards those people with the requirements of political justice and with the exigencies of a democratic society? Should politics be “cleansed” of those discredited by their direct involvement with the Communist regime – with the risk of creating a category of second-class citizenship and the resulting danger of disloyalty towards a democratic state – or rather adopt the “let bygones be bygones” attitude and implement, for the sake of national reconciliation, a policy of forgiveness, even if not of forgetting?

“Amnesty but not amnesia” was indeed one of the slogans of some of the liberal democrats right after the transition. Easier said than done: can one move to a new, democratic system of government without settling the accounts of the immediate past? The worldwide precedents suggest that – with very few exceptions, such as Spain where the transition from the Franco era which occurred in 1976-1978, presided over by King Juan Carlos, involved an amnesty for all political crimes committed in the past (both by government forces and the opposition), sealing of police files, and general abstention from any purge of those implicated in the Franco regime⁶ – most post-authoritarian systems established various state-sanctioned mechanisms of retribution, apology, shaming, purges, reaching “truth and reconciliation”, etc.

This is, of course, only one aspect of so-called transitional justice, i.e. of the legal mechanisms of coming to terms with the legacy of an immediate authoritarian past by a successor democratic regime. (Some authors use the concept “retroactive justice” interchangeably with “transitional justice”;⁷ I prefer to use

⁶ On Spanish model of transition to democracy, see Michel Rosenfeld, “Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example”, *Cardozo Law Review* 19 (1998): 1891-1920.

⁷ See Jon Elster, “Coming to Terms with the Past. A Framework for the Study of Justice in the Transition to Democracy”, *Arch. europ. sociol.* 39 (1998): 7-48 at 14 where he defines retroactive justice as “political decisions made in the immediate aftermath of the transition and directed towards individuals on the basis of what they did or what was done to them under the earlier regime” (footnote omitted); he also makes it clear that this concept is coextensive with “transitional justice”, *id.* at 7.

the adjective “transitional” throughout because the word “retroactive” suggests that the main rationale of these forms of justice is backward looking which, in itself, is a substantive argument and often begs the question, as will become clear below). Other possible forms of coping with persisting manifestations of that legacy include trials of the perpetrators of politically-motivated criminal acts in the prior period, restitution of unlawfully – or unfairly – taken property, truth commissions, access to files of former secret police, official apologies, etc. Each of these ways of handling the past by transitional polities raises a host of difficult and controversial moral and legal problems; as such each deserves separate treatment. I have chosen two problems which I consider to be the most controversial and the most widely discussed questions of transitional justice in post-communist societies: the issue of “lustration” (or purges) of public officials for their past involvement in the Communist regime, in particular collaboration with secret police, and the issue of reopening of the statutes of limitation for criminal offences committed for political reasons in the Communist era.

The moral and political significance of both these issues is beyond any doubt: “lustration” is seen by its proponents as the main device of “decommunisation”, that is, of cleansing the public sphere of newly democratized society of those who have shown their utter disregard for the values of democracy and liberty, while suspension (or reinstatement) of statutes of limitation is seen as the removal of self-serving immunity conferred upon themselves by the perpetrators of crimes. By its opponents, lustration is viewed as a tool for divisiveness and expression of collective responsibility for the past (one author even suggested that “the process of de-communization in Eastern Europe has sometimes been carried out with something like Communist disregard for individual rights”),⁸ and tampering with statutes of limitations as a violation of the principles of legality of the very sort which characterized the old regime. Both these forms of transitional justice also raise the most dramatic ingredient of the transition, namely what to do about the persons implicated – sometimes, in a criminal way, and almost always, in a morally repugnant way – in the oppressive regime, and not the issues of property (as in restitution) or of satisfaction to the victims (apologies, truth and reconciliation, access to secret files, etc). Most importantly, for my purposes, both these forms of transitional justice elicited diverse but important responses in the constitutional discourse in post-communist countries, not the least in the judgments of the constitutional courts.

1. Main Dilemmas Raised by Decommunisation and Lustration Laws

The host of moral, political and practical concerns rendered the issue of “lustration” and decommunisation one of the most vexed and divisive questions of postcommunist transition. The very terms came to denote different things in

⁸ Id. at 46.

different places; perhaps the most widespread use of the notion of “lustration” applied to those instruments which were meant to reveal the real (and largely hidden) past involvement of some people in the Communist regime and its practices, and, depending on the circumstances, specifying further consequences such as a loss of a right to perform certain public positions. But, regardless of the consequences, the starting point of lustration was the exposition of real past of the individuals, mainly for their past collaboration with secret police; it has been used as a policy, the centerpiece of which is to reveal the actual but currently hidden truth about the person’s past. “Decommunisation”, in contrast, was supposed to consist in the removal of ex-members of the Communist Party (above a certain rank) from prominent positions in a new democratic system. Thus, it encompassed not simply the exposure of individual guilt of past collaborators with the secret police but also a more collective removal of ex-Communists as a group from influence upon political decisions in the democratic state.

Of course, the borderline between “lustration” and “decommunisation” thus understood is not precise since group characteristics (such as belonging to a particular sphere of “*nomenklatura*”) are seen – often accurately – as a sufficient sign of deeply discrediting involvement in the invidious practices of the past. Nor does past- or future-orientation mark a practicable distinction between “lustration” and “decommunisation”. To be sure, lustration has been often defended on the practical grounds having to do with the political requirements of democracy rather than with rendering political justice. But precisely the same considerations – alongside more moral, justice-related arguments – have been raised in the calls for “decommunisation” viewed as a guarantee that a democratic system of government will not be eroded by those used to more authoritarian methods of exercising political power.

For this reason, the use of both words, lustration and decommunisation, follows the conventional usage in CEE countries: “lustration” applies to the screening of persons seeking (or occupying) certain public positions for evidence of involvement with the communist regime (mainly, with the secret security apparatus), while “decommunisation” refers to the exclusion of certain defined categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in public debates about the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together, as in this statement of Adam Michnik, one of the leading critics of lustration and decommunization in CEE: “The principle of de-communizing, the idea behind it, is that a certain number of Communist functionaries of the Communist regime, or of the Communist party, would be stripped of their constitutional rights *en bloc*, only for that reason – that they held certain positions in the Communist party. The lustration idea is that using the materials of the political secret police, the past of various personalities active in public life would be examined. In other words, the de-communizing

idea is a direct continuation of the Bolshevik concept of citizens' rights, summed up by the English writer George Orwell in his novel 'Animal Farm', that all animals are equal but some are more equal than others".⁹

The quote from Michnik clearly shows the central moral and, in consequence, legal dilemma which arises when a post-authoritarian state tries to handle its immediate past. Can a break with the past be made in a way which does not itself compromise the legal and constitutional attributes of a democratic state: the rule of law, equality before the law, individualisation of guilt, non-retrospectivity of legal sanctions, etc? If not, if the past is going to be a matter for the study by historians only, will it not keep haunting the newly democratised society? Significantly, many thoroughly democratically-oriented, non-Communist participants in the debate (such as Michnik himself) expressed strong reservations about the policies of lustration and decommunisation. Vojtech Cepl, an eminent Czech legal scholar – and later, a judge of Constitutional Court – right at the outset of the post-Communist stage admitted to his own “deep ambivalence about lustration”: on the one hand, he recognised a need to know about evil committed in the past, and a need to preclude the possibility of “entrusting our future to people who can be continually blackmailed”; on the other hand, he expressed concern both about “careless and indiscriminate lustration” and also about the main thrust of the lustration being directed against low-level executioners of orders rather than against those who actually issued those orders.¹⁰ Similarly, Jirina Šiklová identified the principle of collective guilt as the main objectionable characteristic of the lustration law.¹¹ (This, incidentally, is admitted even by some *defenders* of the policies of lustration who actually argue that collective determination and a presumption of guilt *reduce* rather than strengthen the deleterious character of the lustration laws because the “deliberately overbroad prophylactic bans on officeholding” carry less stigma than individualized determinations of unsuitability for office would!)¹²

In addition, much of the debate around lustration focused on the unreliability of the documents which, inevitably, were to become the main proof of past collaboration; namely, the files of former secret police apparatus. Much of the documentation is incomplete, having been destroyed during the days of transition (in Czechoslovakia about ninety percent of secret police registers were destroyed after the Velvet Revolution: the unreformed secret service still controlled the

⁹ Adam Michnik, “The Rebirth of Civil Society”, Public lecture at the London School of Economics, 20 October 1999, <http://www.lse.ac.uk/Depts/global/Michnik89.htm>.

¹⁰ Vojtech Cepl, “Ritual Sacrifices”, *East Europ. Constit. Rev.* 1:1 (Spring 1992): 24-26 at 25.

¹¹ Jirina Šiklová, “Lustration or the Czech Way of Screening”, in Martin Krygier & Adam Czarnota, *The Rule of Law after Communism* (Ashgate: Dartmouth 1999): 248-58 at 254-55.

¹² Posner & Vermeule, *supra* note 1 at 34.

archives until June 1990, and similar facts have been reported in many other CEE countries);¹³ more importantly, those documents that remained often did not make it clear whether a person was an actual informer/collaborator or merely a candidate for such a role; the police agents often inflated the numbers of collaborators co-opted in order to improve their status and financial rewards. As a result, what was found in the police archives was both over-inclusive (many names of phoney agents) and under-inclusive (missing files of many genuine collaborators).

Another theme in the debates around lustration concerned its consequences for a newly democratized society: is it wise to re-open old wounds and create divisions in a society which needs strong mobilization and coherence to handle the challenges it is facing? On the negative side of the answer, the divisiveness of the effects of lustration has been one of the main arguments of its opponents. Lustration was embarked upon in order to clear the secrets of the past and to make for greater transparency and openness, but its immediate consequence must have been the exclusion of some people from the first category of citizenship; as Ruti Teitel puts it, “perhaps paradoxically, greater access [to the old state files] would still mean political exclusion”.¹⁴ The exclusion occurred not just through formal measures of screening for important posts but also at a psychological, interpersonal level. Šiklová gives a telling account of the results of “unofficial” lustration conducted by some Czech newspapers which carried the list of real or alleged collaborators of secret police: “Many people, who found themselves listed, literally collapsed when they saw their names. Others searched for their own name with trepidation and then, with perverse pleasure, for the names of friends and family members”.¹⁵ And what about the intrinsic morality of lustration: is the moral guilt of ex-informers (some of whom were blackmailed or threatened into what they did) sufficient to inflict upon them now such a tremendous social penalty in the form of – at the very least – moral opprobrium? And conversely, is the sense of outrage on the part of the “lustrators” always based on respectable motives? Wrongful motives may taint otherwise plausible policies, and if that is the case, then lustration may originate from sources which are dubious in nature, such as the sense of guilt and shame for not doing much under the dictatorship. Significantly, some of the bravest dissidents under Communism turned out to be strong opponents of “lustration” (such as Vaclav Havel or Adam Michnik), and, conversely, some of those complicit in some forms of oppression – or at least passive towards it – emerged as virulent proponents of lustration. As Jon Elster suggests: “I suspect that some

¹³ Aviezer Tucker, “Paranoids May Be Persecuted: Post-Totalitarian Retroactive Justice”, *Arch. europ. sociol.*, 40 (1999): 56-100 at 64.

¹⁴ Ruti G. Teitel, *Transitional Justice* (Oxford University Press: Oxford 2000) at 98.

¹⁵ Šiklová supra note 11 at 255.

spontaneous executions that took place in the aftermath of liberation in France and Belgium, as well as some demands for lustration and retribution in Eastern Europe, owed more to a bad conscience than to rightful anger”.¹⁶ Reluctance to endorse lustration may be therefore seen – partly – as a prudential strategy of not allowing public policy to be dictated by illegitimate motives.¹⁷

The central tension, it seems to me, in lustration laws and the public discourse around them, can be seen as a clash between the retributive, past-oriented rationale which can best account for the shape and reach of the lustration laws and, on the other hand, the consequentialist, future-oriented arguments which are used as official, public arguments for lustration. The sources of the retributive kind of rationale are well encapsulated in the observation of Vojtech Cepl: “After decades in which everybody was afraid of everybody else and even close friendships were marred by suspicion, the people of Czechoslovakia are ready for some sort of retribution...”.¹⁸ This applied, with lesser or greater force (depending on the harshness and repressiveness of the old regime, and on the role that members of the Communist elite played in the transition itself) to all the countries emerging from the overturn of Communism, and the basic urge for historical justice, according to which those who were the perpetrators and supporters of the fallen regime should pay, in one way or the other, for their past sins, was understandably strong. But the historical-justice argument rarely figured in the more formal, legal discourse surrounding the lustration laws, in particular insofar as this discourse was controlled by constitutional courts: it seemed that to base such laws on the need for retribution would come too close to revolutionary vengeance, and would contradict too much the dominant rule-of-law ideology.¹⁹ Hence, the dominant legal-political argument was about the need to protect a new democratic regime from the dangers posed by staffing its key institutions with

¹⁶ Jon Elster, “Retribution in the Transition to Democracy”, in Arend Soeteman (ed.), *Pluralism and Law* (Kluwer Academic Publishers: Dordrecht, 2001): 19-36 at 23.

¹⁷ An analogy may be drawn to a central argument by Lee Bollinger who warns against restraints upon racist speech in the US on the basis that such restraints may originate from wrongful motives, such as sheer psychological intolerance, or the sense of guilt for not helping European Jews during the Holocaust, see Lee Bollinger, *The Tolerant Society* (Oxford University Press: Oxford 1986) at 129-30, 274-75 n. 17.

¹⁸ Cepl, *supra* note 10 at 25.

¹⁹ I cannot resist the temptation of quoting this remarkable passage which shows the uncertain boundaries between irrational vengeance and a more respectable sense of retribution as well as consequentialist argument: “Most supporters of lustration in post-communist universe are not very good at articulating their anxieties or grounding them in reality. This created the impression that they were looking for vengeance in western non-paranoid eyes. But their paranoia aside, persecuted they were, and though they could not articulate their fears of the nomenklatura, they had good reason to fear a class of people that survive by stealing anything that can be moved and corrupting any being with a soul”, Tucker *supra* note 13 at 97-98.

people whose democratic credentials are doubtful, to say the least: not only can they be bound by various forms of old loyalties and open to blackmail but, more significantly, their past is evidence that they are not suitable to function in a democratic state. This is a good statement of that rationale: “The democratic method . . . requires a guarantee of the certainty that its office holders will, under all circumstances, heed the democratic rights of citizens. . . . Anyone who consciously participated in suppressing the rights of citizens is a potential danger to a democratic society, and thus does not meet the prerequisites for important positions in state administration. . . .”²⁰

The tension to which I referred earlier is that the lustration laws seem badly matched to the function of protecting the democratic state against non-democratically minded personnel; there is no reason to believe that a large number of old functionaries of the authoritarian system who behaved as they did for a large variety of motives, including fear, opportunism and lack of better prospects, will necessarily undermine the democratic rules of the game in a totally new apparatus, operating along different modes and procedures. A variant of this rationale is not so much that those implicated in the past in the collaboration have no qualifications to participate in the actions of the democratic state but rather that they are liable to various forms of blackmail on account of those past affiliations. This argument has frequently been made argument by proponents of lustration laws, and yet the speculative nature of the argument renders the proposed method of handling this danger distinctly over-inclusive. How many ex-Communists would indeed be blackmailed by former security agents? It could even be argued that blackmail is more likely to occur when a lustration law is in place (because the official sanctions for false declarations make the blackmail more effective than when the only sanction for past involvement is social reprobation).

In turn, the rationale which seems to best account for the shape of lustration laws – namely the retributive one, was not appropriate to figure prominently in public justifications for such laws. It was only rarely that official legal discourse explicitly admitted that the aim of the lustration may be “a genuine public disclosure of the nature of the previous regime, to guarantee a measure of redress, and simultaneously to symbolize the irreversibility of the changes, through revealing the activities of the secret services”.²¹ The problem with this

²⁰ From a statement of the Chairman of the Senate of Czech Republic on the amendment to the lustration law, quoted in the decision of the Czech Constitutional Court Pl. US 9/01 of 5 December 2001, see <http://www.concourt.cz/angl-verze/doc/p-9-01.html> at 5.

²¹ From the Hungarian Constitutional Court Decision 60/1994 of 24 December 1994 (discussed below) in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press: Ann Arbor, 2000): 306-15 at 312.

perspective upon lustration is that the law is a very imperfect instrument for performing these tasks, and in the process of achieving public disclosure and a symbolic break with the past, the law risks creating all sorts of negative side effects related to the collective guilt approach. (Not to mention an obvious argument that if the point of “lustration” is purely symbolic then it should be operated with symbolic means – such as emphatic declarations about the past – rather than by more punitive methods involving the exclusion of certain persons from certain positions). The symbolic function of “lustration” as a ritual breaking with the past seems inconsistent with the nature of a liberal-democratic state which abstains, as far as possible, from engaging in actions of a didactic or symbolic nature: the ideological neutrality of such a state demands that the functions of performing rituals of symbolic transition are better left to non-state actors – media, non-governmental organisations, professional associations, writers, journalists, historians and other opinion-leaders – rather than to state officials. In the context of post-Communist lustration, the danger of involving officialdom in symbolic rituals aimed at “breaking with the past” lies in the fact that the past has been the subject of contestation, dispute and divergent interpretations: there is no single, consensual view about the nature and effects of Communism. One can of course deplore such a state of affairs but to disregard this ideological disagreement and to call for public acts the aim of which is (among other things) to establish an emphatic, official interpretation of the immediate past risks placing those who disagree beyond the pale of the legal and political framework of a newly democratized polity.

This point was stated, in an exaggerated and clearly self-interested way, by those post-communist deputies to the Czech Parliament who objected that the collective assessment about the evils of communism, conveyed in the parliamentary act of 1993 entitled “On the Lawlessness of the Communist Regime and Resistance to It” (discussed in more detail below in Part 3 of this working paper) contained “a doctrinaire evaluation of an historical period of the former Czechoslovakia, introduced in the form of as statute [which] excludes other opinions and conclusions resulting from scholarly knowledge of historical facts”.²² This is an interesting act because it is a unique case of elevating the evaluation of a period of communism to the rank of a statute. The statute contains also some more practical rules – such as about the suspension of statutes of limitations for crimes committed under Communism and not prosecuted earlier for political reasons, to which I will return below. But at this point it is useful to look at the “declaratory” aspect of the statute which, both in its Preamble and in the first part, asserts that the Communist Party of Czechoslovakia, its leadership

²² This is a summary of the petitioners’ objections provided by the Czech Constitutional Court in its Decision 19/93 of 21 December 1993, reprinted in *East European Case Reporter* 4 (1997): 149-174.

and its members are responsible for the manner of rule in 1948-89, discerns joint responsibility of those who supported the communist regime for crimes committed and other arbitrary acts, declares the Communist regime to be criminal, illegitimate and abominable.²³ In the explanatory report for the statute the Parliament indeed made it clear that one of the rationales for the statute was that “there has not been a more comprehensive definition and characterization of the injustice and crime of the dictatorship, by which the whole society became so deeply and systematically marked”.²⁴ Is a parliamentary statute the right place for a “definition and characterization” of a particular historical period?

Framing the question in such general terms seems to yield an immediate negative response, but the matter is made more complicated by the fact that the law concerns the directly preceding period, and that the “definition and characterization” may be seen as instrumental to, and supportive of, the real job that the statute was supposed to do, namely to suspend the limitation period for the prosecution of certain crimes. What is worrying about including such a characterization of Communist rule in the actual articles of a parliamentary statute is that it sets out a fixed ideological orthodoxy about how the past should be viewed. This was precisely the argument of those who challenged the statute before the Constitutional Court, and is encapsulated in a sentence about a “doctrinaire evaluation of a historical period”, and “exclusion of other opinions”, already quoted above.²⁵ The suggestion of “exclusion” of other opinions is extravagant especially when linked to the preposterous claim that such a declaration is contrary to the freedom of research in the conduct of scholarly and journalistic activities.²⁶ Nevertheless, the fact is that any such authoritative statement involving an assessment of the immediate past will create an official orthodoxy on matters on which there is considerable disagreement, even if that orthodoxy does not violate any specific constitutional rights (no-one is compelled to adopt, or punished for not adopting, this official line in their writings, lectures, etc). The Court responded to this claim by saying that the declaration of illegitimacy of the regime and the joint responsibility of all supporters of it, was merely an acceptable expression of the Parliament’s moral-political view on the matter. It creates no criminal sanctions in itself and does not contradict the right to research or express alternative opinions (as the challengers claimed), and thus breaches no constitutional rights. The Parliament – according to the Court – had a right to express “its moral and political viewpoint, by means which it considers

²³ As summarized by the Constitutional Court, *id.* at 152.

²⁴ *Id.* at 152.

²⁵ See text accompanying footnote 17 above.

²⁶ *Id.* at 155. Article 15 (2) of the Czech Charter (“freedom of scientific research”) was one of the grounds for a challenge to the Law.

suitable and reasonable within the confines of general legal principles – and possibly in the form of a statute”.²⁷

But distinguishing between the declaratory and the binding aspects of a statute, and saying that controversial moral judgments may be contained in a legal act as long as they are non-binding is not quite satisfactory because the legitimacy of the legislator to speak for the entire society is put to a severe test. Of course, it is a commonplace that when there is disagreement about a particular rule and practice, the legislator who decides that the matter must be legally regulated will need to side with the majority and in the end will leave the minority unsatisfied. When a statute does this through imperative rules, it is inevitable; when, however, the Parliament does so through declaratory statements, the divisive and alienating effect is something that can be avoided. In a thoughtful analysis of the Czech statute, Jiri Priban defends the parliamentary declaration, and the Court’s defense thereof, by distinguishing between the Parliament acting “as a representative body of the sovereign political will of the people”, in which case it “functions to strengthen the fictionalized general will”, and, on the other hand, when “it expresses moral or political judgments”, in which case it “must naturally exclude competing political or moral judgments that are incompatible with Parliament’s expressed judgment”.²⁸ The former function (“fictionalized general will”) is performed when the Parliament issues imperative rules; the latter (“moral or political judgments”) when it issues declaratory, non-binding statements. But this distinction is questionable because it converts an empirical, political observation about moral disagreement in society into a normative theory legitimating legislative declarations of norms about which people do disagree. When the legislator has to regulate a particular matter in an imperative way, the appeal to majority rule (subject to some precautions about minority rights) is inevitable, and the “fictionalized general will” is in such cases much more fictionalized than general. Partiality is simply inescapable: when some people demand a suspension of statutes of limitations for politically motivated crimes and others reject it, there is no way for the Parliament to stay neutral as between these demands for a particular imperative solution. When, however, what is at stake is the *assessment* of a particular fact or period, with no specific binding consequences attached to that assessment, and there is considerable controversy in a society as to this assessment, the endorsement of one viewpoint in the controversy is politically costly (because it alienates a section of the population) and morally dubious (because it goes against the liberal principle of neutrality of the state). One may object, naturally, that no such neutrality is warranted when the assessment of an authoritarian, oppressive regime is at issue. Perhaps. And

²⁷ Id. at 155.

²⁸ Jiri Pribán, “Moral and Political Legislation in Constitutional Justice: A Case Study of the Czech Constitutional Court”, *J.E. Eur. L.* 8 (2001): 15-34 at 20-21.

yet the very fact of an actual disagreement in the society as to the details of such assessment suggests that the evaluations of a declaratory nature create a danger of leaving those who disagree beyond the pale of a political community, even if only in a symbolic way; they are placed in a position of second-class citizenry. To say that they have brought it upon themselves by siding with the wrong viewpoint is not a good answer because it relies upon an idea of moral homogeneity which is anathema to a liberal approach to the state. Hence, such evaluations are better left outside the sphere of authoritative actions of the state, and relegated to the operations of civil society. In the end, it is a question about whether a democratic society wants to entrust an authoritative body – even if democratically elected and accountable – with the task of declaring an official truth about the past. The name of an institution set up in Poland; the Institute of National Memory,²⁹ exemplifies this danger; the Orwellian title betrays an ambition to “nationalize memory”, to establish an institutional truth about the past, and to exclude those who dissent from that truth.

This, let us note, is not an argument against any societal attempts to establish the truth about the past: after the traumatic overthrow of a repressive regime which had been producing deceptive, propagandist accounts of its own, this reaction aimed at constructing the truth about the past, through various official or quasi-official bodies such as Truth Commissions, is a natural and healthy antidote. It is also an important satisfaction to those who have been directly victimized by the past regimes. There is nothing necessarily illiberal in a post-transition society attempting to regain the truth through collective institutions. But the difference between these truth commissions and the Czech declaration is that the former – such as the Commission on Historical Clarification in Guatemala or Commission for Truth and Reconciliation in South Africa – typically work their way from detailed, single-case accounts to generalized characterizations of the regime, rather in a way an individual historian constructs a synthetic account on the basis of cases, facts and events. They are also meant to establish a sort of consensus, or at least a non-adversary forum for a reflection about what had happened; in such commissions, “[p]ublic knowledge about the past is produced through elaborate processes of representation by perpetrators, victims, and the broader society, grounding the historical inquiry with a basis for social consensus. It is a truth that is publicly arrived at and legitimated in nonadversarial processes that link up historical judgment with potential consensus”.³⁰ Equally importantly, “[t]he truth reports are not generalized accounts but detailed documentary records. . . . The greater the detail, the stronger the counterweight to prior state silence. The more

²⁹ Perhaps better translated as the Institute of National Remembrance. The Polish word “pamięć” which features in the name of the Institute, has both these meanings.

³⁰ Teitel *supra* note 14 at 81.

precise the documentation, the less is left to interpretation and even to denial”.³¹ But the Czech statutory declaration is *nothing but* interpretation, and – at best – a “generalized account”. This is a generalized characterization – accurate, in my view – of the nature of the Communist period, and an interpretation given to that era in the recent Czechoslovak history. As such, it is not the basis for a consensus-seeking establishment of the facts about the past but rather a dissensus-provoking state orthodoxy about the ideological lenses through which the past should be viewed.

Before presenting an overview of the systems of lustration and decommunisation as adopted in the CEE, and the constitutional courts’ responses to them, two remarks are necessary which will help place these developments in a broader context. First, the adoption and implementation of these programs has not taken place in an international vacuum. In particular, the by-and-large lukewarm attitude of many of the constitutional courts may, to some extent, also be explained by external influences which, on balance, inclined the legal systems of CEE against rather than in favour of lustration. In contrast to the post-World War II situation when the Western allied powers pressured Germany to effect a wide-ranging denazification of its state apparatus, after the fall of Communism the stance of Western democratic system was quite the opposite or – at best – indifferent. Indeed, some Western observers came to view the very idea of “corrective justice” as antithetical to constitutionalism itself; this is well encapsulated by the assertion of Bruce Ackerman: “An emphasis on corrective justice will divide the citizenry into two groups – evildoers and innocent victims. ... Constitutional creation unites; corrective justice divides”.³² One commentator of an Eastern European background complained recently that “seeing lustration with ‘Western eyes’, i.e. democratic and liberal but lacking an understanding of the totalitarian experience, became extremely popular among centre and left-wing politicians, who persuaded their electorates that ‘doing nothing’ was the best and most prudent strategy of breaking with the legacy of the past”.³³ But this explanation, with its implied accusation of ignorance of local conditions and ideological bias,³⁴ is only partially true. More importantly perhaps, Western

³¹ Id. at 83.

³² Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press: New Haven, 1992) at 71.

³³ Natalia Letki, “Lustration and Decommunisation in East-Central Europe”, *Europe-Asia Studies* 54 (2002): 529-52 at 539, footnote omitted.

³⁴ In addition, it has been claimed (not inaccurately) that Western ideas about decommunisation have been partly shaped by the selectiveness and bias of Westerners’ contacts with the new élites in post-communist states: “the Western visitors come for a short time, stay only in Prague or Budapest and talk with a few English speaking intellectuals with dissident background. The kind of locals that visitors are likely to interview are likely to be eager to contribute to the integration of their country in Europe”, Tucker *supra* note 13 at 75. There is

observers were keen to see the new democracies of Central and Eastern Europe become “normal” as soon as possible, and this meant, crucially, the adoption of the characteristic standards of consolidated democracies, including robust guarantees for the rule of law, due process, and formal equality. A degree of universality is written into such a notion of “normalcy”, and it is true that the “main motivation for the ‘westerners’ who became interested in post-totalitarian retroactive justice was support for liberal values, like democracy and human rights and a wish to spread justice around”.³⁵ Quasi- and non-judicial forms of investigating into people’s past outside the usual mechanism of criminal process, as well as the creation of whole categories of people deprived of certain political rights is anathema to such an ideal, and the universalistic liberal ideal was used as a yardstick to judge the new democracies’ preparedness to join first the Council of Europe, and then, the European Union. West European political élites developed a stake in the integration of the ex-Communist East into the overarching political structures of the continent, not least for the sake of stability and peace in Europe. The criteria of “normal” democracy, untainted by any extraordinary measures related to its immediate non-democratic past, were instrumental in achieving these aims.

The resolution adopted in 1996 by the Parliamentary Assembly of the Council of Europe, which outlined how lustration procedures should be designed in order to be compatible with the principles of the rule of law, is very interesting in this regard.³⁶ While it does not condemn the very idea of lustration outright, and indeed acknowledges (without disapproval) that “some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws”,³⁷ it does set out a number of criteria that such laws must meet in order to be compatible with “a democratic state under the rule of law”, the most important being that lustration laws must be based on the principle of individual, rather than collective guilt, which “must be proven in each individual

therefore an element of self-perpetuation of the views hostile to decommunisation: opinions in CEE are partly shaped by Western attitudes which, in turn, are partly shaped by selectively sampled informers in CEE.

³⁵ Id. at 73.

³⁶ Resolution of the Parliamentary Assembly of Council of Europe no. 1096 of 27 June 1996 on measures to dismantle the heritage of former communist totalitarian systems, <http://stars.coe.fr/Main.asp?link=http%3A%2F%2Fstars.coe.fr%2FDocuments%2FAdoptedText%2Fta96%2FERES1096.htm>, visited 25 March 2003. For a working document, referenced to by the Resolution, entitled “Measures to dismantle the heritage of former communist totalitarian systems”, Doc. 7568 of 3 June 1996 see <http://stars.coe.fr/Main.asp?link=http%3A%2F%2Fstars.coe.fr%2FDocuments%2FWorkingDocs%2FDoc96%2FEDOC7568.htm>.

³⁷ Paragraph 11 of the Resolution 1096, supra note 36.

case”.³⁸ This would undermine much of the lustration as contemplated (and practised) in CEE because the rule usually is that the very fact of occupying certain positions in the apparatus of the Communist regime is a disqualifying characteristic. This may seem to be a pedantic distinction because the performance of some roles (for example, in the security apparatus, or as a collaborator with those services) almost inevitably meant participation in the consolidation of the authoritarian system. But that goes to the very heart of the debate about the principle of lustration: putting obvious crimes to one side (as it is not the purpose of lustration to deal with these), can a newly democratic state protect itself by removing a whole category of people from performing certain roles? By rejecting the collective approach, the resolution of the Parliamentary Assembly seems to be going further than it claims to go, namely, to delegitimize the very principle of lustration. Further, the resolution (and even more emphatically, the working document accompanying this resolution) makes it clear that lustration may only be used for purposes related to the protection of the democratisation process, not for “punishment, retribution or revenge”.³⁹ This serves to emphasise even more the individual as opposed to the collective approach as there is an inherent tension (as suggested above) between the utilitarian purpose of lustration and the collective identification of the persons to be removed from public offices; such a collective approach, in turn, serves well the purpose of emphatic retribution for the sins of the past but it is what the resolution (and most of the official rhetoric about lustration in CEE) specifically precludes the lustration from aiming at.

The second remark is about the example of the former German Democratic Republic (GDR), and its effect on other CEE countries. The agreement on unification of Germany of 31 August 1990 provided an opportunity to dismiss from the civil service the former senior party functionaries of the GDR who held State offices, as well as leaders of trade unions and those who cooperated with the Stasi – the East German secret police. This was followed by a law of 20 December 1991 concerning the files of the former GDR security police, according to which a wide range of officials were checked regarding their possible links with those security services. As a result, thousands of public officials, judges, university professors and school teachers, among other people, were discharged. But Germany for a most obvious reason was *not* a suitable model to follow by the rest of European post-Communist states, having been absorbed into the former West Germany. Part of the reason why the “decommunization” in former GDR was so efficient and carried out with such zeal was that West Germany had the accusations of incomplete denazification still fresh in its collective memory, and that shaped its resolve to cleanse the state

³⁸ Id., paragraph 12.

³⁹ Id. paragraph 12, see also Doc. 7568, *supra* note 36, paragraph 16.

more thoroughly this time. The Germans had the unique “opportunity” to apply the tools of outsider screening for past sins, rather like the Allied powers in post-War Germany or the Americans in post-War Japan: German decommunisation and lustration was made easy by the disjunction of those who were implicated and those who did the screening. But in other CEE states that was not the case: many of those in charge of (or only in favor of) decommunisation had been implicated in the past; the division between the tainted and the clean was blurred, consistently with the fact that a totalitarian system left hardly anyone immune from responsibility for the systemic evil. And, of course, the more diffuse was responsibility for, and complicity in, the repugnant system, the more difficult it is to come to terms with the past. This is not to say that responsibility for past wrongs was equal for all the citizens of Communist states, nor to deny the moral righteousness of the dissidents, but rather to show that the “luxury” of having a class of uncontaminated citizens exercising moral scrutiny of those who were putatively involved never existed in the CEE, and that this fact importantly affected the erratic and incomplete moves towards lustration and decommunisation – in contrast to the German experience, where the circumstances existed for an exercise of a classic “victor’s justice”.⁴⁰ In contrast, in all other postcommunist societies “transitional justice” was of much purer character – meaning that “the society is in a real sense judging *itself*” which meant, crucially, that “[i]n transitional justice, many of the judges themselves have been implicated in the regime they are judging”.⁴¹ Nevertheless, the case of the ex-GDR did exert *some* pressure upon lustration proposals elsewhere, and provided a model for the strongest proponents of lustration and decommunisation in other CEE states.⁴²

2. Lustration and Decommunisation in Central and Eastern Europe

“Lustration”, or vetting, may be considered harsh or lenient as a function of three particular characteristics: (1) the range of positions in the old Communist regime (or types of involvement with the regime) which trigger lustration-related consequences, (2) the range of current positions the holders of which are subject to lustration, and (3) the consequences that follow from the finding that a person belonging to a range (2) has been implicated in the circumstances defined by

⁴⁰ Teitel, *supra* note 14 at 164.

⁴¹ Elster, *supra* note 7 at 14.

⁴² The German legal solutions were occasionally referred to, with approval, by CEE Constitutional Courts when scrutinizing lustration and decommunization measures in their own countries; see, for example, Constitutional Court of Lithuania, Decision of 4 March 1999, <http://www.lrkt.lt/1999/n9a0304a.htm>, Part 2 of Court’s decision; Constitutional Court of Czech Republic, Decision 19/93 of 21 December 1993, in *East European Case Reporter* 4 (1997): 149-174 at 174 n. 1.

range (1). As will become clear, there has been a considerable spectrum of approaches to “lustration” and “decommunisation” in CEE countries in all these three regards.⁴³ While no single factor explains those differences, three variables seem to determine most the severity and seriousness of the means applied to settle the accounts. First, the degree of repressiveness of the past regime: the harsher and the more pervasive it was, the more robust the decommunisation. Second, the way in which the “exit” the old regime occurred does matter: in negotiated transitions, ex-officials of the Communist regime played an important role as interlocutors and collaborators with former dissidents, and it was both politically impossible and socially awkward to propose measures aimed at disabling them from performing official political roles in the new system. In addition, an act of forgiveness could be seen as a form of reward for good behaviour in the transition period. As one commentator noticed: “When the regime and the opposition negotiate the conditions for holding free elections, the regime demands treatment with a velvet glove”.⁴⁴ Third, the political strength and influence of parties connected to the old regime in the first years after the transition has been significant: when participating in governing coalitions (or even in opposition, but with a high degree of influence), they could – and did – use their clout to prevent any strong and effective lustration measures. But note that, ironically, the relative strength of post-Communist parties well after the transition may have the effect of keeping the issue of lustration salient because it is an effective tool of political struggle by their opponents; that was precisely the case in Poland where, as one observer notes, “[i]n a political climate in which former communists were able to resurrect themselves successfully, the issue of ‘dealing with the past’ became *increasingly salient* and was instrumentalised by the Polish right as part of the political power struggle”.⁴⁵

All these three factors are, naturally, to some degree inter-related (for instance, more repressive regimes, as in the case of former Czechoslovakia, ended in a less negotiated way than more liberal ones, such as Hungary or Poland, hence the connection between the first and the second factor; negotiated transitions usually allowed ex-communists to retain a number of key positions and influence over legislation, hence the connection between the second and the third factor, etc), and none of them accounts fully for the differences in lustration (for example,

⁴³ A glaring exception are many former member states of the USSR (though not the Baltics), including Russia itself, where neither “lustration” or “decommunisation” ever occurred – but less by virtue of a principled, consensual decision about adopting this form of reconciliation and more “by default”, see Elster *supra* note 7 at 18.

⁴⁴ Noel Calhoun, “The Ideological Dilemma of Lustration in Poland”, *East European Politics and Societies* 16 (2002): 494-520 at 495.

⁴⁵ Aleks Szczerbiak, “Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland”, *Europe-Asia Studies* 54 (2002): 553-72 at 570, emphasis added.

between Czech and Slovak systems which, after all, shared the same legacy and the Communist regime "exited" in the same way, and yet which – due to different domestic political constellations after the split of Czechoslovakia – followed diametrically opposed practices. A fourth, secondary factor (secondary because it has been largely affected by the three just mentioned) has to do with the timing: when, due to political circumstances lustration has been placed effectively on the agenda relatively late (as in Poland, when the first successful lustration law was enacted only in 1997), the measures adopted were weaker partly because of the growing unreliability of the files on which lustration determinations could be made, and partly due to the fact that public emotions became, with time, less pronounced.

2.1. The Radical Model: Czech Republic

It was in the Czech Republic that the strongest position on decommunisation and lustration has been adopted. Not only do the laws (confirmed, as we shall see below, by the Constitutional Court) cover a relatively wide group of persons; they also *ban* such persons from a fairly wide range of posts. Therefore, in terms of all three criteria suggested above the Czech approach to lustration can be seen as the harshest.

This, undoubtedly, can be explained mainly by the combination of two factors: the particularly severe and pervasive nature of the police state of Czechoslovakia in the years after Prague Spring until late 1989, and the weakness of Communist or post-Communist political forces in the first months and years after the transition. Secret police infiltration in Czechoslovakia was extremely broad: police “tried to infiltrate every school, office and institution, particularly those employing intellectuals or involving any contact with foreigners”.⁴⁶ Those suspected of having “anti-state” views (or, in academia, of espousing non-Marxist theories) were subjected to a very wide range of discriminatory practices and harassment, ranging from arbitrary arrest and firing from the job to actions such as denial to their children of access to university. The very form of transition (a matter related, of course, to the nature of the pre-transition regime) is of relevance here: in contrast to the negotiated transitions in Poland or Hungary, where the spirit of reconciliation and collaboration of all parties prevailed (at least, in public rhetoric), in Czechoslovakia the changes occurred in a more revolutionary (though non-violent) way. This enabled the adoption of a “new beginning” approach, further strengthened by the dissolution of the federation which reduced any sense of legal continuity, so powerful in Poland or Hungary. These differences explain why the approach in the Czech Republic to “dealing with the past”, not just in the area of lustration but also with regard to property

⁴⁶ Cepl supra note 10 at 24.

restitution or suspension of statutes of limitations for the politically motivated crimes, was markedly different than elsewhere in the region.

The Czechoslovak lustration law of 4 October 1991 decided that those who had collaborated with the security services of the Communist regime, or had held a position within the regime (which has a very wide reach and covers even such people as secretaries of the Party at district level), could not now hold high positions for five years in governmental bodies and organisations.⁴⁷ Even relatively low former functionaries of the Party, from the township level up, were barred from holding certain positions, regardless of whether they had collaborated with the state security agencies or if they had been involved with criminal activities.⁴⁸ The offices from which those persons were barred included positions in State institutions and also key positions in the military, the judiciary, universities, state-run media and many other state run enterprises (including joint-stock companies the main shareholder of which is the State). Each employee or prospective employee within the range of categories covered by lustration was required to ask for a certificate of “negative lustration” that would be submitted to an employer, or in the case of elected officials, to the parliament. (In the years that followed, there were 310 000 requests for lustration vetting, and of these, 15 000 were “positive”, i.e. the persons in question were pronounced collaborators but most of these did not result in the loss of employment status because the lustrated were not in elite positions). The law created a right for those found to be former collaborators to challenge the finding before a special commission and then to appeal the latter commission’s finding in a court; the right of appeal to court was denied to those found to be higher-level collaborators and to the former top officials of the Communist Party.

It is clear that the legislators have not changed their views on this matter in subsequent years, and that the Czech Republic has not taken a different view to that of Czechoslovakia. (In contrast, even though in Slovakia the law was never formally repealed, contrary to the express wish of the first Slovak government of Vladimir Meciar, it became dormant and without any de facto force. The Constitutional Court of Slovakia flatly refused to strike down the lustration law on the basis that the matter had been already considered earlier by the CC of Czechoslovakia). Originally, the 1991 law allowed for this lustration process to continue until the end of 1996, but in September 1995 this was amended to extend the period to the end of 2000. Interestingly, this extension was effected by a parliamentary vote to overturn the veto by President Vaclav Havel who argued that the law would suggest that the country was still in a revolutionary phase, and that it would suggest that a normal rule of law-based system had not been yet

⁴⁷ Act No. 451/1991 Sb. of 4th October 1991

⁴⁸ Helga A. Welsh, “Dealing with the Communist Past: Central and East European Experiences after 1990”, *Europe-Asia Studies* 48 (1996): 413-428 at 415.

created.⁴⁹ In January 1999, the Parliament rejected a bill to annul the law and, in 2000, the law was amended so as to remove the cut-off end period (leaving it open indefinitely).⁵⁰ Much earlier, at the beginning of the independent existence of Czech Republic some additional lustration rules were added (in the so-called “small lustration law”)⁵¹ to the 1991 lustration law (which became known as the “large lustration law”). In addition, a law was passed in 2001 which expanded the application of this lustration law to also cover public higher education institutions.⁵²

The initial 1991 law was challenged before the Constitutional Court of the Czech and Slovak Republic; in fact, it was easily the most important case considered by that Court before the “divorce” of the two constituent entities of the Republic and the substitution of the Court by two successor constitutional courts for the new Republics.⁵³ The Court found the lustration law to be generally constitutional: it justified the law on the grounds of security and democracy, noting the extraordinary nature of transition periods, in that they are much more susceptible to a relapse towards the totalitarian system. It did, however, find one provision to be unconstitutional — one which included those who were merely *candidates* for clandestine collaboration, in the list of those subject to the law. The Court found this to be contrary to Art. 4(3) of the Charter on Fundamental Rights and Human Freedoms, which provides that all statutory limitations on freedoms must apply in the same way to everyone.

In its reasoning, the Court came down heavily on the side of material rather than formal justice, arguing that, until 1989, all important positions in the administration were filled by those conforming to cadre orders that required them to feel a strong sense of responsibility towards the Party. In addition, the Court felt that the regime’s most important tool for the maintenance of power, the State Security organisation, would try to influence or reverse the present democratic developments in the country (the Court cited some State Security directives of 1989, which said they should try to infiltrate the new power structures and obtain positions of influence). The Court went on to say that a democratic State not only has the right to eliminate an unjustified privilege once enjoyed by a certain group of citizens, but it also has “the duty to assert and protect the principles upon which it is founded, thus, it may not be inactive in respect to a situation in which the top positions at all levels of state administration, economic management, and

⁴⁹ “Constitution Watch”, *East Europ. Constit. Rev.* 4:4 (Fall 1995) at 9.

⁵⁰ Act no. 422/2000.

⁵¹ Act no. 279/1992 provided for lustration of candidates for work in the police.

⁵² Act no. 147/2001.

⁵³ Constitutional Court of the Czech and Slovak Federal Republic Decision No. 1/92 of 26 November 1992, see http://www.concourt.cz/angl_ver/decisions/doc/p-1-92.html.

so on, were filled in accordance with the now unacceptable criteria of a totalitarian system”.⁵⁴ It is necessary for employees of the State to have loyalty to democratic principles. Thus, the basic justifications for lustration are stated as being “[the state’s] own safety, the safety of its citizens and, most of all, further democratic developments...”.⁵⁵ The analogy drawn was to the security clearances which are operative in various consolidated democracies in appointment practices; the vetting of candidates for their past practices is a rational and necessary way of avoiding unnecessary risk in staffing practices. The Court has not endeavoured, however, to explain what risk is created by appointing people with discreditable past to positions which do not involve any special opportunity to trample upon others’ civil or political rights, or to take security-related decisions, such as in the universities or in the media: the extensive range of positions to which lustration applied somewhat belied the security rationale provided for the law. In contrast to the sweeping range of the positions covered by the Czechoslovak (as it was then) lustration law, security clearances are tolerated in Western democracies only with respect to a narrow range of top positions, and to apply politically-sensitive criteria regarding a person’s past as part of the qualifications for appointment in most cases is anathema to a liberal democratic state.⁵⁶ So the only way the Court could justify the law was by an appeal to special transitional circumstances – which it in fact did – but then the analogy to the screening practices elsewhere in democratic states rings rather hollow.

Later commentaries often emphasized the fact that, in the case just discussed, the Court was referring to the transition period from totalitarianism to democracy, and special protections were needed at this time. For this reason, it is interesting to note that a second Constitutional Court decision was handed down on this law, by the Czech Constitutional Court, that is, the successor court to the Constitutional Court of the former federation.⁵⁷ It related ostensibly to the 2000 amendments which removed the time restrictions for the validity of lustration provisions: the challenge was based on the argument that the main rationale for the earlier law, namely to counter “the risk of subversion or a possible return of totalitarianism”⁵⁸, was no longer valid after the consolidation of democracy, and that there was no reason to extend what had been transitional, extraordinary measures *par excellence*. However, the Czech Constitutional Court held that amendments cannot be challenged by themselves, and thus the whole law had to

⁵⁴ Id. at 8.

⁵⁵ Id. at 8.

⁵⁶ See, similarly, Teitel *supra* note 14 at 165-66.

⁵⁷ Decision 9/01 of 5 December 2001, see <http://www.concourt.cz/angl-verze/doc/p-9-01.html>.

⁵⁸ Id. at 3.

be re-evaluated. Overall, the Court declared itself in agreement with the earlier Constitutional Court of the Czech and Slovak Republic's decision on this matter, and much of its decision is simply a summary, with approval, of the 1992 decision. It admitted that part of the earlier decision was based on the extraordinary nature of the moment of transition, and the short-lived effect of the law. However, it held that these were not crucially central justifications, and that the Court had also based its decision on the fact that in all democratic systems the State should be able to require loyalty to democratic principles and lay down prerequisites to protect the security of its citizens and further democratic development. In particular, the Court refused to consider whether the social and political conditions as regards the maturity of democracy were satisfied (and hence, the completion of the transition period in which special lustration measures were justified), deeming it to be a “social and political question, not a constitutional law question”.⁵⁹

2.2 Intermediate Model: Albania and Baltic States

The Czech position constitutes one extreme pole in the range of systems of lustration in CEE, when considered from the point of view of the range of positions screened and the consequences for the “positively lustrated” (in the sense of confirmation of a person’s past involvement). The Albanian lustration came close to this position: in Autumn 1995 two decommunisation laws were passed which would deny ex-communists the right to run for the parliament and also work in the judicial system, state banks and other financial institutions, the army and the mass media.⁶⁰ In the case of candidates for election, the law established a special commission to determine whether a candidate had served in one of a variety of capacities under the prior regime or was registered in the secret police files as a collaborator. The Constitutional Court upheld much of this law: it only struck down the provisions about lustration of journalists working for independent newspapers. Earlier, a January 1993 law had stated that both former members and employees of the Communist Party and the collaborators with security services could not practice as (private) lawyers for five years; that law was however overturned by the Constitutional Court in May 1993 on the basis of a variety of constitutional reasons, including the constitutional principle that lawyers constitute a free profession (Art. 16), the constitutional right to work, the principle of separation of powers (the law granted to a licensing commission powers which were normally reserved for the court) and the principle of presumption of innocence.⁶¹

⁵⁹ *Id.* at 15-16.

⁶⁰ “Constitution Watch”, *East Europ. Constit. Rev.* 5:1 (Winter 1996) at 2-3.

⁶¹ For a detailed discussion of this decision see Kathleen Imholz, “A Landmark Constitutional Court decision in Albania”, *East Europ. Constit. Rev.* 2:3, (Summer 1993) at 23-5.

All three Baltic states also introduced bans on former operatives and collaborators of the KGB holding positions in the parliament or government. The Baltic states' case was somewhat special in comparison with other Central European countries because the secret service operatives were more directly related to the annexation of their territories by the USSR, and both during and immediately after the restoration of independence, they posed direct threats to the sovereignty of these states. For example, the Lithuanian government adopted a series of resolutions in 1990 and 1991 warning against the activities of operatives of the USSR Committee of State Security, calling upon them to register with the Lithuanian Ministry of the Interior, and demanding that they break all links with the USSR secret services. But it was only in 1998 that Lithuania introduced the lustration law which banned former KGB employees from being employed in almost all State institutions as well as in a number of types of private institutions (banks and credit unions, security services, communication enterprises, as private lawyers, notaries, etc) for ten years.⁶² At the same time, the law contained a provision allowing the suspension of this lustration measure in respect of some ex-KGB employees under certain conditions: in particular, if they revealed all the information about their former links with the KGB. In such a case, the law set out a procedure whereby the Centre for Research into People's Genocide and Resistance of Lithuania and the State Security Department would jointly adopt a measure recommending the suspension of lustration measures against a particular person. This recommendation would be then considered, and a decision taken, by a three-person commission appointed by the President of the Republic; its decisions would be subject to confirmation by the President.

This law was challenged by a group of MPs before the Constitutional Court, which upheld the lustration in general but struck down the exemption provisions on the basis that it empowered the President to make decisions regarding restrictions of constitutional rights – something that, under the Constitution, only the Parliament was empowered to do.⁶³ When it came, however, to the main thrust of the statute the Court found no defects in the lustration procedure; in particular, it rejected one of the arguments of the petitioners who claimed that lustration allowed for criminal sanctions to be meted out by non-judicial bodies, and also that it denied the presumption of innocence which is normally adopted in criminal proceedings. It also rejected the argument that exclusion from certain positions violates the constitutional right to a free choice of occupation. The Court reasoned that the right to equal opportunity to work in a State office is not absolute, and that “the requirement for loyalty and credibility in connection with

⁶² The statute “On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation” of 16 July 1998.

⁶³ Decision of 4 March 1999, <http://www.lrkt.lt/1999/n9a0304a.htm>, visited 15-5-2001.

service in a State office is common and understandable”.⁶⁴ The Court then extended the same argument to positions in private enterprises – such as banks, credit unions, security services – and also occupations such as private lawyer or notary, stating, rather sweepingly, that “In private enterprise there are also such areas and posts which are of crucial importance to the society and the State, therefore the State may set special requirements to those who want to work in such jobs”.⁶⁵ As one can see, the Court expressed an extremely high level of deference to the legislature thus largely giving it *carte blanche* to determine any position in society – public or private – as being of sufficiently high importance to warrant the exclusion of ex-secret service persons. At this point the suspicion is raised that a rule ostensibly defended in a consequentialist way – as a rational protection of important governmental purposes – is in fact driven by a desire for retribution (how big a danger to the State does an ex-KGB operative pose when working as a notary?) Still, it must be emphasized that the Baltic-style lustration did not go as far as the Czech one as it applied only to ex-operatives of the security services of an occupying empire, and not to ex-Party or state officials.

2.3 The Lenient Model: Poland, Hungary, Bulgaria

The opposite pole, at the lenient end of the range of lustration policies, is occupied by those systems – as in Poland, Hungary and Bulgaria – in which the ostensible object of lustration is to verify and reveal public officials’ past (or the past of candidates for public positions) without, however, banning the those “positively lustrated” (i.e., certified as connected in the past to the security services) from those offices. It is significant that in all these three countries the Communist parties (or the reformist factions within them) took an active and often positive role in the transition (as in Poland and Hungary), or occupied a strong position of power soon after the transition.⁶⁶ Both in Poland and Hungary, the terms of transition were negotiated in round-table discussions between Communist Party officials and the opposition, and the loyalty of Communist Party activists (however renamed and reformed) to the negotiated rules was a central factor in the peaceful and eventually successful transition. The weak method of retribution meted out by the lustration in the years after the transition (as well as the relative lateness of decision on those measures) can therefore be seen as functionally linked to the role of the ex-Communists in the transition itself, and also to their influence upon legislation in the first post-transition

⁶⁴ Id., Section 5 of the Court’s decision.

⁶⁵ Id., Section 5.2 of the Court’s decision.

⁶⁶ In the first elections after the fall of the Zhivkov rule, held in June 1990, the post-Communist Bulgarian Socialist Party (BSP) won a solid majority in the Grand National Assembly; after the collapse of the BSP government in September 1990, a coalition led by both the BSP and the liberal-democratic Union of Democratic Forces (UDF) was formed.

period. Also, in all three countries the role of the Constitutional Courts in shaping the lustration laws, often in a way contrary to the wish of the parliamentary majority of the time, has been quite significant.

In Hungary, the legislature passed a fairly mild lustration law in 1994 which provided for the creation of three-judge panels which would examine whether *present* public office holders (the President, ministers, high officials, members of parliament, judges, some journalists and persons with high positions in state universities and public companies) had collaborated with the state security services or been members of the fascist Arrow Cross Party. Even if a person were found to be “guilty”, the information would only be made public if they refused to resign from their post. They could still keep their job even if such information was publicised. This was therefore a compromise solution between discharge from the job and no lustration at all; it also contained the possibility of no public disclosure, but under the condition of a resignation.

The Constitutional Court found the 1994 law to be partly unconstitutional and offered some pointers and a time limit (July 1996) within which a new law should be enacted.⁶⁷ What is important about the decision is that the Court declared that one of the two main functions of lustration (alongside its moral and symbolic function of exposing the past), namely to protect the democratic transition from being endangered by those who compromised themselves in the past, was no longer relevant: the transition had actually occurred and its protection could not be now used as a rationale for lustration.⁶⁸ In this respect, the Hungarian Court’s reasoning departs radically from that of its Czech counterpart which much later chose to rely on the same argument to maintain the validity of its lustration law. (This had something to do with the lateness of the Hungarian law, which came in the fifth year after the transition, while the Czech Court relied heavily on its Czechoslovak predecessor’s decision which reviewed the law enacted very soon after the Velvet Revolution). In any event, the Hungarian Court applied the standards of a normal democratic society rather than the extraordinary circumstances of transition. Under such standards, the Court explained that there is a necessary balancing act between, on the one hand, the right of informational self-determination (protection of personal data) in Art 59 of the Constitution and, on the other, the right to acquire and disseminate information of public interest, protected under Art 61 of the Constitution. It held that public persons *do* have a smaller sphere of privacy than private persons, and thus it would be just to come down in favor of the principle of freedom of expression/acquisition of information. Thus, such “pure” lustration can be

⁶⁷ Decision 60/1994 (X11.24) of 22 December 1994, reprinted in *East European Case Reporter of Constitutional Law* 2 (1995): 159-193; excerpts in Solyom & Brunner, *supra* note 21 at 306-15. The references below are to the excerpts in the latter volume.

⁶⁸ “[T]he Constitutional Court must consider the transition as a historical fact”, *id.* at 312.

constitutionally permissible for public persons. However, it saw a problem in this law, in that the persons who were *spied on* did not have their “rights of informational self-determination” properly secured. Also, those subject to background checks were chosen too arbitrarily. For instance, the list included all journalists in the public (but none in the private) media. This has no justification. The Court held that the law should either apply to all journalists who shape public opinion (including those working for private media), or to none of them. In addition, the Court felt that persons with high positions in state universities or businesses do not participate in public affairs, and so it was not reasonable to include them in the lustration law. Finally, the Court found an unconstitutional omission in the Parliament's failure to properly secure the rights of privacy and informational self-determination of all citizens by providing for the right of people to check their own files.

After the Court’s decision had been handed down, the Parliament (now with a new majority, this time composed of the Socialist party which had grown out of the reform wing of the old Communist Party) tried to comply with these suggestions by enacting, in 1996, a new – and greatly weakened – lustration law.⁶⁹ This reduced the number of people who would be subject to the law (to persons who must take an oath before the parliament or the President, and those elected by the parliament). It also narrowed the concept of collaboration with the state security apparatus to include only those who belonged to the state security organisation, actually submitted reports on others, informed on others, or were paid by the organisation. The mere presence of someone’s signature upon a declaration of willingness to spy was no longer sufficient.

The Hungarian position is therefore moderate: the established fact of earlier collaboration with the security apparatus is not, per se, a cause for dismissal or screening out of a person; and if a person resigns from their post, the fact of their collaboration need not even be publicized. (As it happened, there have not been, so far, any cases of individuals resigning due to past activities).⁷⁰ And it is only the collaboration with the security apparatus, not any other involvement in the politics of the Communist era, which forms the subject of background check.

The current Polish position is quite similar in that it applies only to collaboration with the secret police, and “positive lustration” does not necessarily result in loss of one's position or eligibility for such a position. But the model adopted is somewhat different from the Hungarian one in that it requires a number of position-holders and candidates to declare publicly whether they had been

⁶⁹ Law LXII/1996. For a political background see Gábor Halmai & Kim Lane Scheppelle, “Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past”, in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997): 155-84 at 176-77.

⁷⁰ “Constitution Watch”, *East Europ. Constit. Rev.* 11:3 (Summer 2002) at 25.

collaborators, and it is only in the case of a court-established *false* declaration (the so-called “lustration lie”) that a person loses the right to hold public office, or to run in elections, for a period of ten years. That penalty is, strictly speaking, for lying about one’s past, and not for the fact of one’s past collaboration with the secret police. The range of positions to which it applies is relatively broad: it includes all elected state officials from the President downwards, including parliamentary candidates, all ministers, state functionaries above the rank of deputy provincial governor, judges, prosecutors, barristers (on the basis of the 1998 amendment to the law), and leading figures in public media. As a result of the 11 April 1997 law, about 22,000 public officials were obliged to disclose all forms of voluntary, secret collaboration with the security service between 1944 and 1990.

This system had been preceded by a number of failed attempts to adopt a more radical, Czech-style lustration process in Poland. In particular, in May 1992, the Parliament passed a resolution stating that the Minister of Internal Affairs must provide information as to whether any person applying for, or holding, a position in the parliament, as a government official (with an extremely wide range of positions subject to this requirement, from local council officials upwards), or as a judge, prosecutor or barrister (advocate), was connected to the secret police under the past regime.⁷¹ This led to a major political crisis (as the Minister of Interior with great zeal undertook the task of providing the Parliament with the names of those whose files were in the archives of the Ministry), and to the dismissal of the Government by the parliament at the initiative of the then President Walesa (whose name, incidentally, was on the list of “top agents” produced by the Minister); the resolution was later found unconstitutional by the Constitutional Tribunal in its decision of 19 June of the same year. The Tribunal found that the resolution violated individual dignity without giving those “lustrated” any means of protection against such a violation: it led “to the violation of the good name of the persons to whom the information [demanded by the Parliament from the Minister of Internal Affairs] applies and creates a *sui generis* penalty of infamy”.⁷² According to the Tribunal, that clashed with art. 1 of the so-called “Little Constitution” (in force at the time) which contained a formula providing for a democratic *Rechtsstaat*.

A law of narrower scope (because it only applied to judges), but with harsher penalties, was passed in December 1997. It amended the 1985 Act on the Courts

⁷¹ Sejm [The lower chamber of Polish parliament] Resolution of 28th May 1992, described in Andrzej S. Walicki “Transitional Justice and the Political Struggles of Post-communist Poland” in McAdams, *supra* note 72: 185-238 at 197-98; see also Wiktor Osiatynski, “Agent Walesa?”, *East Europ. Constit. Rev.* 1:2 (Summer 1992): 28-30; Calhoun, *supra* note 44 at 503-505.

⁷² Decision U. 6/92 of 19 June 1992; Polish text on file with the author, p. 6.

of General Jurisdiction, so as to allow the removal of judges who had collaborated with the previous regime, or prevent them from receiving pay rises: the law applied to judges who in the years 1944-1989 had committed acts contrary to judicial independence by issuing unjust sentences, or judges who had otherwise impaired a defendants' right to defense. The central article of the law – article 6, which provided that statutes of limitation would not apply until 31 December 2000 in the case of disciplinary proceedings against judges – was found defective by the Constitutional Tribunal on procedural grounds.⁷³ According to the Constitution, the National Council of Judiciary (NCJ) has the right to express opinions on all matters related to bills dealing with the judiciary, including, naturally, this one. However, art. 6 was introduced as an amendment to the bill and went beyond the scope of the initial bill. Since it occurred at a late stage of legislative procedure, the NCJ was not consulted. This was a controversial decision, as indicated by two strongly worded dissenting opinions by Justices Rymarz and Zdyb who denied that there was a procedural defect, claiming that there was no firm obligation on the Parliament to consult with the NCJ.⁷⁴ In particular, one of the dissenters, Justice Zdyb, warned against elevating procedures to such a position that they will be able to justify any evil and injustice. It is important to note that the Court emphasized the narrow, procedural basis for its decision, and made it clear that professing an opinion on the substance of the law would be inconsistent with the principle of judicial restraint.⁷⁵ And since the procedural grounds were quite controversial, the Tribunal effectively avoided facing the issue of lustration openly.

It was, however, unable to avoid doing so a few months later when it had to conduct a review of the main lustration law of 11 April 1997 (described above), this time in the ex-post review process initiated by a group of deputies belonging to the post-communist Democratic League Alliance.⁷⁶ The law, as explained above, required high-level public officials to make public declarations about any collaboration with the secret police under Communism, and penalized makers of false declarations with a ban from public office for ten years. Those challenging the law claimed that it required public officials to incriminate themselves, and also that it enabled the resumption of proceedings against a person who has already been cleared of charges. On the main points, the Tribunal ruled the law constitutional: it found that the statute did not require individuals to incriminate themselves because those who admitted their past collaboration were not *eo ipso* barred from office; only those who made the false statements did. On the other

⁷³ Judgment K. 3/98 of 24 June 1998, translation in *East European Case Reporter of Constitutional Law* 6 (1999) 130-211. The ex-ante review was initiated by the President.

⁷⁴ *Id.* at 201-2 (Rymarz, J., dissenting), and at 203-11 (Zdyb, J., dissenting).

⁷⁵ *Id.* at 190.

⁷⁶ Decision K. 39/97 of 10 November 1998, *O.T.K.* (1998), Item No. 26 at 491-557.

hand, the Tribunal found inadmissible the provision allowing for the resumption of proceedings should new facts about the lustrated person's past become known: the Tribunal decided that it introduced "a state of permanent uncertainty on the part of a lustrated person ... and therefore unconstitutionally violated his/her liberty".⁷⁷ At the very least, the Tribunal suggested, there should be a set time limit for the possibility of resumption. One important aspect of this decision was a binding interpretation of the notion of "collaboration" with the security forces of the Communist state: the challengers alleged that the definition of "deliberate and secret collaboration" was unduly vague. The Tribunal provided a definition of collaboration by making it clear that a simple commitment to collaborate, even if evidenced by a person's signature, is not sufficient: what matters is whether this was followed by specific actions which constituted collaboration, such as "operational gathering of information" and conveying this to agents of the secret police.⁷⁸

This was not the end of the Constitutional Tribunal's encounters with the Polish lustration law. In June 2000 it issued a decision in the course of a "concrete review": a judge of the "lustration court" (one of the branches of the appellate court in Warsaw) asked the Tribunal two questions related to the case before him.⁷⁹ The first question concerned the November 1998 amendment to the April 1977 law, on the basis of which the lustration procedure would be carried out in respect of a public official even though he had resigned from office (before the amendment came into force) in order to avoid lustration. The Tribunal decided that continuing (or resuming) the lustration process in respect of those who resigned from office (but only before the amendment entered into force, that is, in the period when the resignation resulted in the abandonment of the lustration proceedings) was unconstitutional because it violated the principle of the citizens' trust in the state and in the law, which could be derived from the constitutional principle of the democratic *Rechtsstaat*. The violation was due to the fact that even those who resigned from their offices on the basis of April 1977 rules in order to avoid the lustration procedure could be called before the lustration court on the basis of November 1998 amendment: this "suggests that the lawmaker does not observe the principle of loyal behavior towards citizens".⁸⁰ The second question was more weighty: it concerned the "presumption of innocence" in the lustration proceedings. This went to the very heart of the lustration process as established in 1997: as a hybrid process combining the characteristics of criminal and administrative procedures, it contained elements

⁷⁷ Decision K. 39/97, OTK at 525.

⁷⁸ *Id.* at 518-19.

⁷⁹ Decision P. 3/00 of 14 June 2000, http://www.trybunal.gov.pl/OTK/teksty/_otkpdf/2000/p_03_00.pdf

⁸⁰ *Id.* at 11.

which would not be acceptable in fully fledged criminal procedure. One such element was the rule that, if the lustration court found that there was insufficient evidence of a “lustration lie”, it was supposed to discontinue the proceedings. This, according to the critics of the procedure (and as reflected in the question put to the Tribunal) suggested that the presumption of innocence was not respected in the lustration proceedings. Under such a presumption all the doubts should be interpreted to the benefit of the “defendant”, and so insufficient evidence would result in a decision by the lustration court that the lustrated person's declaration was truthful. However, proponents of the existing system argued that the lustration procedure is not a criminal procedure, and therefore the rules of criminal procedure only apply to it insofar as a given matter was not properly covered by the law on lustration. In other words, the question boiled down to whether the lustration procedure was a form of criminal procedure and was therefore governed by the general rules of fair trial. In June 2000, the Tribunal used a strategy of avoidance as to this fundamental question: it simply found that an answer to this question was not necessary in order to consider the specific case before the lustration judge who had initiated the concrete constitutional review, and as the lustration proceedings had to be dropped anyway, in consequence of the answer to the first question, the question was moot.

This was a really good – and missed – opportunity for the Constitutional Tribunal to fine-tune the shape of the lustration process by reducing the infamy to a “defendant” consequent upon an inconclusive decision by a lustration court: one of the worrying aspects of the scheme of lustration adopted in Poland was the way it combined a relatively low level of legal punishment (no criminal sanctions; no sanctions at all if a person makes a truthful declaration) with a high level of social opprobrium for those called upon to defend the truthfulness of their declarations. The “discontinuation” of proceedings for lack of sufficient evidence is hurtful to those to whom it applies: it does not vindicate their position, and permanent doubt remains over their reputation. There have been some legislative attempts to alter this scheme (by compelling the court to “acquit” a defendant in the lustration proceedings when the evidence is insufficient) but so far they have been unsuccessful.⁸¹

A similarly moderate approach to “lustration” has prevailed in Bulgaria, despite contradictory moves at times towards, and at times against, a stronger system of “purifying” certain public domains of ex-Communists. In 1992, soon after the October 1991 electoral defeat of the post-communist Bulgarian Socialist Party (BSP) and the rise to power of the liberal Union of Democratic Forces (UDF), the Bulgarian legislature passed a series of three laws applying, respectively, to the

⁸¹ For example, a draft law proposed by a centrist party Freedom Union in April 2001, see Jolanta Kroner, “Preczyzniej, z domniemaniem niewinności, bez donosu poselskiego”, *Rzeczpospolita* (Warsaw) 9 April 2001 at C1.

banking sector, to social-security entitlements, and to academia. The first “decommunisation” law would have established that officials of Communist Party organisations appointed within the last 15 years were barred from managerial positions in banks for 5 years. However, the Constitutional Court struck it down on the basis that it violated the right to work; the dissenting judges (the case was decided by a 7-4 majority) claimed that the law merely established some additional, legitimate professional qualifications for the jobs in question.⁸² The second law passed in 1992 held that time spent working in Communist Party organisations was not included in pension calculations. This law was held by the Constitutional Court to contradict the constitutional guarantee of welfare rights (Art. 51 (1)).⁸³ Finally, the third statute, the so-called “Panev law” (after its author Georgi Panev) disqualified former members of the Communist Party who held certain posts or former instructors of Marxism-Leninism from holding leading positions in scientific and educational institutions. The law caused great controversy: in the opinion of one eminent lawyer and scholar of an older generation, and thus implicated in the highly ideological scholarship of the Communist era, “it had very negative consequences [because] many distinguished scholars withdrew [from academic activities]”.⁸⁴ In fact, the law did not prevent those people from maintaining their teaching posts and from lecturing; they just could not occupy leading positions in their institutions. This law was found not unconstitutional⁸⁵ by the Constitutional Court: the Court held that there was no violation of the right to work, as the lustration laws simply set out requirements of professional standards.⁸⁶ It has been suggested that this change in reasoning (compared to the decommunisation in banking and to the pensions statute) was not due to any legal reasoning, but rather to the Court being influenced by the change in the political situation between the dates of these two cases. As Romyana Kolarova notes, “While in the first case [concerning banking] the presumption of the justices was to soften the retributive anti-communist policy of the parliamentary majority, in the second case they had to decide

⁸² Decision 8/92 of 27 July 1992, discussed in Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press: Chicago, 2000) at 188-89.

⁸³ Decision 11/92 of 29 July 1992.

⁸⁴ Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (in 1991-94), Sofia 10 May 2001. He was one of the dissenting judges in this case.

⁸⁵ Which is not to say that it was found constitutional. The Bulgarian Constitutional Court takes decisions by majority; in this particular case, six judges voted to uphold the law, five to strike it down, and one abstained. There was therefore not a sufficient majority (of seven) to strike down the law but neither was the law explicitly confirmed as constitutional.

⁸⁶ Decision 1/93 of 11 February 1993, see “Constitution Watch”, *East Europ. Constit. Rev.* 2:1 (Winter 1993), at 3.

against the backdrop of a newly formed and unstable parliamentary majority”.⁸⁷ In any event, the ‘Panev Law’ was in March 1995 repealed by Parliament (after a change in the Parliament’s composition resulting from the election in the end of 1994 when BSP won an absolute majority in the parliament).⁸⁸

As from 1997, with a new UDF parliamentary majority (won in the April 1997 elections) the Bulgarian legislature started to pass wider-reaching (but, at first, quite mild) lustration laws. In July 1997, it passed the Law on Disclosure of Secret Police Files.⁸⁹ This set up a supervisory body to examine the past of all members of Parliament and government, the President, Constitutional Court judges and other judges and prosecutors. If they were found to be listed as agents in the card-index of the former State Security apparatus or had personal files as agents in the archives of the Ministry of Interior, they could either resign, or the information would be made public. However, they could still keep their job if they were found to have collaborated. When the law came before the Constitutional Court, it was found to be *partially* constitutional.⁹⁰ Thus, members of parliament and senior government officials could be checked in such a way but not the President and the Vice-President of the Republic and Constitutional Court judges. The Court justified this on the basis of the principle of separation of powers and not on the basis of particular rights provisions.

The only serious attempt to establish a strong, Czech-style lustration system was made by the legislature in 1998 when it passed a far-reaching lustration law (the Administration Act) which would prevent high-ranking Communist and secret service officials or collaborators from obtaining high government and civil service positions for 5 years. Those already in office would have to provide a declaration, within 30 days, denying that they had held such a position/ been a collaborator. Any admission would lead to removal from office.⁹¹ However, in a decision of 21 January 1999, the Bulgarian Constitutional Court resisted this move by the legislature to expand lustration along Czech lines.⁹² The reasoning they gave for this was that it violated the rule of law, was discriminatory, and was contrary to international human rights principles. It was also held to violate the

⁸⁷ Romyana Kolarova, “Bulgaria: A Self-Restricting Court”, *East Europ. Constit. Rev.* 2:2 (Spring 1993): 48-50 at 50.

⁸⁸ “National Assembly Repasses Act Reversing Panev Law”, BBC Summary of World Broadcasts, 25 March 1995 (available in LEXIS-NEXIS)

⁸⁹ “Constitution Watch”, *East Europ. Constit. Rev.* 6:4 (Fall 1997) at 8.

⁹⁰ Decision no 14/1997 of 22 September 1997.

⁹¹ Annual Report 1999, International Helsinki Federation for Human Rights, at <http://www.ihf-hr.org/reports/ar99/ar99bul.htm>.

⁹² Decision no. 02/99 of 21 January 1999, summarised in *Bull. Const. Case-Law* 1999 (1): 28-29, BUL-1999-1-002.

equality principle and the right to work (Arts. 6 and 48 of the Constitution).⁹³ So the current legal situation is as established by the 1997 law, with the modifications introduced by Constitutional Court: members of parliament and senior government officials (but not the President or Constitutional Court judges) would have any former collaboration made public if they did not admit to it. They could, however, keep their jobs.

3. Retroactive Extensions of Statutes of Limitation

While lustration raises the question of administrative and quasi-judicial procedures to cope with the past involvement of people with the repressive apparatus, it is really not a part of criminal law as the acts which are at the center of lustration concerns – collaboration with the secret services, involvement in the propaganda of an oppressive regime and its ideology, performing leading political and administrative official roles – were not criminal under the law when they occurred. But this does not exhaust the “unfinished business” of coping with Communism’s legacy. An even more difficult issue is how to deal with those acts related to the political oppression of the ancien régime which, formally speaking, were criminal at the time they were committed. If the cases can be re-opened and tried now, they face an evidentiary problem after the elapse of such a long time. But – as the example of Poland indicates – the trials of torturers in Stalinist prisons can meet the demand for retributive justice while at the same time the symbolic, lenient punishments make sure that the revenge exacted upon the very elderly men is not too offensive to our notions of humanitarian treatment of the elderly. A more difficult – legally and morally – issue arises when the criminal acts of the past fall under the statutes of limitation (established, of course, under the old legal system) which have already expired and the only way of opening these cases would be to revoke those periods of limitation. Can a new polity attempt to prosecute time-barred crimes committed under predecessor regimes?

This, let us note, is a matter different from a retrospective determination that certain acts, while formally legal under the Communist regime, should be now deemed illegal *ex post facto*. The element of retroactivity is very minor in the case of reopening of statutes of limitations: it does frustrate the expectation of an offender that once the specific period of limitation has run the course, he or she has nothing to fear from the law, and indeed does so *ex post*. But the truly objectionable aspect of retroactivity which consists in the violation of the principle *nulla poena sine lege* is absent here. This is a point to which I will return below.

The two main contrasting approaches to the question of statutes of limitation in CEE are exemplified by the Czech and Hungarian law. Consistently with their

⁹³ “Constitution Watch”, *East Europ. Constit. Rev.* 8:1/2 (Winter/Spring 1999) at 7.

already noted differences in approach to lustration, these two legal systems also show distinctly different attitudes to the dilemma of dispensing material justice versus observing strict legality. In the Czech Republic, in July 1993, the Law on the Lawlessness of the Communist Regime and Resistance to It stated that the Communist regime was illegitimate and that all those who supported it (“[t]hose implementing the communist regime from their positions of officials, organizers and supporters at the level of political and ideological activity”) are jointly responsible for the crimes committed by it. This law, apart from declaring the communist regime “criminal and illegitimate”, also lifted the statute of limitation for criminal offences committed between 1948 and 1989 and not prosecuted for political reasons. It also allowed for the reconsideration of criminal convictions of the Communist period.

The Czech Constitutional Court upheld the 1993 law.⁹⁴ (I have already discussed an aspect of this decision above, in Part I of this working paper). The Court criticized the idea of constitutional neutrality with regard to values, which it associated with positivism and with a “legalistic conception of political legitimacy”; in contrast, the current Czech constitution is not neutral and merely procedural but “incorporated into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society”.⁹⁵ There is no contradiction – it said – in the fact that old laws are now re-interpreted in the light of new democratic values. At this point, the Court engaged in a discussion of the principles of the rule of law (or, in its language, the state based on law), and refused to accept a formal definition of legality, merging legality with legitimacy, the latter being contingent upon the democratic character of the state (“A political regime is legitimate if, on the whole, it is accepted by the majority of citizens”)⁹⁶; hence, the fact that some pre-1990 laws have continued in force cannot be said to endow the old regime with legitimacy: “even while there is continuity of ‘old laws’ there is a discontinuity in values from the ‘old regime’”.⁹⁷ At this point, and crucially from the point of view of the statutes of limitations, the Court introduced the evidence that the Communist regime did not comply even with its own laws: this proved that the constitutional (under the Communist-era Constitution) principles of universal observance of the law “became fictional and

⁹⁴ Decision 19/93 of 21 December 1993, reprinted as “Judgment of the Constitutional Court of the Czech Republic”, *Parker Sch. J.E. Eur. L.* 1 (1994) 363-91; see also comment by Herman Schwartz, “The Czech Constitutional Court Decision on the Illegitimacy of the Communist Regime”, *Parker Sch. J.E. Eur. L.* 1 (1994) 392-8. See also the same translation in *East European Case Reporter* 4 (1997): 149-174. The references below are to the latter source.

⁹⁵ *Id.* at 157.

⁹⁶ *Id.* at 158.

⁹⁷ *Id.* at 157.

hollow whenever the [Communist] party recognized such to be advantageous for its political interests”.⁹⁸

This is correct and convincing but this line of argument sits uneasily with the overall theme of the decision that the regime was, on the whole, unlawful (*because illegitimate because it exercised power without majority approval*). For if the illegality of the system as a whole is asserted, then the non-compliance of the illegitimate system with its own laws is beyond the point; in fact, it weakens the force of the argument (aimed, as it is, at the question of statutes of limitations) because it suggests that, had the regime complied with its own laws (their illegitimacy notwithstanding) the suspension of statutes of limitations would not be justified. In a way, it is an example of a situation where having two reasons makes the argument weaker than if there was only one.⁹⁹ On this basis, the suspension of the limitation period was held to be constitutional because, in the opinion of the Constitutional Court, during the period of Communist rule, the law was simply a tool of the regime and thus limitation could not be said to have actually been running. In fact, the Court’s reasoning is quite complex at this point: it asserts that it does not suspend the operation of the limitation period but rather states that, “for criminal acts, which on political grounds were not prosecuted by the regime then in power, [the statute] declares the period of time during which the limitation was not able to run, even though it should have run”.¹⁰⁰ The anchor for this reasoning is in the Criminal Code’s provision that the periods of time when it was not possible to bring an offender before a court “due to legal impediments” do not count as part of the period of limitation; the statute simply declared that the Communist era was precisely such a period, as far as “criminal acts, which on political grounds were not prosecuted by the regime then in power”¹⁰¹ are concerned.

In other words: the Court is suggesting that it views the statute not as introducing an impediment to the running of the limitation period but rather as deeming the institution of limitation fictional in the period of lawlessness. This is an ingenious argument but is it convincing? It may be said that it merely re-characterizes the suspension of the statute of limitations in order to render it more palatable; after all, the effect of the strategy adopted by the Court is exactly the same as an ex-post suspension of statutes of limitation. As for the problem of retroactivity, the Court held that this law did not infringe constitutional guarantees against the retroactive application of laws, because a statute of limitations is not a law but

⁹⁸ Id. at 160.

⁹⁹ For a similar criticism of this aspect of the Court’s decision by a scholar otherwise supportive of the Court’s jurisprudence, see Pribán, *supra* note 28 at 28.

¹⁰⁰ Decision 19/93, *supra* note 103 at 163.

¹⁰¹ Id. at 163.

merely a procedural requirement; as such, it is not governed by the Charter of Fundamental Rights. What *is* banned by the principle of non-retroactivity is the subsequent designation of criminality of certain acts, or imposition of a higher punishment than the one that was in force at the time when a crime was committed – but this is clearly not the case with the statute of limitations regulation.¹⁰²

The Hungarian experience with statutes of limitations was quite different from the Czech one. For one thing, the Hungarian legislature created a whole series of limitations laws for the simple reason that the Constitutional Court repeatedly declared the ones just passed to be unconstitutional. At first, the legislature seemed to ignore the Constitutional Court's reasoning in the creation of new laws, but in 1993 it started to take account of the jurisprudence of the Court, and tried to structure its laws accordingly.

In 1991, the Parliament passed a law (the so-called Zetenyi-Takacs Act, after its drafters) stating that, between 1944 and 1990, limitation periods would not be considered to have run for the crimes of treason and manslaughter, where such crimes were not prosecuted for political reasons.¹⁰³ The law was not extremely wide, as it only covered acts that were crimes at the time they were committed, and only those cases where there had been no trial due to political reasons (*not* where there was a trial but also an acquittal, on political grounds). The President refused to sign the law and sent it to the Constitutional Court which then declared the 1991 law to be unconstitutional.¹⁰⁴ In a decision to which I will be referring below as the *Zetenyi* decision (after the abbreviated name of the law which was struck down), it did so partly because of the unacceptable vagueness in the law, with 'political reasons' being a term that is not capable of one clear definition to cover a period over the past fifty years. More fundamentally, it based its decision on its conception of the state based on the rule of law. It said that in a constitutional state, "[n]ot only must the legal provisions and the operation of state organs comply strictly with the Constitution but the Constitution's values and its conceptual culture must permeate the whole of society".¹⁰⁵ Since the transition to democracy occurred on the basis of legality, no distinction can be made by the Court between laws enacted before and after the new Constitution; every law must therefore conform to the Constitution and every law must be

¹⁰² Id. at 166-69.

¹⁰³ Law of November 4th 1991 on the "Right to Prosecute Serious Criminal Offences Committed Between 21 December 1944 and 2 May 1990 That Had Not Been Prosecuted For Political Reasons" in *Journal of Constitutional Law in Eastern and Central Europe* 1(1994): 129-157.

¹⁰⁴ Constitutional Court decision of 5 March 1992, no. 11/1992; reproduced in Solyom & Brunner, *supra* note 21 at 214-18.

¹⁰⁵ Id. at 219.

reviewed in the same way. On this basis, the Court applied the principle of legal certainty – as a fundamental requirement of the rule of law – to the statute of limitations act, and found the law deficient on this score; the law, according to the Court, was a form of retroactive legislation, thus offending against the rule of law. The Court declined a possibility of appealing to “the unique historical circumstances of the transition”¹⁰⁶ and refused to suspend constitutional requirements on the basis of the exceptional nature of the circumstances which warranted – in the eyes of the drafters – this law.

In consequence of this invalidation, the Parliament adopted, in February 1993, an “authoritative resolution” (an instrument used to interpret other laws) stating that the period 1944 to 1989 should not be included in the time used to calculate limitation periods. In addition, at the same time, the Criminal Procedure Act 1973 was amended to state that public prosecutors must prosecute in certain situations, even if the limitation period has run its course.¹⁰⁷ The authoritative resolution of parliament and the amendment to the Criminal Procedure Act were both declared unconstitutional by the Constitutional Court.¹⁰⁸ It did this, in addition to procedural grounds, for the same reasons as in the decision described above.

In the same month the legislature also created a law entitled “Procedures Concerning certain Crimes Committed During the 1956 Revolution”, which stated that war crimes and crimes against humanity, being crimes under international law, do not have a limitation period (they are outside the scope of domestically-defined crimes). Thus, on the basis of this law, past crimes could be prosecuted. This law interpreted the events of 1956 as war crimes and crimes against humanity, and made specific reference to Geneva Convention 1949 (treatment of civilians during war) and New York Convention 1968 about war crimes and crimes against humanity which provided for no statutes of limitations.

President Goncz again sent this law to the Constitutional Court, and the Court struck down some parts of the law but upheld others.¹⁰⁹ It held that, generally speaking, statutes of limitations cannot be extended. However, in two situations this *could* occur: (1) Where there was no statute of limitations in existence at the time the crime was committed, or (2) where it related to a crime against humanity or a war crime, covered by international law which had no statute of limitations. The Court justified this view on the basis that Art. 7 of the Constitution states that Hungary must respect the rules of international law. In addition, crimes against humanity and war crimes are seen as being so serious that they can be treated apart from other crimes. Since Hungary was a signatory to an international

¹⁰⁶ Id. at 221.

¹⁰⁷ Halmai and Scheppele, *supra* note 69 at 164-165.

¹⁰⁸ Decisions 41/1993 (VI.30)Abh and 42/1993 (VI.30)Abh.

¹⁰⁹ Decision 53/1993 (X.13) Abh.

convention (the New York Convention) which did not lay down any statutes of limitation for such crimes, it was reasonable to not apply limitation periods in Hungary. That is, prosecutions could be brought under international law, rather than domestic law. However, the Constitutional Court invalidated an article of the law under review which referred exclusively to crimes defined by domestic law. The Court also instructed Parliament to change the law to conform with its decision and, for example, define the crimes it covered in the same way that international law defines crimes against humanity and war crimes. The law entered into force in October 1993.

These two approaches: the Czech and the Hungarian one, put in stark relief the question of the degree to which the principle of legality should control considerations of substantive justice. The Hungarian approach (as exemplified by the *Zetenyi* decision of 5 March 1992) gives strong priority to the formal principle of legality, resulting in the rejection of retrospective changes to the statutes of limitation, contrary to the decision of the Parliament to renew the expired period. It is rather hard to see what values underlying the principle of legality support such a conclusion. As said above, the non-retroactivity principle in criminal law protects the interests of a defendant in not facing consequences which he or she could not anticipate at the time of planning an act. But this concern is absent from alterations to statutes of limitations: we are not dealing here with acts which did not constitute crimes at the time of their commission, but rather with crimes which went unpunished because of a combination of official tolerance of such acts with the state's decision on the period of limitation. The period of limitation did not substantially weigh on the offender's mind when he or she undertook to commit the crime in question; rather, it was the anticipation of impunity that was decisive. So there is no ex-post facto frustration of the offender's expectations; no unfair change of the rules by the state. The only aspect of retroactivity which may seem morally offensive here is "a vested interest in repose, on which an offender is entitled to rely"¹¹⁰ once the limitation period has expired. But is such an interest justifiable and legitimate? According to Stephen Schulhofer, "a wrongdoer cannot reasonably claim a right to rely on stated limitation periods in planning his criminal activities, so extensions enacted before the limitation period expires can fairly be applied to offenses committed beforehand".¹¹¹ But if the first part of that sentence seems compelling (as it does), the second part does not necessarily follow: why would extensions enacted *after* the limitation period expires be in any different relationship to the wrongdoer's right (or a lack thereof) to rely on the limitation periods as known at the time of the crime? After all, if the offender indeed factored knowledge about the statutes

¹¹⁰ Stephen J. Schulhofer, comments in the symposium "Dilemmas of Justice", *East Europ. Constit. Rev.* 1:2 (Summer 1992): 17-22 at 18.

¹¹¹ *Id.* at 18.

of limitations into his or her decision whether to commit a crime (a highly unlikely proposition, and no ground for a legitimate reliance anyway), then it does not really matter whether the change in the period will come before or after the expiry of the period as known at the time of the crime. From the point of view of the main concerns which usually argue against retroactive criminal justice, there does not seem to be any specially relevant difference between the reinstatement of expired statutes of limitations and the extension of the non-expired ones, and both seem to present rather mild, indirect and relatively unobjectionable forms of retroactivity.

To be sure, there are also other arguments about statutes of limitation than those related to reliance by the offender (the evidentiary problems exacerbated with the passage of time, the criminal's changed personality which may allow us to see him or her as, morally speaking, a different person, etc), and yet they do not undermine the rightness of retrospective changes in statutes of limitations; rather, they vindicate the very idea of statutes of limitations, and also the proposition that they should not be excessively long. These are also quite contingent arguments and the courts usually have opportunities to rely in their judgments on insufficient evidence or the changed moral character of the offender. An argument which definitely *is* effective against ex-post-facto renewals of an expired statute of limitation is the one about "a vested interest in repose" but one wonders how weighty the legitimacy of this interest is as compared to the countervailing arguments in favor of the reopening of such periods when the failure to prosecute the offences was due to deliberate state policy of tolerating politically-motivated violations of individual rights.

This is an important consideration in the case of post-communist legal systems: they are confronted with the time-barred unpunished offences of the past not for the usual reasons why some crimes go unpunished elsewhere (weakness and inefficiency of the police, prosecutorial and judicial institutions) but for the specific reason that those crimes were inspired, mandated and tolerated by the state, as a result of which limitation periods were allowed to expire. The argument that limitation periods should be unchangeable advanced the Hungarian Constitutional Court does not ring quite true: the Court explains that "[t]he statute of limitations in the criminal law guarantees lawful accountability for criminal liability by imposing a temporal restriction on the exercise of the State's punitive powers. Failure to apprehend [the criminal] or the dereliction of duties by the authorities which exercise the punitive powers of the State is a risk borne by the State".¹¹² But the "guarantee" which the Court applies has no relevance here because the "failure to apprehend" and the "dereliction of duties" were part of the purposeful policy of the Communist state, and therefore a respect for statutes of limitations cannot, in this case, perform the role of an incentive for the State to

¹¹² Decision 11/1992 of 5 March 1992 reproduced in Sólyom & Brunner, *supra* note 21 at 223.

act lawfully in its exercise of penal functions. The Court stretches the artificiality of its argument to its limits when it talks about “a risk borne by the State” which has failed to prosecute the criminals and allowed the statute of limitations to pass, as if the “risk” in question was a matter of negligent State behavior which must then pay the price of its negligence by letting some criminals go scot-free. Here the non-identity of the “State” before and after the transition is most crucially relevant, and the fiction of continuity at its most absurd. For on the part of the Communist state it was not a matter of a “risk” but of deliberate and lawless protection of offenders, while on the part of the successor state the “price” in the form of non-prosecution is unrelated to *its* negligent criminal policy.

There is, admittedly, something impressive and respectable about the Hungarian Constitutional Court trying hard to confine its treatment of the past within the strict limits of legality, and to make sure that it does not condone parliamentary acts which may be seen to violate the rule of law. The Court goes a very long way in its *Zetenyi* decision to emphasize that precisely what distinguishes the current notion of constitutionalism from the shameful past is a strict adherence to various precepts of legality, including the observance of legal certainty, even if in some circumstances the ex-communists – those very people who violated the rule of law in the past – were to benefit from the principle of legality today. But it is not clear that in this particular case its interference with the parliamentary statute was justified, and whether the balance between legality and substantive justice has been struck wisely. One can understand, and applaud, the general strategy of behaving as if the exceptional character of the transitional period did not matter here, and as if the usual standards of a mature constitutional democracy were to be scrupulously applied.¹¹³ But the “as if” mode betrays the weakness of this strategy in this particular case because the matter *was* exceptional, and the specific reason for the expiry of statutes of limitation for some particular crimes committed in the past weighs upon the moral and political characterization of the parliament’s decision to reopen those periods. This specific reason – a lawless and reprehensible refusal by the old regime to punish those who committed some of the most severe crimes *as defined under the law valid at the time* – seems to effectively vitiate the general moral reprobation for various forms of retroactivity in criminal law. In a word, it would seem perverse if the crimes committed in the past were to go unpunished solely because those who committed them were part of the system which protected them, and made sure that, as long as the system lasted, those crimes would remain unpunished.

The Czech approach seems more compelling: when statutes of limitations were part of a deliberate practice of unlawfulness, it is not a requirement of legality that those limitations be respected now. Note that it does not apply to the law across the board: it is not the case that whatever was done in the name of law

¹¹³ See *id.*, especially at 221-22.

under the Communist period should be now disregarded; in fact, the arguments for a generalized principle of continuity are very strong. The transition to democracy in CEE occurred in the context of a peaceful and negotiated settlement within (by-and-large) old legal rules; there was no revolutionary overturn which would warrant a radical legal rupture. But continuity rationales are stronger in some cases than others, and in the case of statutes of limitations they seem to be singularly weak. In this regard, the Czech Constitutional Court's characterization of changes in periods of limitations as a procedural rather than a substantive issue is quite proper; for the reasons mentioned above, the questions related to the statute of limitations do not raise the fundamental issue of unfairness to the offender. As Eric Posner and Adrian Vermeule observe, such changes in the statutes of limitations "only apply to those who have, after all, violated underlying substantive law that was in effect when they violated it; usually that substantive law will have moral content, as opposed to being a strictly regulatory offense".¹¹⁴

The defect that the Hungarian Court found in the reinstatement of statutes of limitations is highly questionable *both* because there was no clear prohibition in the Hungarian Constitution of retrospective laws (the whole constitutional textual basis of the Court's reasoning is in the concept of the rule of law, from which the Court inferred the principle of legal certainty, from which it inferred the ban on retroactivity) *and* because the retrospective nature of the reinstatement of statutes of limitations is highly uncertain, if one considers the principal rationales underlying the general abhorrence of retroactivity in criminal law (as argued above). That is why the intervention of the Court in the parliamentary action aimed at bringing the perpetrators of some of the crimes to justice can be seen as an arrogation of the power, by the Court, to dictate the terms of the transition, under the guise of a self-righteous legalism and commitment to the rule of law. For this reason perhaps, the decision was so broadly applauded by the Western observers and commentators:¹¹⁵ they could identify with the Court speaking the idiom of liberal constitutionalism and the "civilized" rule of law, as opposed to the apparently revengeful and populist parliament. But there is nothing canonical about this particular interpretation of the rule of law, and by denying the Parliament the authority to define the parameters of transition – the proportions of continuity and discontinuity with old legal system – the Court opted for a highly arbitrary interpretation of the rule of law to prevail over politically defined understandings of the right mix of continuity and discontinuity. Ruti Teitel put it well: "the statute-of-limitations decision [by the Hungarian Court] represents a controversial power grab by the court. It is a brilliant power grab in that it

¹¹⁴ Posner & Vermeule, *supra* note 1 at 28.

¹¹⁵ See, e.g., Spencer Zifcak, "Hungary's Remarkable, Radical, Constitutional Court", *Journal of Const. Law in Eastern and Central Europe* 3 (1996): 1-56 at 6-9.

appears to represent a victory for the rule of law”.¹¹⁶ Very early after the fall of Communism in Hungary (remember, this was a March 1992 judgment) the Constitutional Court successfully – but controversially – challenged the Parliament’s power to define the terms on which the polity handled the darkest legacy of the immediate past: by repeating a mantra of the rule of law (without a textual anchor in the constitution, and under a highly arbitrary interpretation of the concept) it established itself as the ultimate interpreter of the legal parameters of the transition. In the words of Teitel again: “The [1992] case [on statutes of limitations] stands for the proposition that the authority to assess the legality of the prior regime does not lie with Parliament, but instead with the Constitutional Court”.¹¹⁷ This, rather than the details of the argument, is what fundamentally distinguishes the Hungarian approach from the approach by the Czech Constitutional Court, which, in a decision handed down a year after its Hungarian counterpart (and discussed above), expresses a proper deference to the political judgment about the (il-)legality of the former regime and the degree of (dis)continuity between the Communist system and its successor.

Michel Rosenfeld – who applauds the Hungarian decision – has articulated the central issue here in terms of the following paradox: “past injustices and the flouting of the rule of law may be redressed through application of a retroactivity law, but since the determination of what constitutes a ‘political reason’ itself depends on political criteria, use of a retroactivity law seems bound to undermine adherence to the rule of law”.¹¹⁸ True, the Hungarian law under scrutiny in that decision provided that the reopening of the statute of limitations would apply to those crimes which have not been prosecuted under the Communist regime “for political reasons”. But I am not sure why, in itself, this proviso should render the law inconsistent with the rule of law; the rule of law *would* be endangered if the political criteria were to apply to deciding whether the act constituted a crime, or what punishment should be meted out. But the reopening of the statute of limitations for crimes not prosecuted in the past uses the ‘political criteria’ only in a way which tracks the political criteria for not prosecuting the crimes in the past. It is therefore not the sort of infusion of political criteria into legal consideration which is particularly offensive to the principle of legality; rather, it merely identifies the crimes which should have been punished but (for wrongful reasons), were not.

This is not to say that the Hungarian law (the *Zetenyi* act) was well drafted, and that in its entirety it complied with the rules of legality. Note that the law applied

¹¹⁶ Ruti Teitel, “Paradoxes in the Revolution of the Rule of Law”, *Yale Journal of International Law* 19 (1994): 239-47 at 244-45.

¹¹⁷ *Id.* at 246.

¹¹⁸ Michel Rosenfeld, comments in the symposium “Dilemmas of Justice”, *supra* note 110 at 20.

only to two types of crimes which were not, even though they should have been, prosecuted: treason and homicide. Ruti Teitel was correct to observe that the re-imposition of liability for treason (in contrast to liability for murder) actually might offend against the principle of *nulla poena sine lege* as the notion of treason under the Communist era was significantly different from the current one in Hungary, and so those who would be punished now for treason as interpreted in democratic Hungary would in fact be liable for an act which was not unlawful in the time of its commission. One can, no doubt, disagree about how far this argument goes: whether “treason” (as defined under Communism) remains exactly the same “concept” then and now, while the “conception” of what particular behavior actually constitutes treason changed – and there would be precedents for such an approach: for instance, the criminal trials in post-Second World War France against French citizens were based on such pre-war criminal prohibitions as those applying to treason or to acting in conjunction with an enemy power. However, there is something problematic about it from the point of view of the *nulla poena* maxim: what matters is whether a person committing a particular act had, at that time, the knowledge of its illegality. Those Hungarians who had collaborated with the USSR in a treacherous (from today’s perspective) way most probably had no idea that what they were doing was in fact an act of treason: it was an act officially and authoritatively condoned by the state. But those who committed murders of political prisoners could not have thought that their acts were “legal”; rather, they knew that they enjoyed impunity for their crimes. The state never authoritatively and officially announced that the torturing of a political enemy to death is a legal and right act; rather, they denied that this is what took place. This difference – which may be a difference of degree only (as it relies on the degree to which particular behavior is officially condoned as legally correct) – is the one between legality and illegality-cum-impunity, and it informs the difference between those instances of reopening the statutes of limitations which do, and those which do not, violate the principle of punishing only for those actions which were known to be illegal at the time of their commission.

4. Conclusions: Transitional Justice and Constitutional Continuity

As is clear from the above discussion, the “unfinished business” of having to deal with the immediate Communist past elicited rather varying responses in CEE. Of the two main issues discussed here: lustration/decommunisation and punishment for crimes already covered by the statutes of limitations, the moral and political dilemmas raised by these matters yield different models and approaches. On the lustration and decommunisation issue, the main dilemma identified here was the clash between the socially dominant concept of retributive justice (demanding that those involved in the running of the Communist system, and in particular those who had discredited themselves by collaborating with the dreaded secret police, be removed from prominent public positions in the new democratic polity,

for some time at least) and the official, legal-political rationale given to the lustration and decommunisation laws which was future-oriented, consequentialist and prudential in its nature. While the latter types of argument – about the need to protect the democratic system against those who lack the necessary qualifications to manage it, or are liable to dangerous blackmail – constituted the legitimate pattern of “public reason” provided for such laws, the shape of the laws was largely over-inclusive from the point of view of this rationale and thus revealed the past-oriented, retributive-justice rationale.

In the end, lustration and decommunisation was undertaken on a reasonably wide scale only in the GDR (where its success was made possible by the special case of absorption of the whole defunct State into the new German statehood, with its Western part playing the role of collective judge over its Eastern, Communism-tainted brethren) and in the Czech Republic. The success of lustration there – compared to all other CEE states where, as was described above, the screening of public figures has been undertaken in a very feeble way, and focused mainly on the truth in admission rather than the consequences for past misbehavior – deserves some attention. There have been, no doubt, serious political bases for such an outcome: a political combination of the relative harshness of the pre-transition Communist regime (much harsher than, say, in Hungary or in Poland), a grudging complicity of the old Communist elite in the process of the transition itself (distinguishing it from a largely bona-fide, collaborative approach leading to round tables in Poland and Hungary), and the relative weakness of Communists (or reformed Communists) in the immediate post-transition constellation when the legal shape of lustration and decommunisation took place. But these factors cannot explain everything: the first two factors were almost identically present in Slovakia (for obvious reasons), Romania and Bulgaria. An important stimulus for the strong lustration system in Czech Republic was provided by the attitude of the Constitutional Court which was extremely deferential towards the legislature’s harsh lustration and decommunisation approaches, and limited itself basically to fine-tuning the lustration system (for instance, by excluding the disqualification of former *candidates* for collaboration, largely on the basis that their files were unreliable). The composition of the Czechoslovak Constitutional Court, and then its successor court in Czech Republic (both elected by the anti-Communist parliamentary majorities), was a guarantee to the legislature that they would not interfere actively with the lustration and decommunisation systems. The line of argument adopted by the Court in defending the laws – based on the political if not legal narrative of discontinuity, and of “lawlessness” of the Communist regime – allowed it to undertake very minimalist scrutiny of the laws aimed at purging the present from the remnants of the past, and to tolerate a discrepancy between the consequentialist rationale of the lustration-cum-decommunisation laws and their sweeping reach which indicated retributivist motives at work in the legislation.

In contrast, the lustration practices adopted in Poland, Hungary and other states of the region were much more timid and limited, in the ways described above. They can be seen much more as symbolic measures emphasizing the value of transparency more than of purge (though the scale of the actual purge which occurred in Czech Republic must not be exaggerated, either);¹¹⁹ in Hungary and Poland, in slightly different ways, the point was to elicit statements from public figures about their past rather than remove those who had been implicated in discreditable activities from their current positions or to disqualify them from applying/running for such positions. This was partly for self-serving reasons (the impact of ex-Communists upon the law-making in the transition period) and partly in order to emphasize the non-revolutionary nature of the transition which necessitated a degree of continuity, including at the personnel level. The discourse of continuity – propounded not least by Constitutional Courts – made it very difficult to draw sharp distinctions between different candidates for public offices based on the past involvement of the candidates.

Similarly, with regard to criminal liability for political crimes committed by the regime in the past, a fundamental line can be drawn between those constitutional systems which have adopted a dominant narrative of a sharp break with the past – and hence, no need to be bound by the legal commitments reflected in the statutes of limitations used as self-serving protections of the *ancien régime* – and those systems which asserted continuity and insisted on the strict rule of law and respect for statutes of limitations. The latter were allowed to be upset as a result of international human-rights commitments (as in Hungary) or constitutional prohibitions on statutes of limitations for war crimes and crimes against humanity (as in Poland) but not as a result of the legislative restoration of liability for crimes for which the statutes of limitations have already expired (as in Czech Republic). The distinction is in the understanding of the degree of constitutional continuity with the past, and also in the institutional division of roles played by political institutions and the constitutional court in defining the right mix of continuity and discontinuity. An arrogation, by the constitutional court, of the supreme defining position about this crucial aspect of transition, became in Hungary the starting point for a broader grab for power in which the Court freely translated major political issues into constitutional ones, and provided its own philosophy of the true meaning of the “invisible constitution” in order to control the way in which the polity handled the unfinished business of the immediate past.

The very concept of legal (dis-)continuity is a troubling and ambiguous one, and to present the matter as a simple dichotomy tends to blur rather than clarify the

¹¹⁹ It is assessed that only a few hundred Czechs lost their jobs because of lustration, and that about five percent of the members of parliament were forced to resign, see Tucker *supra* note 13 at 84.

real dilemmas raised by the legacy of the authoritarian system. It is not only because there is always a choice of the *degree* of continuity (rather than a simple option for continuity or discontinuity) but also, more fundamentally, because even a general commitment to legal continuity does not dictate any particular choice of a specific legal commitment undertaken by the precedent regime which should be observed meticulously by the successor regime. Consider this observation from a book by Carlos Nino centering upon post-authoritarian transitions in Latin America: “when the new democratic regime is legally continuous with the old authoritarian one and the human rights violations to be tried were legally protected at the time of their commission or afterwards (say, by an amnesty law), the principles against ex post facto reversal of that legal protection create formidable obstacles to retroactive justice”.¹²⁰ This short sentence hides a number of dilemmas, none of which is conclusively resolved by the initial assumption of legal continuity of the new democratic regime with the old democratic one. Here are the most fundamental two dilemmas:

- (1) To what extent were the violations of human rights, by the authoritarian regime, indeed protected at the time of their commission? As we have seen earlier, many of the crimes committed (especially in the Stalinist period) by perpetrators within the Communist system were nominally prohibited but de facto tolerated, encouraged and mandated by the system. As a result, the act of punishing a torturer in a Stalinist prison now is not a case of retroactive justice but rather takes seriously the nominal criminal code in force then, and applies it *à la lettre*, though subject to a delay caused by the failure of the Communist law to operate according to its textual commitments. In addition, this characterisation abstracts from other sources of preexisting law which can now be acknowledged as having been in operation then: international human rights law, constitutional law with its abstract (though unimplemented at the time) commitments to human rights, perhaps even (most controversially) universal natural law. While under the old doctrine, none of these sources affected the actual valid law at the time, under today’s understanding these higher orders of law vitiate much of the lower-level law which could be invoked by the perpetrators of the crimes under the *ancien régime*, thus reducing the charge of retroactivity of justice. They do not eliminate retroactivity altogether (because *today’s* interpretation is brought to bear on *past* actions) but they reduce it significantly (because these higher legal orders are thought to have been in force when the crimes in question were committed). One particular legal form of such partial reduction of retroactivity is by means of interpretive statutes by which legislatures may declare that the preexisting positive laws, properly understood, never actually

¹²⁰ Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press: New Haven, 1996) at 120.

authorized the relevant acts. Such an instrument of minimizing the retroactivity of justice was adopted, for example, in Belgium after the 2nd World War where the provisions against treason (valid throughout the Nazi occupation) were said to include not only military activities but also less direct forms of collaboration;¹²¹ this is precisely what the Hungarian legislature attempted to achieve – unsuccessfully, due to the Constitutional Court’s intervention discussed above – when it issued in February 1993 an “authoritative resolution” stating that the period 1944 to 1989 should not be included in the time used to calculate limitation periods.

- (2) Nino talks about the situation where an amnesty protects earlier crimes; a consecutive reversal of the amnesty would constitute an ex-post-facto (and thus, questionable) removal of legal protection. To start with, an amnesty is itself a retroactive act so there is an element of retroactivity in any event; an act of reversal of the amnesty would erect one case of retroactivity against another. To be sure, lenient retroactivity (amnesty) is less problematic than harsh retroactivity (reversal of amnesty) but the point is, the option of not relying upon retroactivity at all is simply not available to us in such cases. Further, it makes a crucial difference whether we face an amnesty conferred upon the perpetrators by the ancien régime itself, a “self-amnesty”, so to speak (as was the case of the Argentine military in 1983),¹²² or an amnesty established during the process of transition itself, as a philosophical formula of dealing with the past by the polity as a whole (as in the Spanish post-Franco transition or in South African post-apartheid transition). The force of the latter commitment is naturally much higher than the former one; the former one is better seen as an attempt of unilateral self-protection by those who fear imminent retribution, and there is no special moral or philosophical reason why the community as a whole should respect such self-serving action, even if formally speaking it was cloaked in the form of a valid law. There may be, admittedly, some good pragmatic reasons for non-prosecution of the perpetrators of past crimes but these reasons do not derive their force from the concept of legal continuity of the present regime with the old one. Now the cases of statutes of limitation which protected crimes committed during the Hungarian revolution of 1956 by the Communist regime can be analogized to the amnesty conferred upon itself by the authoritarian regime: by non-prosecution of these crimes, and by allowing the crimes to obtain the privilege of limitations, the old regime acted similarly to the ex-post facto conferral of the benefits of amnesty upon them. Consistently with what has

¹²¹ Posner & Vermeule, *supra* note 1 at 26.

¹²² For an account, see Carlos H. Acuña & Catalina Smulovitz, “Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts”, in McAdams, *supra* note 69: 93-122 at 102.

just been suggested, there is no special, conclusive obligation deriving from the principle of legal continuity to meticulously observe those privileges, and no obvious reason why a prosecution would be an outrage to the principle of non-retroactivity of justice.

One way of glossing over the ambiguity and complexity of the concept of (dis-) continuity has been to assert that the principle of legality requires a strong sense of continuity precisely in order to emphasize that the democratic, legality-based regime is not replicating the faults of the prior system which paid lip service to, but has not observed the principle of, legality – and the consequent principle of legal certainty – at all. This rationale emphasizes the virtue of the current system by insisting on the contrast of its character with the vices of the former one, even if it commits the present one to respect the commitments of the old one. In the words of one theorist (who does not necessarily endorse this approach): “The justification for adhering to prior law in the transitional moment is that under prior repressive rule, adjudication failed to adhere to settled law. On the positivist view, transformative adjudication that seeks to ‘undo’ the effect of notions of legality supporting tyrannical rule would imply adherence to prior settled law”.¹²³ No doubt, the self-righteous rhetoric of behaving better than one's predecessors (along the lines of: “we believe in the rule of law so we will observe the settled entitlements even if they were conferred by our authoritarian predecessors upon themselves”) has played an important role in the argument of post-Communist constitutional courts (especially, in the Hungarian Court's *Zetenyi* decision discussed above)¹²⁴ but the implication of adherence to prior settled law is highly problematic. It is a non sequitur to say that if a new legal system wants to observe the rules of legality, it must adhere to prior settled law, no matter what its content is. The range of options is much broader than either full observance of all the entitlement-conferring rules of the predecessor system or a revolutionary rupture with the legal past.

The very nature of constitutional change in CEE reveals its partly non-continuous character: these countries have not followed fully the routine path of constitutional amendment as written into the old Communist constitutions, but rather found their anchors in extra-constitutional processes: in the Round Table negotiations in Poland and Hungary, in the restitution of independence from the USSR (formally expressed in Declarations of Sovereignty – an extra-constitutional instrument par excellence) and restoration of pre-Communist constitutions in Baltic states, in the liberation war on the part of Slovenia and separation from Yugoslavia, in the violent overthrow of the regime in Romania, etc. Consequently, at a macro-level, the idea of full constitutional continuity was

¹²³ Teitel, *supra* note 14 at 14.

¹²⁴ Constitutional Court decision of 5 March 1992, no. 11/1992, see notes 113-115 *supra* and the accompanying text.

eroded from the outset. At a micro-level, the notion of “vested rights” has not been fully adhered to either: the fundamental transformation of the socio-economic system meant that mechanical adherence to previously vested rights would be neither feasible nor fair. Thus in Poland, the Constitutional Tribunal derived (in a fashion characteristic to the other CEE constitutional courts) the notion of “vested rights” from the “democratic state based on law”. In claiming that upholding them is dictated by the related principles of (1) trust of the citizen towards the state, and (2) non-retrospectivity, the Constitutional Tribunal established at the same time that they were not absolute but subordinate to the principle of social justice. Accordingly, the Tribunal drew a distinction between those vested rights which deserve protection and those that were acquired unfairly or which can be extinguished if their protection would lead to unjust privileges to certain groups, in a changed economic situation.¹²⁵ This indicates that the legislatures and constitutional courts have been from the outset dispensing a complex mix of continuity and discontinuity, and therefore the principles of legality and certainty never conclusively dictated complete adherence to the specific laws settled under the prior regime. It was always a matter of *choice* even if the availability of choice was often denied by the self-righteous rhetoric of scrupulous legality in contrast to the misbehavior of the predecessors.

All this shows the extraordinary, special nature of the issues that transitional constitutional systems are faced with. This bring me back to the article by Posner and Vermeule with which I began this working paper. In analogizing “transitional justice” to various routine problems faced by day-to-day operations of the American legal justice Posner and Vermeule greatly facilitate the task for themselves by stretching the very concept of “transition” so broadly as to encompass virtually any change, including change in the law itself, so that they point at such American “transitions” as the “difficult transitions from one government to another, such as the contested elections of 1800, 1876 and 2000; transitions created by changes in criminal and civil law or procedure . . . and quotidian changes in economic and social regulation and taxation, or in common-law entitlements. All of these transitions might, and many did, pose questions of retroactivity, personnel management and compensation usefully analogous to those arising after regime transitions”.¹²⁶ They did not. It is trivial to say that any major change, whether legal, social or political, upsets various existing patterns

¹²⁵ See, e.g., decision of Constitutional Tribunal K.7/90 of 22 August 1990 (upholding the constitutionality of the law which deprived ex-high officials of the Communist Party of their high pensions, based on the argument that their early-retirement law was unjust in the first place); see similarly decision U.6/93 of 12 April 1994 (a decision by the Minister of Industry discontinuing the right to free electricity of employees of energy industry, held constitutional because the right to free energy violated equality before the law).

¹²⁶ Posner & Vermeule, *supra* note 1 at 3.

of actions, incentives and expectations, but they are not all alike: when the regime changes from an oppressive and authoritarian one to a democratic one, the new legal system faces troubling problems about how to deal with the people implicated in the past regime, and is confronted by unsolved business which many people expect, as a matter of justice, to be resolved – such as unpunished crimes by still living perpetrators. The value of analogizing such issues with the question, for example, of “contested election of 2000” in the United States is nil – no issues related to the purge of discredited public officials can be identified in the post-Clinton administration, and certainly no statutes of limitations are involved. Even less are they raised by “quotidian changes in economic and social regulation”: the specificity of transitional justice in post-authoritarian societies is that it is a legal response, often undertaken grudgingly and with reservations, to a fundamentally novel political and social situation consisting of fundamental regime change rather than routine legal change which, as is natural, provokes various negative social responses including irritation caused by upset expectations and unmet preferences. The “normalization” of transitional justice by such a sweeping notion of “transition” defines the specific, tragic choices to be made by the post-authoritarian societies out of existence.

And yet, these choices were real, and they were informed by understandings of the nature of the past repressive regimes, and of the right mix of continuity and discontinuity between the pre-transition regime and the current one. In the words of Ruti Teitel: “the content of the rule of law [in a transitional system] is justified in terms of distinctive conceptions of the nature of injustice of the prior repressive regime”.¹²⁷ The controversy about the role of the constitutional court in dictating the terms of transition can be seen as a manifestation of the institutional struggle over controlling the meaning of that past injustice, and consequently over controlling the degree of continuity to be injected into the transition. Not much is gained, and much is lost in terms of comprehending the complexity of the issue at hand, by “normalizing” such dilemmas through analogizing them to various routine constitutional dilemmas faced by consolidated constitutional systems in their day-to-day operations.

¹²⁷ Teitel, *supra* note 14 at 13.