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Philosophical Foundation and Constitutional Rejection in Hungary

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Abstract: There are internationally set criteria that apply in the case of a legacy of grave and systematic violations of human rights, generating obligations of the state towards the victims and society. They specify: (1) a right of the victim to see justice done, (2) a right to know the truth, (3) an entitlement to compensation and nonmonetary forms of restitution, as well as (4) a right to reorganized and accountable institutions. Facing the complete failure of implementing the first three points, one can claim that none of them has been fulfilled in Hungary since the fall of Communism, almost one quarter of a century ago. This paper analyses the context in which constitutional adjudication may confront certainty of law with the very idea of justice by putting an end to any progress of leaving the legacy of Communism behind. As a consequence, the Rule of Law becomes a mere simulacrum.
Keywords: Communist crimes; transition vs. legal continuity; statutory limitation; rule of law; constitutional adjudication; legal security vs. material justice.

1. When a Criminal Past is over

More than twenty years ago, after the collapse of the Communist regime the very first symposium addressing the issue had been organised in Hungary on 12 January 1990 (cf. *Visszamenőleges...* 1990). I started my intervention on a rather sceptical note, aware of the fact that

> it is always a potentially catastrophic practice to administer justice in the aftermath of political changes. At the same time, it would be likewise disastrous to eliminate the possibility of jurisdiction in such periods of history. We are clearly on the horns of a dilemma here. Our choice is that between the Devil and the deep sea[1].

[1] Varga 1995b: 21; the analogy was taken from the title of Huyse 1994.

For it was clear at that time that

> it is a *sine qua non* of this process to grant, at least in principle, a minimal redress to the victims, and also to make certain that the related measures have a preventive effect on the public in general, and the offenders in particular. It is likewise necessary [...] to denounce the negative developments in history, at least symbolically. Among other things, this is important so that we can rule out communism, whose ingrained practices still appear to linger, as an acceptable political alternative. We must prevent communism from sneaking back in through the back door in the guise of a democratically legitimate political alternative[2].

Back at the time when the trust in the possibility of a *Justitia*-programme (as the governing party Hungarian Democratic Forum [MDF] had named it) was still unbroken, and aware of being right and also morally responsible, this simply seemed to be a problem of proper formulation justifiable for both sides in the Parliament. The rather modest program the governing party developed and put on its agenda only ascertained that the victims were entitled to (1) a *recognition* from the National Assembly, representing the whole nation, (2) a *judicial procedure* through which perpetrators are named, and (3) *a comprehensive documentation* and official clarification of all the relevant facts, accompanied by (4) further *exploration* of the historiography of the acts of this criminal past, funded from guaranteed state resources.[3]

Within six months, the Prime Minister of the Republic of Hungary set up a Committee for the Investigation of Unlawful Benefits (Government Decision No. 1025 on 30 August 1990), to which each member—professors of the Eötvös Loránd University in metropolitan Budapest—submitted a background paper to clarify their respective positions. There and then, in my contribution I formulated as a preliminary question:

> What is the consequence if the state does not use [its prerogative] for fulfilling its punitive responsibility but rather as a perspective for avoiding fulfilment? What if the state itself becomes a perpetrator? What if the politics of the state are backed only by committed crimes and rewarded state criminals?[4]

[2] Varga 1995b: 122.

[3] Files (starting from May 1990) from the author's personal archives; for a documentation, cf. Varga 2008c: 173–174. The Hungarian programme has remained within the framework of pure legal justifiability of naming and processing in law the concerned deeds, as compared to most instances of "settling accounts"—cf., e.g., Orentlicher 1991a—, where direct sociopolitical ends have been targeted and also served first of all *dissociation*, that is, relocation and re-mapping of the nets of the kinds of formal and informal public *auctoritas*es, at both local and national levels. Cf. Nino 1996: ch. 3 and, especially, Karstedt 1998.

[4] Varga 1995c: 133.

In order to illustrate the underlying conditions that contextualise this response, I quoted an example, apparently extreme but by far not unrealistic, from World War II Central European history:

> The commanders of the [Soviet] occupying forces reacted abruptly under military law when official notice was given at incidences of rape, by shooting the offender. It could only be established subsequently that this was the exception. The common practice was to expose those making the complaints (the victim and/or her relative) to immediate brutal, often tragic destiny. The invaders preferred eradicating the trouble itself once and for all; and only if it proved not to be feasible for any reason, they resorted to kinds of legal proceedings. In any case, the roles of the victims and the guilty were mixed, and the only secure way was not to take cognisance of the crime committed. Is it then reasonable, fitting within the morality of the Rule of Law, that those transgressing any [conceivable] law and order would be the first beneficiaries of the protection extended by the new law and order [as restored]? That the new Rule of Law has to be tested [and corrupted] from the very beginning by granting lack of punishment for state-organised murderers? All this is simply because the running amok did not last for a shorter period of time? Simply because they were unscrupulous enough to make their crimes officially unnoticeable? Because they held on long enough so that both their self-granted statutory limitation could pass and grant a pardon to make the rest unpunishable?[5]

With regard to the issue's pending constitutional adjudication, I emphasized that not even the declaration of the limitation period passed (as the apparent routine answer) could be without problems. For

> In the final analysis, once the routine is questioned, the insistence on routine is just as much one of the choices for a genuinely creative, responsible and responsive decision as the one based upon substantive argumentation. Eventually, any of them is only justified by a political position[6].

The issue had been reconsidered five weeks before the Constitutional Court was to take its decision. As to the alternatives one may choose from when giving an answer to the dilemma of statutory limitations, it was concluded that

> On the one hand, we may say that despite the honourable merits of the above [routine] arguments, they are legally irrelevant, they have no legal sense. This is the same stating that, in a legal sense, there is no difference whatsoever between an unmarried mother committing infanticide and the murders committed by, and for the sake of, the party state within an institutional framework,

[5] Varga 1995c: 133–134.
[6] Varga 1995c: 134.

> for the benefit of the prevailing regime, thus openly rewarded by its political establishment, and whose prosecution was therefore blocked by the same state—all this only provided that since they were committed, the time prescribed in the law as statutory limitation had already passed. On the other hand, we may equally say that there is something intrinsically different between the two situations, namely, the differing state reactions to the crimes—and that this can be taken as a basis for differentiating between the two cases in a legally relevant way. That is to say that while prosecution was hindered, the mere physical passage of time could not initiate statutory limitations[7].

As opposed to the recurrent claim forwarded by both those allegedly transubstantiated into Social-democrats from rank-and-file Communists and also fellow-travellers preaching cosmopolitan libertinism under the guise of Open Society liberalism, stating that all it could only stand for witch-hunt and political justice,[8] I added:

> If, for example, we state that the Communist regime imposed by Moscow was based not on guaranteeing internationally accepted human rights but on neglecting them, not abiding even by its own declared set of rules—this is only an institutional statement at most, as its meaning can only be understood in an institutional context. It is as party-neutral as if we would state: rain also falls in Socialism. Or, the same way: stating that the whole question of facing the past has political roots, as the flawed phenomenon of certain crimes remaining unprosecuted was caused by the political system—this is also a sort of classifying statement that describes the medium which was especially active in the previous regime. As we have already noticed, anything could have prevented the state from exercising its punitive power, and this wouldn't alter the characteristics of the problem one bit[9].

Later on, in a compilation of works preparing the German Laws I and II on Statutory Limitations (including initiatives and drafts, as well as *Bundesrat*-commissioned academic opinions on them, followed by Hans-Heinrich Jescheck, interviewed on the topic), on the one hand, and the Czech Law on the Illegality of the Communist Regime (with its reaffirming constitutional court assessment), on the other,[10] the alert was also formulated relatively late, saying that

> It would be a rather cynical solution, and would also impair our prospects for the future, if we agreed to grant impunity (let alone anonymity) to the

[7] Varga 1995d: 139.

[8] Miller 1996.

[9] Varga 1995d: 140.

[10] *Coming to Terms* 1995, including *VerjährungsG* (26 March 1993) & 2. *VerjährungsG* (27 September 1993); *Zákon...* (9 July 1993) & Sp. zn. Pl. ÚS 19/93 (21 December 1993); followed by expert opinions to the Hungarian Parliament.

> criminal minions of a state that throws obstacles in the way of fighting crime only because this fundamentally criminal state managed to throttle fight against its own crimes over a period of time specified by itself. An intact judicial sense would exclaim in protest against such an abnormal and preposterous manifestation of absolutism. Not even the most ancient and primitive laws would allow anyone to gain by his sin. Any temporal limitation of criminal persecution can be enforced only if in the preceding period the state's punitive mechanism had functioned properly, i.e., the obligation to fight against crime was observed, or at least the authorities were ready to meet that obligation. If the state's relevant mechanisms were unable to perform these duties, no starting date can be attached to statutory limitation[11].

This is the position that supports the very ideal and ethos lurking behind the millennia-old institutionalisation of *Verjährung*, or prescription or statutory limitation in Europe (Varga 1999). It is suitable for proper social function, as it is justifiable both according to the law's own analytical doctrine [*Rechtsdogmatik*] and from a moral point of view. For any other constitutional response, indeed, "would clearly signal our total disrespect for the law's moral foundations, would slap in the face the principles behind the legal regulations, and would only serve to encourage the would-be dictators"—with far-reaching consequences, hardly reparable even on the long-term. For

> Should these ideals turn out to be unfit in helping us transcend the past, our initial enthusiasm would inevitably cool off, our constitutional ideals themselves would lose their moral cohesion and appeal, and would inevitably dry out, as it were with our democratic pathos and perspective evaporating away[12].

The practice of the German Constitutional Court has excelled by caring for, and being aware of the importance of nurturing the popular demand for any support to *Rechtsstaatlichkeit* (Varga 1996), i.e., their rule of law.

2. "Radical Evil on Trial"

Certainly, the attempts at clarifying the legal alternatives available in Hungary were not undertaken in a scholar vacuum. A number of theoretical stands have been crystallised, out of which those of the Argentinean liberal criminalist and legal philosopher perhaps are the most known. Carlos Santiago Nino summarised views appeared in a posthumous publication (Nino 1996).

Concerning the *moral aspects*, he finds it relevant to reassert Shklar's position[13]: settling accounts (including Nuremberg) in terms of legalism as

[11] Varga 1995e: 154.
[12] Varga 1995e: 155, 145.
[13] Nino 1996: 146–147; Shklar 1986.

ideology is thoroughly unlawful. This is justifiable only in terms of legalism as social policy. Nevertheless, there are sufficient grounds for it as it is setting the targets for (1) recording officially what actually happened, (2) strengthening procedurally the Rule of Law, and (3) appeasing the thirst for private revenge. Additionally, as added by others (Malamud 1991), trials may also (4) help victims to recover their self-respect as holders of legal rights while also (5) promoting public deliberation in a unique manner.

As to *legal aspects*, legal *excuses* may be grounded upon claims like (1) lack of agency, (2) necessity, (3) lawful self-defence, (4) due obedience, (5) statute of limitations, and (6) the selectivity of punishment. Summarily, none of them is considered to become an obstacle: what they may imply is rather a reference for the lawyerly rhetoric to be rejected *ab ovo* as a mere pretext.

Accordingly, (1) reference to *lack of agency* cannot raise any difficulties, as the chain of command and order is unbroken in principle. For instance, even "the decision convicting some of the Argentine junta members [...] held each of the commanders responsible for the deeds of his subordinates without limiting or undermining the responsibility of the latter."[14]

As for the next one, (2) revoking *necessity* may in itself sound conclusively. However, its judicial proof may scarcely be successful in any particular situation, for

> The defence of necessity requires three conditions: (i) balance: that the evil prevented be greater than the evil caused; (ii) efficacy: that the necessary action effectively prevents the expected evil; and (iii) economy: that there be no other means less harmful for preventing the expected evil in an at least equally efficacious way[15].

Not even (3) invoking *lawful self-defence* is much use for excuse either. If there is no specific law available that provides such an entitlement in a democratically and constitutionally defendable framed way, its mere absence does not necessarily implicate the legality of the deed debated.

Also (4) referring to *due obedience or obligation of the subordinate*, this can only be based on a misunderstanding. For,

> Insofar as due obedience is a derivative excuse based on duress or mistake, it can be regulated retroactively without affecting the principle against retroactivity of the criminal law. Because excuses are irrelevant to the lawfulness of an act, previous knowledge of such excuses should not be a prerequisite to their applicability *vis-à-vis* those acts[16].

[14] Nino 1996: 166–167.
[15] Nino 1996: 171.
[16] Nino 1996: 181–182.

Moreover, (5) *statute of limitations* is again an easy to transcend pseudo-object as the objection itself transforms it into mere rhetoric. Apparently,

> These arguments in favour of a statute of limitations are weighty, but those who have committed criminal acts should not be allowed to profit from the fact that they, or the regime to which they belong, impede justice. Therefore, legal rules that suspend the statute of limitations when prosecutions are impossible also appear tempting. This may be accomplished by retroactively extending the statute or declaring it to have been suspended during the dictatorship. Initially, this seems to clash with the principle which prohibits the retroactivity of criminal legislation, and this would be illegitimate under a liberal system of criminal law. This appearance, however, is deceptive. The prohibition of retroactive criminal laws is linked to the requirement that one must consent to assume the liability of punishment. [...] But consent is tied only to knowledge of those circumstances which are relevant to the unlawfulness of the act [...] and not to knowledge of other factual or normative conditions for actually imposing punishment. The statute of limitations is not relevant to the legality of the act. Prevention by way of punishment is in no way qualified by the delineation of a term during which the state's claim to punishment would expire. [...] People should decide whether or not to commit an act according to norms of unlawfulness and consequently run the risk of relying on factors which are irrelevant to such norms. If somebody commits a crime because he hopes that before he is caught the statute of limitations will run out, he must bear the burden of relying on factors alien to the legality of the act, just like the person who hopes that he will not be punished because all the prisons in the country will burn. Therefore, I do not believe that the principle prohibiting retroactive criminal legislation is an obstacle to extending or abolishing statutes of limitations for massive human rights abuses[17].

This very stand is consequently upheld by the French doctrine and the international practice as well.[18]

Further on, (6) the *selectivity of punishment* cannot represent any major obstacle either, for "nobody has a right that certain persons be punished and, consequently, nobody has a right not to be punished because others are not. Punishment does not call for equal treatment"[19].

Let us add one more conceivable legal excuse, notably, (7) the act of *self-amnesty*, noticed by one of his reviewers. Accordingly,

[17] Nino 1996: 182–183.

[18] E.g., Laquièze 2000: 25 declares that "Prescription is not a fundamental right."—inspired by the stand Glaser 1964 takes, according to which "Prescription […] does imply a benefit but not constitute a right." In terms of practice, Roht-Arriaza 1995 identifies the disregard of limitations for the period of the practical denial of access to justice in the case initiated by the United States against an Argentinean general having fled to its territory in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1988).

[19] Nino 1996: 183.

> Persons should not benefit from their own wrongs—that is, those who have contributed to the suspension of democratically enacted laws that made human rights abuses criminal acts should not benefit from that decision by successfully claiming that no law criminalized their conduct or that non-democratic laws sanctioned or pardoned such acts. This interpretation is consistent with the current trend under international law—as evidenced by reports of the UN Human Rights Committees and the Inter-American Commission on Human Rights to the effect that domestic laws, such as self-amnesties, that grant impunity to perpetrators of abuses should be denied legitimacy[20].

After all, there are signs of a shift of opinion in the international community which have been emerging in the last decade (Méndez 1997). In this light, the indifference of human rights activism towards past victims (as an exclusive framework) because of the perpetrators' rights, may have corroded its very existential basis, and has compelled human rights watch organisations to re-consider why the memory of the unburied dead keeps haunting after decades, and why unhealed wounds are opened up again. Notably, while human rights activists were already suspicious of a limitation of rights whenever a government had attempted to examine past legal offences in order to break the continuity with a prior dictatorship, now they seem almost inclined to impute the obligation to the succeeding government to face in law all the major injustices committed by a prior dictatorship. They range in fact up to the point of a suggestion made by Diane F. Orentlicher, to formulate as a *formal international duty of the successor state* to prosecute crimes committed and left unpunished by the past regime because of political reasons[21].

All this is a sign of the new awareness of the substantive values that need to be implemented through legal mediation, awareness of the prioritization of solutions which can only be the result of careful pondering and balancing, having in mind that reaching a resolution is not simply siding without judgement with any position in the conflicts of values and/or major interests. It is also an awareness of the fact that the law's instrumentality is by far richer than any particular regulatory or procedural formula usually applied in everyday routine. Otherwise speaking, in law, too, problems should be dealt with in depth and not at their surface.[22]

This is to say that law is a complex (and never fully exploited) aggregate of instrumental values, of working principles as well as of ways of (re-)establishing coherences and inferences (linkages and connections, imputations and ascriptions), in brief paths and ways, forms and modes of procedure. We use these forms and modes of procedures by mentally and also formally

[20] Millán 1999: 549.

[21] Orentlicher 1991a.

[22] For more of the context of the whole paragraph, cf. Varga 2008d and, as a general theoretical conclusion, Varga 2006 and 2008f.

confronting available kinds of reasoning and argumentation in substantiation of a final decision that should be taken in the end[23].

Accordingly, practical challenge and its legal response are not meant to imply (by judging, criticising or even destroying) one another. Discourses in law should strengthen them in dialogue within the formally perfected but never exhaustively actualised bounds of social acceptability and legal justifiability, taken in a widened macro-sociological (cultural and civilizational) sense, instead of any merely strict formalism (for theoretical outlines in foundations, cf. Varga 2011 and 2012).

3. Attempts at Resolution in Hungary

There was an internal pressure resulting from the tensions between the coalition opposing the forces of the former regime (Communist ex-rulers and arrivistes) and their antinomy *doubleurs* (those who converted from their once extreme Maoist and anarchist beliefs into neophytes of radical libertinism). Both of them contradicted any genuine break with the past in terms of principles like inviolability of human rights and the rule of law. These principles would allegedly be endangered by acts coming from the state or the society, because these acts would touch the privacy the new scheme guaranteed to them. It was in these conditions that Hungary became the first post-communist state to attempt to formulate a legal answer to the new dilemmas.

Although the draft was prepared as a personal motion by the Hungarian Democratic Forum MP Dr Zsolt Zétényi (helped by several representatives of the legal professions and sciences), it went through quite many scholarly debates, conferences and analyses in media[24]. It was supported by the international *academia* as well, such as M. Cherif Bassiouni, Professor of Law at De Paul University College of Law in Chicago, who—in his Expert Opinion sent on 30 October 1991 to the Hungarian Parliament at the Request of Deputies Dr. Gábor Perjés & Dr. Zétényi—held the strong stand, according to which

> Crimes against the person such as murder and torture which were criminal under existing laws could still be prosecuted, even if there is or was prescription. The basis for that conclusion is predicated on the assumption that the prescription is stopped by the deliberate non-enforcement of the criminal laws. (*Fac simile* reprint in *Coming to Terms...*[25])

[23] As a fine exemplification, cf. Koskenniemi 2005: 562–617.

[24] Cf., e.g., *Visszamenőleges...* 1992; Békés et al. 1991; [Büntetőjogászok klubja] 1991; *A múlt...* 1992 (including Wolfgang Brandstetter, von Bülow, B. Sharon Byrd, Joachim Hermann, Joachim Hruschka, Martin Kriele, Karl Heinz Schnarr & Jacques Verhaegen); *Visszamenőleges...* 1992 (including Christoph Mayerhofer, Giuseppe de Federico & Vito Zincani).

[25] 1995: 173–174.

Indeed, at its session on 4 November 1991, the National Assembly passed an Act on the *Amenability to Prosecution of Grave Crimes Committed, But Not Prosecuted for Political Reasons, between 21 December 1944 and 2 May 1990*, reading as follows:

> Article 1 (1) The period of statutory limitation on the punishment of crimes committed between 21 December 1944 and 2 May 1990 and defined by laws in force at the time of their commission, which were specified as treason by Art. 144 (2) of the Act IV of 1978, as wilful homicide by Art. 166 (1) and (2), and as bodily injury causing death by Art. 170 (5) of the said Act, shall, where the State's failure to prosecute criminal offences was based on political reasons, start again on 2 May 1990. (2) The punishment imposed by application of para. (1) hereof may be mitigated without restriction.

The press (de-nationalised by its once cosmopolitan nationalisers) was unfavourable, insisting on the metaphors of the rise of evil ghosts and witch-hunting, and the Constitutional Court reacted abruptly by declaring the bill unconstitutional, with objections, among others, stating that

> 5. Cases of failure by the State to have exercised its criminal jurisdiction cannot be constitutionally distinguished on political or other grounds. 6. Given its ambiguity, the decision to declare it a cause of suspension of the period of limitation that »the State did not exercise its criminal jurisdiction for political reasons« prejudices legal certainty and is consequently contrary to the Constitution.

Its drafter may have believed that the assurance given by the Council of Europe—in addition to the justification drawn from the elementary sense of justice shared by the victims of the dictatorship in Hungary, who bloodily revolted against the regime as early as 1956—is enough to address the new sensitive issue. In fact, MP Zétényi's official inquiry was favourably replied by the Chairman of the Council of Europe Committee on Legal Affairs and Human Rights, Lord Kirkhill. As he explained in his letter dated on 28 June 1993 (a copy of which also reached the Director of Human Rights, Dr. Leuprecht),

> the famous principle of von Feuerbach *Nullum delictum nulla poena sine previo lege penale*, which is mentioned in Article 7 of the European Convention on Human Rights, is not absolute. The Convention itself, in the second section of this Article, mentions the possibility of making exceptions: '2. This Article shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

As a stand in the doctrine of law, he affirmed that "The statutory limitation of crimes is, however, not a matter of substantive law but concerns procedure [...]." And he concluded accordingly:

> Under these circumstances, it seems to me that a prolongation of the period of statutory limitation or even a reopening of periods already expired, provided this is done in accordance with due legislative process, may be entirely justified and not contrary to the principles of human rights and the rule of law. (*Fac simile* reprint in *Coming to Terms...*[26])

And notwithstanding the fact, too, that both domestic and international representatives of the *academia* and *universitas* were in favour of the logic which the disqualified bill embodied. Most importantly, Professor Dr. jur. h.c. mult. Hans-Heinrich Jescheck, emeritus director of the *Max-Planck-Institut für ausländisches und internationales Strafrecht* at Freiburg im Breisgau, gave a *Presseinterview* (*fac simile*), the argumentation of which he developed once again in a letter to Dr Zétényi on 30 April 1992. According to its transcription in his letter addressed to me in person on 20 January 1994[27] (fac simile reprint) the master of all the academically high-ranked criminal lawyers in Hungary from Freiburg Institute, (though not represented in the Constitutional Court itself, but including, of course, the acting Chief Procurator of the country), also opinionated that

> Wenn Sie diese Rechtsgrundsätze auf Ungarn anwenden, so handelt es sich gar nicht um eine rückwirkende, die Lage der Betroffenen verschlechternde Vorschrift über die Verjährung, sondern um eine Bestimmung, die schon zur Tatzeit gegolten hat. Selbst wenn es die Vorschrift im ungarischen Recht formell nicht gab, so wird man doch sagen müssen, daß sie aus dem Sinn der Verjährungsrechts zwingend abgeleitet werden muß, denn die Verjährung kann nicht beginnen oder weiterlaufen, wenn die Rechtslage die Verfolgung einer Straftat unmöglich macht. Die Regierung würde sich auf diese Weise jedes Verbrechen leisten können, ohne später eine Strafverfolgung befürchten zu müssen. Die Verjährung wird also durch den allgemeinen Rechtsgedanken des Ruhens nach zwingenden Grundsätzen der Gerechtigkeit eingeschränkt.

4. Constitutional Counter-revolution

All along the process of transition, the Hungarian Constitutional Court (with a general overview in Majoros 1993) acted under the pretext of constitutional adjudication. Therefore each and every decision taken was to be added to the Hungarian constitutional order with undoubtable constitutional force. In other words, there was no legal possibility to hold it responsible either politically or legally and its activity could only be limited by their own moderation and self-control - which was far from being their prime virtue in those dramatic—transformative—times.

[26] *Coming to Terms...* 1995: 175–176.

[27] *Coming to Terms...* 1995: 134–136

This may explain the paradox that the catchword *'rule of law'* became incontestable both legally and socio-politically, while it was exactly under this pretence that the sense and the merit of the entire transition process (integrating the nation in a manner ethically acceptable for generations) got lost. For at every crossroad the hypnotising siren's song of a 'revolution led by the rule of law' could be heard, and indeed, "the role of law was primordial in that each step in this process, no matter how unexpected, was controlled and accompanied by a legal response."[28]

In fact, "The Hungarian Constitutional Court adopted a formalistic and neutral approach to the rule of law that focussed on legal certainty"[29]. According to it, from the stand of its founding first president

> the rule of law—as the key concept for the transition and also in a technical sense—gained a meaning identical with legal safety that is regarded by the Constitutional Court […] as the »conceptual element« of the rule of law[30].

The practice followed that "the rule of law […] is construable as exclusively a formal rule of law" (Decision No. 31/ 15 December 1990 of the Constitutional Court in *Alkotmánybírósági Határozatok* (1990), 136 at 141). As a matter of fact, this was "the approach with which the Constitutional Court could transform the great political-ideological debates of the transition into problems of constitutional law and thereby neutralise them."[31]

The result was debatable because the method itself was debatable. Scholars agree that a normative construction based on the exclusivity of "not entirely normatively definable" concepts and principles can only prove the "political hypertrophy" of the interventionist activism of such a constitutional judicial complex[32].

In consequence, "the Court […] never really addressed the past directly." When its inevitably over-politicised role-play forced it to do so, the result proved to be mostly a catastrophe: as lifeless as an *indoctrinated* thinking can be.

> "In fact the Court seemed to make a point of considering that there was nothing particularly special nor problematic with this past and that its adjudication function was as normal as in any other Western country."[33]

Thereby,

[28] Dupré 2003: 29.

[29] Dupré 2003: 31.

[30] Sólyom 2001a: 686.

[31] Sólyom 2001a: 689. The same sentence in authorial English translation has some substantive variations: "The existence of the Constitutional Court during the transition […] allowed the transformation of political problems into legal questions that could be addressed with final, binding decisions" (Sólyom 1994: 223).

[32] Přibáň 2001: 28 and 16.

[33] Dupré 2003: 192.

> by repeating the mantra of the rule of law (without a textual anchor in the constitution, and under a highly arbitrary interpretation of the concept) […] the Court decided that its own highly arbitrary interpretation of the rule of law should prevail over politically defined understandings of the right mix of legalism and substantive justice[34].

This shows an attraction to extremity with a number of *sui generis* fundamental differences effaced, albeit relevant enough to substantiate a formal distinction. This is one case of mistaken partisanship (for similar ideas see, e.g., Posner & Vermeule 2004), referring to which another scholar concluded that

> 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[35].

The decision of the Constitutional Court on legality silenced justice and allowed crimes to remain unpunished, which made out of prosecuting the past a "travesty of legality"[36]. This can be contrasted with the "*constitutionalisation* of criminal law"[37] and it clearly shows the Court's preference for formal interpretation by narrowing—and indeed, reducing—the very idea of the Rule of Law to a most positivistic understanding of legal security, that can only assume an unbroken continuity with the past: a continuity which cannot be either challenged or intervened in, by legislatorial or other legal means. At stake was the fact that the successor state had to complete the criminal proceedings against such deeds (especially homicide and torture) which had previously been formally time-barred. We still have to keep in mind that all this happened after the inglorious collapse of a state that had become criminal itself (by committing offences against its own properly enacted criminal code, then gratifying this criminal service while also punishing and repressing any eventual social or legal initiative at their effective prosecution). That happened because their adjudication was statutorily limited in time exactly by the perpetrator state involved in those crimes. In the name of this "rule of law", but in fact belying any sound ideal of law, it has to assume and enforce, in this new constitutional democracy, the Machiavellist cynicism of the dictators' murderous logic, according to which one can safely go on doing the dirty work, as long as they take care for only one thing: to be able to construct and strengthen a state power oppressing enough to last until the actions implied by such a mission can

[34] Sadurski 2005: 256.

[35] Sadurski 2003: 50.

[36] Sadurski 2003: 2.

[37] Szabó 2000: 9, in terms of which "the *nullum crimen sine lege* principle as reflected […] to a domain transcending the criminal law proper is now already the genuine provision for a guarantee." (Szabó 2000: 6.)

be declared prescribed or pardoned by itself. However, such a decision inspired by this stunning logic, disproportionately beneficial for the perpetrator, has got into the focus of critical debate both domestically and internationally.

For in its decision No. 11/1992 (5 March), the Constitutional Court stipulated with an unprecedented sharpness that

> With respect to its validity, there is no distinction between »pre-Constitution« and »post-Constitution« law. The legitimacy of the different (political) systems during the past half century is irrelevant from this perspective; that is, from the viewpoint of the constitutionality of laws, it does not comprise a meaningful category.

From now on, "constitutional review does not admit two different standards for the review of laws" (*Constitutional Judiciary...*[38]) and what follows from this is an utter "constitutional indifference" towards the legal actualities of a Communist dictatorship.

The decision's description of what the statute of limitations is about is correct: "The 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". This was reflected in the bill just voted for by the Parliament. Also, it had declared the legal passing of the prescription's time interrupted so far as (in the terms of the bill) "the State's failure to prosecute for criminal offences was based on political reasons". The Court concluded that "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." Thus, as the judgement stated, in the view of previous opposite expressed statutory provisions, the period of limitations can also expire through a lapse of time relieved from official procedure by a dictatorial (i.e., again, criminal) *rétorsion* of any victim's legal initiative at prosecution. Consequently, no subsequent differentiation whatsoever and no comprehension detached from the dictatorial past can now confront the cynicism implied by such an inhuman logical formalism. For—as the verdict goes on—"If the statute of limitations has expired, the person has a right to immunity from criminal punishment."[39]

As one author deems, "It is rather hard to see what values underlying the principle of legality support such a conclusion." For "failure to apprehend" and "dereliction of duties" as conditions referred to by the decision let the limitations expire as if they were accidental occurrences in a society operating normally under the Rule of Law. In our case, however, the system itself became more degenerated by having silenced its law and order. With its flagrantly unlawful intervention brutally blocking any lawful intention to

[38] *Constitutional Judiciary...* 2000: 220
[39] *Constitutional Judiciary...* 2000: 223

retaliation, it itself annihilated the very chance of normality the Constitutional Court discretion now claims to have existed. All the underlying conditions did not arise by chance—"as if the »risk« in question were a matter of the negligent behaviour of the state"—but they "were part of the purposeful policy of the Communist state". In other words,

> 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, in terms of the Communist state, it was not a matter of a »risk« at all but rather of deliberate and lawless protection of offenders, whiles on the part of the successor state the »price« in the form of non-prosecution is unrelated to *its* negligent criminal policy[40].

Of course, this is not about putting aside respectable principles but it is about the necessity of pondering and balancing among values, like in any genuine judicial procedure that confronts "prospectivity" with "equal justice", "legality" with "substantive justice" (Sadurski 2003 and 2005) or 'legal security' and 'material justice' (as termed by the Hungarian Constitutional Court itself). It is the more so as

> 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 of various forms of retroactivity in criminal law. Put simply, 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 that protected them, and made sure that, as long as the system lasted, their crimes would remain unpunished[41].

Or, if read in a reversed way, the stand taken by the above decision is a plain encouragement to crime, as it places the grace into the perpetrator's hand from the very beginning, by allowing the latter to absolve itself at its own discretion either by proclaiming pardon or setting statutory limitation for its own deeds, irrevocable by any later development in principle. Moreover, it makes the successor state an accomplice to crime, as it leaves the latter with the exclusive choice to declare all those wrongfully unprosecuted offences not prosecutable.

Such an artificial solution was neither inevitable nor did it follow from the Constitution itself. For it is obvious that

> By non-prosecution of these crimes, and by thus allowing them to become time-barred, the old regime successfully brought about a state of affairs

[40] Sadurski 2005: 253, 254, 254–255 and 255.
[41] Sadurski 2005: 255.

> practically identical to what it could have achieved by conferring upon itself and its members a blanket amnesty. Consistently with what has 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 to prosecute despite them would be an outrage to the principle of non-retroactivity of justice.

Extremism accompanied by inflexibility ending up in empty formalism may have prevented the Court from any search for in-between, compromising, or simply practical (genuinely responsible and responsive) solutions. Indeed, "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." According to a psychologically motivated political interpretation, "the intervention of the Court […] can be seen as an arrogation of the power, by the Court, to dictate the terms of the transition"[42].

The bitter dilemma may indeed arise, as a student of mine has in fact once put it: "What is more important? Does man exist for the rule of law or does the rule of law exist for man? Or does the rule of law exist for its own self and sake?" His generation can only conclude now that

> Our society was judged unsuited to face with the past by the Constitutional Court with its decisions from »above«, while in Germany the wise and precise legal thought addressed the problem itself, thereby allowing space and opportunity for social debate as well[43].

Indeed, all these inputs may have contributed to the survival of the past power relations in Hungary. Up to the general elections that ended with the fall of the explorers of the past, one could witness the failure of any hope for a brand new start as a framework of which the early implementation of a fully-fledged rule of law was in fact heralded at its time. For the Court's lasting contribution was the final recognition of *full continuity of the law*, with *inviolability of past relations* within the framework of making absolute *all new, rule-of-law-schemed legal guarantees*, idealised as untouchable civic rights[44]. In other words, the autotelic political interventionism of the Constitutional Court has successfully instituted a new *fetishism* of what it has hypothesised to be the "invisible constitution" it has used (in a most doctrinarian manner) as an exclusive yardstick, thereby transforming it into the opposite of what the *nihilism* of the "real Socialism" law was.

Such an end result puzzled even an American constitutional scholar, who speculated that the decision itself may have been not so much on prescription

[42] Sadurski 2005: 261, 262 and 256.
[43] Rumi 2005: 46 and 51.
[44] Sólyom 2001a: 542–544.

but on declaring, barely hiding the political zeal, who is leading the transition in Hungary. As formulated, "The Zetenyi case 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". It may have stood as "a controversial power grab" that "enables the court to operate in a counterrevolutionary fashion while increasing judicial power". On another angle the whole affair known as "the Zetenyi case could be less about the rule of law than about institutional distrust."[45]

5. Perspectives?

If we consider now the set of criteria of reforms stipulated in international literature (as formulated one and a half decades ago), the following requirements can be found:

> a legacy of grave and systematic violations generates obligations that the state owes to the victims and to society. [...] [T]hey are in fact distinct duties, each one of which must be complied with to the best of the government's abilities [...] (1) to investigate, prosecute, and punish the perpetrators – a right of the victim to see *justice done*; (2) to disclose to the victims, their families, and society all that can be reliably established about those events – a right to *know the truth*; (3) to offer the victims adequate reparations – an entitlement to *compensation* and also to nonmonetary forms of restitution; and (4) to separate known perpetrators from law enforcement bodies and other positions of authority – a right to new, reorganized, and *accountable institutions*."[46]

Well, drawing a balance of all the implementations hitherto actualised, it has to be ascertained that none of these four mutually complementary basic requirements has been fulfilled in Hungary during the almost one quarter of a century labelled as "change of regimes". A "regime re-instated" resulted instead. And the question may arise: what would be the answer of our rule of law, if state terrorism swept over our people again? However shameful, the answer may be expressed in silence, incompetence, and helplessness. After one and a half decades the last word said on the issue[47] is the same unique decision of the Hungarian Constitutional Court: the legality of the self-prescription by the predecessor regime annulling the chances of making changes for any successor regime. For no professorial justices sensed then any difference in

[45] Teitel 1994: 246, 244 and 246; for the context, cf. Varga 2008b.

[46] Méndez 1995: 255, 261.

[47] There is a new constitution (http://www.euractiv.com/sites/all/euractiv/files/CONSTITUTION_in_English__DRAFT.pdf adopted in 2011 and amended five times since; however, in the midst of criticisms and debates, both in and out of the country, it did not change one iota on the practical avoidance of facing8 relevant issues.

whether or not criminal prosecution failed despite efforts required by the law. Even more, whether or not it was from the beginning intimidated, or deterred from having a start. That is, whether legal normality or abnormality in a state based on criminal terror over both its citizens and state apparatus operated on the time period of statutory prescription to be expired. For, from that time on, neighbouring states in Central Europe have already learned from our specific inability, and elaborated specific laws with the possible effect that annihilation of law in a dictatorial state should never be recognised and reassessed by the Rule of Law, for fear that self-legalisation of terrorism could end up in its re-legitimation and incite states in trouble to test it anew (for the exhaustive overview of the underlying normative material Udvaros 2002).

All this is as if the negative prophecy of the writer and resistance activist, then president of the Czech Republic, Václav Havel, extended for the entire Central and Eastern European region. According to him, "we are all—though naturally to differing extents—responsible for the operation of the totalitarian machinery. None of us is just its victim. We are all also its co-creators."[48] Such a false equalisation in human responsibility has already led to the shameless revival of a plainly criminal past transformed into the mainstream to be lived through anew, with a constitutionally law beyond morality serving as its background (Varga 2008e). Such challenges to the very ideal of the Rule of Law, questioning its root meaning, merits and liveability,[49] may call for further research, extended to dysfunctions encountered when also the question of globalisation, involving legal regimes, appears (for some preliminary studies, cf. Varga 2007).

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[48] First presidential speech in The New Year's Address to the Nation (Prague, 1 January 1990) in <http://old.hrad.cz/president/Havel/speeches/1990/0101_uk.html>.

[49] For a comparative analysis of transition-from-dictatorship schemes with the underlying rule-of-law ideals behind them involved, constrasting closing-the-WWII models to after-Communism ones, on the one hand, and the German and Hungarian constitutional adjudicative patterns, on the other, see Varga 2009.

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