

**JUSTICE OR CERTAINTY?
ESTABLISHING THE RULE OF LAW
IN CENTRAL AND EASTERN EUROPE**

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ABSTRACT

The aim of the present thesis is to explore and explain the diversity of meanings that the rule of law principle assumed in the legal thinking and in the jurisprudence of the Constitutional Courts during the post-communist transition in Central Eastern Europe. I argue that the specificities of the mode of extrication and the related constitutional genesis produced a set of “tensions” between continuity and discontinuity and that the latter had a direct impact on the way the rule of law has been embraced in the domestic constitutional doctrine. I also offer a systematic account of the existing theories which have tried to grapple the institutional and normative complexity of the concept. On these basis I will question the popular dichotomy between a “moral” and “positivist” approach to the rule of law in Central Eastern Europe.

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*Legum ministri magistratus, legum interpretes iudices,
legum denique idcirco omnes servi sumus ut liberi esse possimus.*

(Marcus Tullius Cicero, *Pro Aulo Cluentio Habito*, LIII, 146)

TABLE OF CONTENTS

INTRODUCTION	1
<i>The existing literature and its gaps</i>	2
<i>Thesis statement</i>	4
<i>Method</i>	5
<i>Structure of the thesis</i>	8
CHAPTER 1 THEORETICAL BACKGROUND: WHAT IS (NOT) THE RULE OF LAW?	10
1.1 The Rule of Law, the Rechtsstaat and the definitional jungle	10
1.1.1 The British Rule of Law	12
1.1.2 The German <i>Rechtsstaat</i>	15
1.2 The quest for the normative core of the rule of law	17
1.2.1 Which law for the rule of law?.....	19
1.3 Formal and substantive rule of law. A useful classification?	22
1.3.1 Formal conceptions	23
1.3.2 Substantive conceptions	26
1.4 Rule of law, democracy and fundamental rights. Do “all good things need to go together”?	28
CHAPTER 2 CONSTITUTIONAL REVOLUTIONS: CONTINUITY AND CHANGE	31
2.1 Socialist legality: role of law instead of rule of law	31
2.2 Constitutional revolutions. Continuity and change	37
2.2.1 The choice for continuity	39
2.2.2 Revolution, “refolution” or reform? A problem of concept formation	44
2.2.3 The problem of legitimacy	48
2.3 The nature of law in the early stage of transition	52
2.3.1 Formalism and substantive justice, an apparent contradiction?.....	54
2.3.1.1 Formalism and law as an instrument	55
2.3.1.2 Normativism and substantive justice	57

CHAPTER 3 CRAFTING THE RULE OF LAW: THE ROLE OF CONSTITUTIONAL COURTS.....	60
3.1 The role of Constitutional Courts: Rebuilding the ship in open sea	60
3.1.1 Institutional constraints	61
3.1.2 Normative constraints	63
3.2 “Transitional” rule of law: exception or rule?	64
3.2.1 Hungary	66
3.2.2 Poland.....	68
3.2.3 Czechoslovakia and the Czech Republic	71
3.3 Filling the (normative) gaps	74
3.3.1 Hungary	75
3.3.2 Poland.....	77
3.3.3 Czech Republic	80
3.3.4 Slovakia.....	82
DISCUSSION AND CONCLUSION	84
4.1 How many Rules of Law?	85
4.2 Explaining variance	88
4.2.1 Approaches to the pre-communist age	88
4.2.2 Degree of legal continuity and the constitutional genesis	89
4.2.3 Opportunity structure	92
4.3 Final Remarks	94
BIBLIOGRAPHY	96

INTRODUCTION

Few concepts in the political and legal scholarship are more evocative and at the same time more vaguely defined than the principle of the rule of law. Since its genesis this concept has been used to describe a *relational* ideal between power and law¹ with the purpose of reconciling the otherwise unlimited power of the sovereign with certain *per se* valuable characteristics of certainty, fairness and human dignity. However, the strongly normative nature of this principle and the multiplicity of domains in which it has been applied have also determined its conceptual indeterminateness.² In a way, the rule of law has been victim of its own success.

These difficulties powerfully resurfaced in Europe during the democratic transitions ensuing the collapse of the Soviet bloc.³ At a very early stage of the transformation process, all the Central Eastern European states introduced in their new constitutions an explicit mention of the rule of law principle.⁴ As numerous authors have claimed, for the post-communist states the very idea of a “legal” state or *Rechtsstaat* (as the concept was formulated in the German legal doctrine), was a major departing point from the previous

¹ Gianluigi Palombella, “The Rule of Law and its Core,” In *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Oxford, UK and Portland, OR: Hart Publishing, 2009), 17; Geoffrey de Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988), 1.

² Gianluigi Palombella, “The Rule of Law as an Institutional Ideal,” in *Rule of Law and Democracy: Inquires into Internal and External Issues*, ed. Gianluigi Palombella and Leonardo Morlino (Boston: Brill, 2010), 3; Randall Peerenboom, “Human Rights and Rule of Law: What’s The Relationship?” *Georgetown Journal of International Law* 36, n. 3 (2005): 19; Frank Emmert, “Rule of Law in Central and Eastern Europe”, *Fordham International Law Journal* 32 no. 2 (2008): 561; Jovica Trkulja, “Der Sozialismus und der Rechtsstaat,” *Rechtstheorie* 24 (1993): 34.

³ Emmert, “Rule of Law in Central and Eastern Europe.”

⁴ Czech constitution at art.1.1, Hungarian constitution at art.2.1 (maintained in the newly enacted constitution at art.B.1), Polish constitution at arts.2 and 7, Slovak constitution at art. 1.

regime and, at the same time, a legitimizing factor for the new one.⁵ Strengthening the rule of law, alongside with establishing democracy and protection for fundamental rights, was perceived as “a promise, a moral and intellectual programme, as well as a political expectation” for the transitional countries.⁶ The past socialist legacies, coupled with the political turbulence of the transition greatly complicated the process. These challenges were both of a normative and institutional nature. They implied the necessity to redefine, or establish altogether, both *aims* and *means* for a functioning *Rechtsstaat*.⁷ These immense challenges had to be reached first of all constitutionally, amending the existing constitution or enacting entirely new ones, entrenching constitutional guarantees and – even more importantly – attributing to them a renewed, more prominent role within the legal system and political culture. Establishing powerful constitutional courts as guarantor of these order served both as a safeguard *vis-à-vis* the law-making power in its norm-creating function (therefore shaping the *lex*) and as a promoter of a constitutional culture based on the rule of (legitimate) law (the foundation of the *ius*).

The existing literature and its gaps

The modern literature on the rule of law theory has generally operated two types of distinctions: the first between the Anglo-Saxon idea of the Rule of Law and the German *Rechtsstaat*;⁸ the second between a “formal” and “substantive” conception.⁹ The risk deriving

⁵ Martin Krygier, “The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law”, in *Out of and Into Authoritarian Law*, ed. András Sajó, (The Hague: Kluwer, 2002), 223. Jiří Příbáň. *Dissidents of Law: on the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract* (Dartmouth: Ashgate Publishing, 2002).

⁶ Renáta Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence”, in *Relocating the Rule of Law*, see footnote 1, 72.

⁷ Ulrich Preuss, „Die Rolle des Rechtsstaates in der Transformation postkommunistischer Gesellschaften,“ *Rechtstheorie* 24 (1993): 183.

⁸ Palombella, “The Rule of Law and its Core,” 17 ff; Miklós Szabó, “New Constitutionalism Based on an Old Notion. The Rule of Law in the Mirror of the Decisions of Hungarian Constitutional Court,” *Rechtstheorie* 27 (1995): 297; Lidiya R. Basta-Posavec, “Anmerkungen zur Beziehung zwischen Rule of Law und Rechtsstaat,” *Rechtstheorie* 24 (1993): 227-229; Loammi C. Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law As A Paradigm For Protecting Rights”, 107 *S. African L.J.* 76 (1990): 76-99;

⁹ Paul P. Craig, “Formal and substantive conceptions of the rule of law: an analytical framework,” *Public Law* (1997): 467; Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge

from a superficial assessment of these differences may lead either to an overlap of the two distinctions (whereby British notion is too quickly associated with a substantial approach and the German with a formal one) or to the analogy formal=procedural, substantive=moral. The rule of law is indeed an extremely difficult concept to empirically observe and operationalize. Social sciences often employ the concept of rule of law without sufficiently sound theoretical underpinning. They often rely on checklists and indicators, which however often present problems of validity, given the complexity of the concept and its configuration as *relationships* rather than separable variables.¹⁰

A considerable amount of literature in the political science camp has employed the rule of law concept in the study of political transition. Most authors analyses it in conjunction or in function of other variables, such as good governance,¹¹ economic development,¹² democratic quality or democratization,¹³ but rarely as a concept *per se* worth of analysis.¹⁴ Concerning the relationship between the political and legal dynamics – which constitute the core of the present work – Herbert Kitschelt has provided a comprehensive theory on the relationship between pre-communist conditions, communist regime and mode of transition.¹⁵ The legal scholar Vojtech Sadurski has suggested a connection between the regime type and degree of transitional justice, Radoslaw Procházka saw in the constitution-making process one possible

University Press, 2004); and especially, on opposite positions, Joseph Raz (“The Rule of Law and its Virtue,” *Law Q. Rev.* 93 [1977]: 195 – 196) and Ronald Dworkin (*A Matter of Principle*, 9th edition, Cambridge: Harvard University Press, 2000).

¹⁰ See Martin Krygier, “Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?” in *Getting to the Rule of Law*, ed. James E. Fleming (New York and London: New York University Press, 2011), 70.

¹¹ See for instance the *Worldwide Governance Indicators* developed by the World Bank.

¹² David M. Trubek, “The Rule of Law in Development Assistance: Past, Present, and Future,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek et al. (New York, Cambridge University Press, 2006), 74 -94; Elliot M. Burg, “Law and Development: A Review of the Literature and a Critique of ‘Scholars in Self-Estrangement’,” *Am. J. Comp. L.* 25 (1977): 492 ; John Henry Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement,” *Am. J. Comp. L.* 25 (1977): 457.

¹³ Amichai A. Magen and Leonardo Morlino, *International actors, democratization and the rule of law: anchoring democracy?* (Abingdon: Routledge, 2008); Guillermo O’Donnell, “Why the rule of law matters,” *Journal of Democracy* 15, no. 4 (2004): 32-46. Juan Linz and Alfred Stepan. *Problems of Democratic Transition and Consolidation: South America, Southern Europe, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996).

¹⁴ Although there are some exceptions, such as O’Donnell’s “Why the rule of law matters” see note 13.

¹⁵ Herbert Kitschelt, *Post-communist party systems: Competition, representation, and inter-party cooperation* (Cambridge University Press, 1999).

explanation for Court's interpretative techniques,¹⁶ while Stark and Bruszt have claimed that the mode of extrication may account for the institutional outcomes.¹⁷ My claim is different and complementary at the same time. What I intend to argue, in fact, is that the regime of extrication and the type of constitutional genesis may have influenced the way the rule of law principle was given a meaning by the Constitutional Courts.

Thesis statement

The Courts have been widely recognized in the literature as being among “the most important component and agent of the legal transition.”¹⁸ As bluntly put by the Hungarian Court's president Sólyom, “the interpretation of the notion of the rule of law is one of the Constitutional Court's important tasks.”¹⁹ Here I subscribe to Dworkin, who maintains that the courts, like the legislature, are political institutions deeply embedded in the community, whose implicit task is to participate in the political process.²⁰ However, this thesis will question his assumption that constitutional judges shall implement latent principles emerging from the contingent situations the community is bound to answer to. As we will see, this was one possible, and not necessarily the most preferable answer.

The legal literature so far has mainly focused on how Constitutional Courts have helped in building democracy and human rights either in a comparative perspective²¹ or in a case-

¹⁶ Wojciech Sadurski, *Rights Before Courts. A study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. (Dordrecht: Springer, 2005)

¹⁷ David Stark and Laszlo Bruszt, *Postsocialist Pathways: Transforming Politics and Property in East Central Europe* (Cambridge: Cambridge University Press, 1998).

¹⁸ Szabó, “New Constitutionalism Based on an Old Notion,” 299.

¹⁹ Decision 9/1992(I.30.)AB. (V, 2).

²⁰ Ronald Dworkin, “Hard Cases” *Harvard Law Review* (1975): 1057-1109.

²¹ Kasia Lach and Wojciech Sadurski, “Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity,” *Journal of Comparative Law* 3, no. 2 (2008): 212-233; Jonathan Bond, “Concerning Constitutional Courts in Central and Eastern Europe,” *International Public Policy Review* 2, no. 2 (2006): 5-25; Wojciech Sadurski, *Rights Before Courts*, see note 16; Jiří Přibáň, “Constitutional Symbolism and Political (Dis)continuity: Legal Rationality and Its Integrative Function in Postcommunist Transformations,” in *Rethinking the Rule of Law after Communism*, eds. Adam Czarnota, Martin Krygier and Wojciech Sadurski (Budapest and New York: Central European University Press, 2005) 295-322; Kim Lane Scheppele, “Democracy by Judiciary. Or, why Courts Can be More Democratic than Parliaments,” in *Rethinking the Rule of Law after Communism*, cited above; Venelin I. Ganey, “Foxes, Hedgehogs, and Learning: Notes on the Past and Future Dilemmas of Postcommunist Constitutionalism,” in *Rethinking the Rule of Law after Communism*, cited above; Radosław Procházka, *Mission accomplished: on founding*

study basis.²² They have usually dealt with *how* the courts got to the rule of law, rather than *to which* rule of law they got. Scope of this thesis is then not much to analyse how the courts contributed to the achievement of a rule of law state of affairs, but rather on how – to use Procházka’s term – the Courts “domesticated”²³ the rule of law by interpreting and applying it in their jurisprudence. In order to do this I will have to:

- a. Identify a coherent conceptual pattern of the rule of law principle in the Court’s jurisprudence.
- b. See how this relates to “environmental” explanatory variables (mode of extrication, constitution-making, opportunity structure).

Method

The first theory-building chapter will be based mostly on the textual exegesis of legal-political theories and their critical assessment. Throughout the second and third chapter I will adopt a case-oriented qualitative comparative approach, identifying factors decisive in

constitutional adjudication in Central Europe (Budapest: Central European University Press, 2002); Alexander Schmitt, “Die Rolle der Verfassungsgerichte im verfassungspolitischen Transformationsprozess in Polen, Ungarn und Russland,” *Jahrbuch für Ostrecht* 43 (2002): 31-52; Herman Schwartz, *The Struggle For Constitutional Justice In Post-Communist Europe* (Chicago: University of Chicago Press, 2000); Georg Brunner, “Development of a Constitutional Judiciary In Eastern Europe,” *Rev. Cent. & E. Eur. L.* 18, No. 6 (1992): 535-553;

²² Specifically on Poland see: Leszek Lech Garlicki, “The Experience of the Polish Constitutional Court,” in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (The Hague: Kluwer Law International, 2002), 265-282; Mark F. Brzezinski, *The Struggle for Constitutionalism in Poland* (New York: St. Martin’s Press, 1998).

On the Czech Republic and Slovakia: Jiří Příbáň, “Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System,” in *Constitutional Justice, East and West*, cited above, 373 – 394; Darina Malová, “The Role and Experience of the Slovakian Constitutional Court.” In *Constitutional Justice, East and West*, cited above, 349-372; Joseph Marko, Alfred Ableitinger, Alexander Brörtl and Pavel Holländer *Revolution und Recht. Systemtransformation und Verfassungsentwicklung in der Tschechischen und Slowakischen Republik* (Frankfurt a. M., Berlin, Bruxelles, New York and Vienna: Lang, 2000).

On Hungary: Oliver W. Lembcke and Christian Boulanger, “Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court,” in *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, ed. Gábor A. Tóth, 269-299 (Budapest: Central European University Press, 2012); Lázlo Sólyom, “The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary” *International Sociology* 18 (2003): 133 – 161; András Sajó, “Reading the Invisible Constitution: Judicial Review in Hungary,” *Oxford Journal of Legal Studies* 15, No. 2 (1995): 253-267; Péter Paczolay, “The Role of Constitutional Adjudication in Legal Change,” in *Constitutionalism and Politics*, ed. Irena Grudzińska Gross, (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), 293-300.

²³ Procházka, *Mission accomplished*, 269.

shaping both similarities and specificities among countries. Although some explanatory variables will be isolated to simplify the cross-case analysis of concomitant variation, the “small N” nature of the study (3-4 cases) will rather approach the units of analysis as a complex “configuration of causes – that is, the effects of the contemporaneous presence/absence of a combination of factors.”²⁴ The unit of analysis in the second chapter will be the legal system and in particular the constitutional arrangements of the 3-4 countries under review, while in the third chapter they will be the Constitutional Courts. The enquiry will not strictly follow the framework of comparative constitutional law but rather open itself to a combination of approaches coming from political science, legal philosophy and sociology. As for the level abstraction, I choose a middle ground between particularistic and the universalistic, between the ideographic-nomothetic dilemma by performing an intra-regional analysis. This allows to perform a comparative study with custom-tailored conceptual categories, although at the expense of a little generalizability of the outcomes.

My aim is not to perform a systematic comparison of all the cases dealing with a specific issue, nor a broad overview of all aspects of the court’s jurisprudence. I will narrow down my selection of Constitutional Courts’ cases to what I consider as representative decisions for the development of a rule of law doctrine. Again, there will be no space nor need to address all cases in which the rule of law argument has been invoked. As we will see, the *Rechtsstaat* clause has been extensively (and sometimes inappropriately) employed by Courts in their judgments and not all these case are relevant: they either reaffirm previous tendencies or refer to procedural, uncontested uses of the rule of law, without adding much to the core argument of the thesis. The criteria applied for choosing cases has been informed by Renáta Uitz’s conceptual distinction between transitional justice jurisprudence (involving

²⁴ Donatella della Porta, “Comparative analysis: case-oriented versus variable-oriented research,” in *Approaches and Methodologies in the Social Sciences. A Pluralist Perspective*, ed. Donatella della Porta and Michael Keating (Cambridge: Cambridge University Press, 2008), 213.

rulings on lustration, decommunization, retroactive criminal liability, restitutions, etc.) and ordinary jurisprudence.²⁵ I call the two groups the “testing grounds” for the rule of law.

As illustrated by a large volume of literature,²⁶ the main instruments employed during the post-communist transitions in order to “come to terms with the past” have been three: so-called “lustration laws,”²⁷ retroactive punishment and properties restitution or compensation. I will analyse here only the first two, while property-related laws – given their complexity and intertwinement with private law considerations – will be left for further studies. Nor does an accurate analysis of these legislative measures fall within the scope of this work. Here I will rather try to test Ruti Teitel’s argument that transition times are characterized by a *sui generis* rule of law an opposition between the imperatives of the *Rechtsstaat* and natural justice.²⁸

The second testing ground will consist in those cases where the Courts employed the rule of law principle to “help” the constitutional text by filling the gaps left by an often fragmentary constitutional process. These cases are particularly instructive because here the Courts had to provide theoretical justifications for their intervention, thus exposing a rule of law theory.

The approach I will follow suffers from some obvious shortcoming which shall be acknowledged. First of all it concentrates on endogenous explanations, paying little attention to external factors. Their importance has been suggested by many authors, both in terms of borrowing of foreign legal arrangements²⁹ and under the guise of “conditionality” by

²⁵ Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” *passim*.

²⁶ Adam Czarnota, “Lustration, decommunisation and the rule of law”, *Hague Journal on the Rule of Law* 1 (2009): 307-335; Ruti Teitel. “Post-Communist Constitutionalism: A Transitional Perspective.” *Columbia Human Rights Law Review* 26 (1994-1995): 167-190; Hilary Appel, “Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe,” *East European Politics and Societies* 19 no. 3 (2005): 379-405.

²⁷ Namely statutorily-defined prerequisites in order to access certain positions in the public administration (and sometimes even private) aimed at excluding from “sensitive” positions individuals regarded as compromised with the previous regime.

²⁸ Teitel, “Transitional Jurisprudence. The Role of Law in Political Transformation,” *The Yale Law Journal* 106, No. 7 (1997): 2018.

²⁹ Catherine Dupré, *Importing the law in post-communist transitions: The Hungarian constitutional court and the right to human dignity*. Vol. 1. (Oxford & Portland: Hart Pub Limited, 2003); Wiktor Osiatynski, “Paradoxes of Constitutional Borrowing,” *Int'l J. Const. L.* 1 (2003): 244; A.E. Dick Howard, panel speech

international organizations such as the Council of Europe and, later, the European Union.³⁰

Second, we must always keep in mind that courts are made by people. This means that the normative and philosophical beliefs they express and which I try to systematize are in a final analysis depending on the charisma, ideology and motivation of the judges. The activist Hungarian Court, for instance, after the departure of its ambitious first president Lázlo Sólyom has become strikingly quiet. “This experience should warrant caution in placing excessive weight on any short list of characteristics as determinative of court success”.³¹ Finally, Courts do not necessarily “speak” in the name of the whole society. Their judgements have sometimes been strongly criticised by observers.³²

Structure of the thesis

My argument proceeds in four steps: in Chapter 1 I review the broad literature on the rule of law theory, confronting different traditions and interpretations in order to both single-out a normative core of the rule of law principle and at the same time develop a toolkit of concepts and ideal types for the subsequent case-oriented analysis. In Chapter 2 I will take a “step back” and analyse the complex relationship between continuity and change in the East European “constitutional revolutions.” A special attention will be paid to the nature of the past legacies of socialist legality as well as to the ambiguity of the term “revolution” in the Central Eastern European cases. Here I will outline the patterns of variance among the 3 cases and argue that they had an impact on the respective understanding of the law. In Chapter 3 I

delivered on September 26, 1996 at the symposium “Constitutional ‘Refolution’ in the Ex-Communist World: The Rule of Law.” Transcribed in *American University International Law Review* 12, no. 1 (1997): 57; Matthias Hartwig, “Die Legitimation des Staates durch Verfassungsrezeption in Mittel-und Osteuropa,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 59, no. 4 (1999): 937. Herman Schwartz, “The New Courts: An Overview,” *E. Eur. Const. Rev.* 2 (1993): 28.

³⁰ Procházka, *Mission accomplished*, 16 ff; Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” 72; Emmert, “Rule of Law in Central and Eastern Europe” 570. See, however, the critical assessment of such theories by Lach and Sadurski in their article “Constitutional Courts of Central and Eastern Europe”, 218.

³¹ Bond, “Concerning Constitutional Courts in Central and Eastern Europe,” 18.

³² It is sufficient to remind István Csurka’s Zsolt Zétényi’s criticism to the Hungarian Court’s decision on retroactive criminal prosecution, the public support for death penalty in spite of the Court’s ban, Václav Havel’s criticism against the Czech Court’s upholding of the extension of lustration laws, the continuous rivalry between courts and government in Slovakia during Vladimír Mečiar’s premiership, etc.

will elaborate on this by assuming the perspective of the Constitutional Courts. I will analyse the Court's jurisprudence in the two above mentioned "testing fields" searching for a coherent trajectory in the way the rule of law was employed and interpreted. I conclude by recapitulating the diversity of outcomes in the creation of a rule of law tradition and by exposing the variables which are considered to be most relevant to explain them.

CHAPTER 1

THEORETICAL BACKGROUND: WHAT IS (NOT) THE RULE OF LAW?

The first chapter of the present work will elaborate a theoretical conceptualization of the rule of law principle, as an operative framework for the chapters to follow. Starting from a summary of the two main traditions, the British “Rule of Law” and the German *Rechtsstaat*, it will individuate a number of “core issues” which represent the essence of the rule of law, independently from the different institutional morphologies and legal cultures. Special relevance will be given to the distinction between “formal” and “substantive” conceptions of the rule of law, whose rationale will be critically assessed. As a final endeavour of this theoretical premise, I will single out what the rule of law is *not*, addressing the problems engendered by the general trend to inflate the concept.

1.1 The Rule of Law, the Rechtsstaat and the definitional jungle

The concepts of Rule of Law and law-governed State (or similar expressions) have entered the vocabulary of legal reasoning as well as everyday political discourse, not only in the “older democracies” but also – and maybe even more – in the countries undergoing transition from authoritarian rule. The use of this term is wide and, since the diffusion of transitional literature, it has dramatically increased, albeit most likely at the expense of its conceptual clarity. One of the main problems when dealing with the rule of law is the fact that – although virtually everybody talks about it – there is no accepted definition of what the rule of law actually is. The only aspect nearly every author seems to agree on, is that there is no

agreement on what the rule of law exactly means. Speculations about its content vary across legal traditions, academic disciplines, professional categories and scholarly interpretations, just to mention some. This is both its strength and its weakness:³³ concept stretching has made the term a very popular slogan but at the same time it is “increasingly in danger of becoming so vague as to become useless.”³⁴ Next to its “typical” elements (legal certainty, formal equality, judicial independence, fair hearing, etc.), approaches in the social sciences – especially in the field of democracy promotion – often couple the rule of law with disparate desirable outcomes such as democracy, good governance, equality, human rights, economic growth, etc. In addition to definitional difficulties, lexical ambiguity when it comes to translation of the concept into other languages have determined a mayhem of terms, sometimes used as synonyms, sometimes with dissimilar theoretical underpinnings.³⁵ The most immediate and fundamental juxtaposition is between the two main traditions, the Anglo-Saxon “Rule of Law”³⁶ doctrine and the continental European (yet originally German) *Rechtsstaat* theory. According to most authors,³⁷ the two concepts are not immediately overlapping, whereby the main difference can be synthetized in the catchphrase that *Rechtsstaat*, *état de droit*, *stato di diritto*, etc. are peculiar forms of a State,³⁸ while the rule of law is a particular kind of law.³⁹ The following sections will try to clarify the apparently

³³ Peerenboom, “Human Rights and Rule of Law,” 19.

³⁴ Emmert, “Rule of Law in Central and Eastern Europe,” 561.

³⁵ It is sufficient to think about the different translation of Rule of Law in French: “*prééminence du droit*”, “*Etat de droit*”, “*principe de droit*”, “*régime de droit*”, “*règne du droit*”, etc. The Council of Europe has issued a directive whereby – due to its bilingual nature – it establishes the term *prééminence du droit* as the correct equivalent of the English Rule of Law, while underling its distinctiveness from the German *Rechtsstaat*, whose translation is “*Etat de droit*”. See Erik Jurgens (rapporteur), *The principle of the Rule of Law*, Council of Europe Parliamentary Assembly, Doc. 11343, 6 July 2007.

³⁶ For reasons of clarity, I will employ the words Rule of Law with capital letters when referring to the rule of law *stricto sensu* in the British doctrine. On the contrary, “rule of law” in lower case letters refers to the more general and abstract concept of rule of law *lato sensu*, not contingent on a specific legal order but rather in its normative core.

³⁷ Among others: Palombella, “The Rule of Law and its Core,” 17 ff; Neil D. MacCormick, „Der Rechtsstaat und die Rule of Law“, *Juristenzeitung* 50 (1984); Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law”; Basta-Posavec, “Anmerkungen zur Beziehung zwischen Rule of Law und Rechtsstaat,” 227-229.

³⁸ Palombella, “The Rule of Law and its Core,” 17; Szabó, “New Constitutionalism Based on an Old Notion,” 297.

³⁹ Szabó, *id.*

obscure meaning of this proposition, with the precise intent of exploring the diversity in time and context of the institutions supporting the rule of law as “a premise for reconstructing a possible unitary normative meaning.”⁴⁰

1.1.1 The British Rule of Law

The Anglo-Saxon doctrine of the Rule of Law stems from the long historical gestation of a (not systematically codified) legal order which, differently from the German experience, does not see the “State” as a single juristic concept,⁴¹ but rather as a polycentric apparatus which evolved through the struggle among different organs of power. Such a “precocious division of sovereignty”⁴² largely explains why the word “*Staat*” [State] is missing in the English term, and almost alien to English legal thinking, preferred by the one of “government”.⁴³ The British Rule of Law, therefore, has no attachment to a monolithic form of State, but rather emerges autonomously as a form of law “in action”. This is not reducible to a given set of positively enacted statutes, but rather is preceded by an alluvial development of normative acts, courts’ jurisprudence, conventions, customs and (not strictly legal) precepts that piled up in elaborating that plurality of sources that is the “law of the land.”

The cornerstone of the British Rule of Law is the “normative synergy between Parliament and judiciary”,⁴⁴ giving form respectively to the statutory law and the common law. The doctrine of “Parliamentary sovereignty” originated from the historical circumstances of 17th century England, when – after years of political struggle, including a couple of revolutions – Parliament, was regarded as the representative of the people as opposed to the Monarch’s absolutism.⁴⁵ In this context, the primacy of (Parliament’s) law meant endorsing the legislative with the task of restraining the Crown’s regulating prerogatives. On the other

⁴⁰ Palombella, “The Rule of Law and its Core,” 18.

⁴¹ MacCormick, “Der Rechtsstaat und die Rule of Law,” 65.

⁴² Costa, “The Rule of Law. A historical introduction,” 102.

⁴³ MacCormick, “Der Rechtsstaat und die Rule of Law,” 67.

⁴⁴ Danilo Zolo, “Rule of Law: A Critical Reappraisal,” in *The Rule of Law. History, Theory, Criticism*, eds. Pietro Costa and Danilo Zolo, (Dordrecht: Springer, 2007), 8.

⁴⁵ Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law,” 89.

end of the synergetic link, the English constitutional structure, lacking a written and rigid document, as well as mechanisms of judicial review of statutes, found in the guarantees of the rule of (common) law, embodied in the judicial branch, the primary source of equal protection of the subjective “rights of the Englishmen” from both the Crown and the Parliament. Having gradually achieved independence from both these organs, the English common law constitutes, in the words of Sir Edward Coke, the “surest sanctuary” for individuals “birth rights”,⁴⁶ thanks to a historically stratified jurisprudence which has in the *stare decisis* (binding precedent) principle its cardinal element of strength.

However, as the most eminent theorizer of the British constitutionalism – Albert Venn Dicey – has explained, parliamentary sovereignty entails an “absolutely sovereign legislature” which “cannot be bound by any law.”⁴⁷ This parliamentary omnipotence implies – on a theoretical level – that legislation could even infringe rights,⁴⁸ and confidently overrule any consolidated “judge made law”.⁴⁹ “From this standpoint there is no distinction in theory between the absolutism of Parliament and that of the most despotic monarch.”⁵⁰ This tension between sovereignty, law and individuals was resolved by Dicey by turning this antagonism into coordinating mechanism: the sovereignty of parliament favours the supremacy of law,⁵¹ but when conceiving law within the specific setting of the British legal system, the second pillar, the common law, has to be taken into consideration. Hence, as he writes, “Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land.”⁵² Almost

⁴⁶ Edward Coke, *The Second Part Of The Institutes Of The Laws Of England*, [1642], (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein Co. 1986): 55.

⁴⁷ Albert Venn Dicey, *Law of the Constitution*, 39, 40. Cited in Arthur L. Goodhart, “The Rule of Law and Absolute Sovereignty,” *University of Pennsylvania Law Review* 106, no. 7 (1958):950.

⁴⁸ Palombella, “The Rule of Law and its Core,” 24.

⁴⁹ Pietro Costa, “The Rule of Law. A historical introduction,” in *The Rule of Law. History, Theory, Criticism*, 73-199, eds. Pietro Costa and Danilo Zolo (Dordrecht: Springer, 2007), 104.

⁵⁰ Goodhart, “The Rule of Law and Absolute Sovereignty,” 950.

⁵¹ Dicey, cited in Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law,” 90; and Palombella, “The Rule of Law as an Institutional Ideal,” 9.

⁵² Dicey, cited in Palombella. “The Rule of Law as an Institutional Ideal,” 9.

paradoxically, the supremacy of parliament, as noted by Blaau, indirectly strengthens the power of the judges.⁵³ It is precisely in the stratified, plural and independent nature of the law of the land that the legal imperative prevailing over the will of the sovereign is to be found, and this is the Rule of Law. In other words, where the continental European legal orders had to recur to codified bills and positive constitutions, in Britain it is in this flexible and judicially-based “constitution” (resulting from inductive generalization from specific cases rather than general abstract principles⁵⁴) that constituted the safest safeguarding against arbitrary rule.⁵⁵ The Rule of Law, in a certain sense, is the minimal core of the constitution. As Csaba Varga put it, while in continental Europe rule of law implies loyalty to a text, in the British-American experience it rests on a trust in social processes.⁵⁶

Dicey identifies three fundamental features of the British Rule of Law: the principle of *nullum crimen sine lege*, namely that no man can be punished for an act not forbidden by a law; the principle of equality before the law, or more specifically, that every individual be subject to the same law, administered by the same courts, irrespective of his or her “rank or condition”; and that constitutional principles and rights flow “from below”, namely from court judgments, rather than “from above”, i.e. from written constitutions. As Dicey liked to remark (not without some degree of parochialism, as Krygier has underlined⁵⁷), these common law roots of British constitutionalism imply that “the rules that in foreign countries naturally form part of a constitutional code, are not the source, but the consequence of the rights of the individuals, as defined and enforced by the Courts.”⁵⁸

⁵³ Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law,” 91.

⁵⁴ Zolo, “Rule of Law: A Critical Reappraisal,” 17.

⁵⁵ Ulrich K. Preuss, “The Political Meaning of Constitutionalism”, in *Democracy and Sovereignty: American and European Perspectives*, ed. R. Bellamy (Aldershot: Avebury, 1996): 19.

⁵⁶ Csaba Varga, “Varieties of Law and Rule of Law,” *Archiv für Rechts- und Sozialphilosophie* 82 (1996): 63, 65.

⁵⁷ Krygier, “Four Puzzles about the Rule of Law,” 66.

⁵⁸ Dicey, cited in Palombella, “The Rule of Law and its Core,” 24.

1.1.2 The German *Rechtsstaat*

The German *Rechtsstaat*, as the name suggests, refers to a specific quality of a State. It was coined much later than its British counterpart, namely in the 19th century, as a compromise between liberal and conservative positions following the Restoration,⁵⁹ and it influenced the continental European tradition (transposed in the French *état de droit* and the Italian *stato di diritto*). It was elaborated by the German legal doctrine as a tool to bind the State power to respect its own laws, primarily when encroaching upon citizens' liberty and property rights. This was meant to be achieved through formal rules, mechanisms of accountability and legal coherence, the most important being the principle of legality (*Gesetzmäßigkeit*), which – similarly to the British Rule of Law – sanctioned the supremacy of law over executive and judicial powers.

One of the most influent enunciations of the *Rechtsstaat* principle came from the conservative jurist Friedrich Julius Stahl, according to whom it simply referred to a way of state action under legal form, according to precise and fixed rules that would unquestionably determine the boundary between its ambit of action and that of the citizens. The aim of the *Rechtsstaat* was therefore not to protect citizens' rights; it endorsed no specific content-based limits but rather purported to “remove extemporariness and arbitrariness from the state's action and [make] it regular, legal.”⁶⁰ Stahl emphasized the importance of positive rules in setting institutional and procedural mechanisms to state's action, limiting its power through law. It follows that law is not the constraint, but rather the ‘form’ of the State's will. It is thanks to Robert von Mohl that the German legal theory started to move individual freedom from a residual by-product to a goal of State action. According to Mohl, not only was the

⁵⁹ Zolo, “Rule of Law: A Critical Reappraisal,” 11.

⁶⁰ Costa, “The Rule of Law. A historical introduction,” 91.

State supposed to abstain from interfering in individuals' life plans, but also to aid them in overcoming obstacles to the attainment of its goals.⁶¹

"The development of the state in the nineteenth and twentieth centuries as an administrative power was decisive in shaping the contours of the *Rechtsstaat*."⁶² It is in this context that Otto Bähr, in his *Der Rechtsstaat*, attempted to overcome Stahl's formalism, claiming that the State's action, at least in its administrative function, could be subjected to judicial control. The *Rechtsstaatlichkeit* was initially constrained only to the administrative norms both because it was seen as more directly harmful to liberties and possession, and because State legislation, in absence of a rigid constitution, could not be logically limited, being by its very nature the most typical expression of sovereignty.⁶³ Only a voluntary act of State self-limitation, as theorized by Jhering⁶⁴ and Jellinek,⁶⁵ could carve out certain areas of individual autonomy from state power, which – behaving as possessing a sort of legal personality – entered into relationships with individuals, from which reciprocal rights and obligations originated.

Dominant in the German 19th century legal thinking was in fact the debate between, on the one hand, the historicist and organicist view, according to which the State essentially corresponded to the aggregation of the national community (the *Genossenschaft*), and, on the other hand, formalist conceptions (such as Gerber's) that emphasized the centrality of the State's objective order in its relation with law and citizens. Common to both views, however, was the perception of the State as a unitary metaphysical entity, possessing his own volitional capacity and abstracted from the individual citizens who compose it.⁶⁶ Its powers, politically and legally tied to the figure of the Kaiser, did not reciprocally limit each other like in the

⁶¹ *Id.*, 92.

⁶² Palombella, "The Rule of Law and its Core," 20.

⁶³ Costa, "The Rule of Law. A historical introduction," 101.

⁶⁴ Rudolf von Jhering, *Law as a Mean to an End*, trans. Isaac Husik (Boston: The Boston book company, 1913): 283

⁶⁵ Georg Jellinek, *System der subjektiven öffentlichen Rechte*, (Aalen: Scientia Verlag, 1979).

⁶⁶ Palombella, "The Rule of Law and its Core," 19.

British case, but were perceived as practically separated functions of a single ontological (and juristic) entity. This statist meta-legal background is mirrored in Jellinek's theory of "public subjective rights" as a self-obligation of the State to recognize certain equal rights to individuals, maintaining however its dominance as the only legitimate source of law. Liberty and rights are therefore not based on natural law, but rather dependent on the political community and hence the State,⁶⁷ that through the priority of legislation (epitomized in the principle of legality) both protects and subordinates them. Contrary to the British Rule of Law, here liberty is not presupposed by, but a product of the law.⁶⁸

This rather formalistic understanding developed into fully-fledged legal positivism at the outset of the 20th century. The concept of *Rechtsstaat* that emerged has been (rightly or wrongly) blamed for the justification it provided for the connivance of the judiciary with Nazi state terror and the incapacity of law to constrain political power. The new Basic Law of Germany, as well as all the "ethical" constitutions drafted in the post-World War II context – were equipped with substantive elements such as human dignity, in order to locate these values in an extra-legal sphere, beyond the legislating capacity of the government and in some cases – through constitutional entrenchment – also beyond constitutional amendments. However, positivist approaches continued in the legal practice and it was only in 1973, with the Princess Soraya case,⁶⁹ that the German Constitutional Court put a definitive end to German legal positivism.

1.2 The quest for the normative core of the rule of law

Having reviewed the two main conceptions of Rule of Law and *Rechtsstaat*, we can attempt to draw some conclusion on the existence of a minimal common denominator, a coherent unitary normative core. With all the necessary caution that the awareness of the time

⁶⁷ Costa, "The Rule of Law. A historical introduction," 100; and Palombella, "The Rule of Law as an Institutional Ideal," 14.

⁶⁸ Palombella, "The Rule of Law and its Core," 19.

⁶⁹ BVerfGE 34, 269 (1973)

and space-dependent differences in institutional settings and legal traditions require, we can agree with Costa that “different culture-bound features nonetheless allow for the ... determination of a shared ‘culture-invariant’ function.”⁷⁰ Particularly persuading is the definition of rule of law given by Gianluigi Palombella, as a commitment to a normative ideal meant to ensure “the adequacy of legal institutions to prevent the law from turning itself into a sheer tool of domination, a manageable servant to political monopoly and instrumentalism.”⁷¹ It is important to note that the reference here is not to a specific set of institutions, but rather to their adequacy to the normative purpose they are meant to serve. This point has been clearly illustrated by Martin Krygier, with his critique of what he calls anatomical notions of the rule of law.⁷² With this term he intends to spell out the misleading nature of the tendency – so common among “rule of law promoters” – to associate the rule of law with a certain “morphology of particular legal structures and practices.”⁷³ The major pitfall in this understanding, is the assumption that all we need to do in order to have the rule of law is to have a certain institutional configuration and/or procedural guarantees, coming usually under the form of a checklist. According to Krygier, the inevitable failures of such approaches are due to the erroneous understanding of the rule of law in anatomical terms, rather than in teleological ones. Conceptualizing the rule of law in the latter sense means understanding it as a “state of affairs”, “when the exercise of political, social and economic power, are effectively constrained and channelled to a significant extent by and in accordance

⁷⁰ Pietro Costa, “The Rule of Law. A historical introduction,” in *The Rule of Law. History, Theory, Criticism*, eds. Pietro Costa and Danilo Zolo (Dordrecht: Springer, 2007): 103. On the same line of thoughts, G. de Q. Walker: “If we focus not so much on the description of the institution but on the immediate purpose which it is designed to serve, we find important points of resemblance between legal systems.” In *The Rule of Law. Foundation of Constitutional Democracy*, (Melbourne: Melbourne University Press, 1988), 10.

⁷¹ Palombella, “The Rule of Law as an Institutional Ideal,” 4.

⁷² Krygier, “Four Puzzles about the Rule of Law,” 68; and “The Rule of Law: Legality, Teleology, Sociology,” in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Oxford, UK and Portland, OR: Hart Publishing, 2009), 47.

⁷³ Krygier, “Four Puzzles about the Rule of Law,” 68.

with law so that nonarbitrary exercises of that power are relatively routine.”⁷⁴ What is crucial, is that this *telos* may be achieved through different institutional morphologies.

If we recall the cynical critique of Carl Schmitt to the idea of *Rechtsstaat*, namely that it “can mean as many things as the term *Recht* [law] itself and as many different concepts as the many institutional arrangements implied by the term *Staat* [state],”⁷⁵ we are forced to give him some credit for it. This is not to say that we shall side with Schmitt and treat the rule of law as an excessively vague and dismissible concept. It only urges us to recognize that not only the range of “structural packages” that sustain this “state of affair” may vary, but also the ideal of law underneath is not clear-cut: for legal and political philosophers tend to disagree on such basic concepts such as the role of law in a society, its nature, content, limits, legitimacy and so on. We must therefore now answer the question: which law is required for the rule of law to be there?

1.2.1 Which law for the rule of law?

The rule of law is a “cumulative” concept. This means that it cannot be represented by one single feature or definition, but rather it is the product of a series of features which – when taken as a whole, may (or may not) produce that “state of affairs” referred to by Krygier’s teleological definition. It is largely intuitive that one basic requirement for the rule of law is that some (positive) law must exist.⁷⁶ As John Locke once said: “A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society.”⁷⁷ From this consideration derives the idea of rule of law as opposed to anarchy, or lawlessness. It goes without saying, however, that this is a necessity,

⁷⁴ Krygier, “Four Puzzles about the Rule of Law,” 69.

⁷⁵ Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer, (Durham and London: Duke University Press, 2004 [1932]), 14.

⁷⁶ Walker, *The Rule of Law*, 3; Re Manitoba Language Rights, [1985] 1 S.C.R. 721. The Supreme Court of Canada, in this famous decision, stated that “the rule of law requires the creation and maintenance of an actual order of positive laws to govern society.” (III).

⁷⁷ John Locke, “Second Treatise of Civil Government,” §219, in *The Second Treatise of Government and A Letter Concerning Toleration*, (Mineola, NY: Courier Dover Publications, 2002), 99.

but not sufficient condition for the rule of law:⁷⁸ its meaning would otherwise collapse into mere “law and order”.

Another classical opposition is between the rule of law and the rule by law.⁷⁹ Rule by law narrows the role of law to a mere instrument at the mercy of the sovereign, stripped of any normative content. It provides little or no limitation to its power: it just prescribes that law “is the means by which the state conducts its own affairs,”⁸⁰ instead of mere utterances, or other expression of will. But it tells us only about the form of acts of domination, while nothing on its qualities. Rule by law, as hinted by Goodhart, exploits the binding capacity of law on its subjects but does not guarantee any form of limitation of governmental officials, hence it is not under the law.⁸¹ Such a rule by law can be said to exist in all states, but it is still not enough to reach the threshold of the rule of law. This implies something more, namely a specific articulation of law held to bear an inherent value.⁸² This does not mean that law, also under a rule of law conception, does not absolve any instrumental function, yet the difference between rule of law and rule by law is that the latter conceives law to be just an instrument.⁸³

Political power is both dangerous and necessary, therefore law should at the same time enable and restrict it. This “conflict” is what the rule of law tries to reconcile.⁸⁴ According to Costa, the common *raison d’être* of the Rule of Law, the *Rechtsstaat*, the *état de droit*, etc. is to shape the relationship between these two elements (political power and law) in a way “which is, overall, beneficial to individuals.”⁸⁵ This *telos* can be accomplished only by equipping law with both the capacity to rule and qualities that narrow its otherwise

⁷⁸ Palombella, “The Rule of Law as an Institutional Ideal,” 4.

⁷⁹ See, among others, Palombella, “The Rule of Law as an Institutional Ideal,” 5 ff; Tamanaha, *On the Rule of Law*, 92; Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law,” 77 ff; Goodhart, “The Rule of Law and Absolute Sovereignty,” 947.

⁸⁰ Tamanaha, *On the Rule of Law*, 92.

⁸¹ Goodhart, “The Rule of Law and Absolute Sovereignty,” 946-7.

⁸² Palombella, “The Rule of Law as an Institutional Ideal”, 5-6.

⁸³ *Id.*

⁸⁴ Walker, *The Rule of Law*, 1.

⁸⁵ Costa, “The Rule of Law. A historical introduction,” 74.

unrestricted capacity. The issue of how this goal is to be attained – which reflects which characteristics the rule of law shall have – is approached in different ways.

According to Tamanaha, this is realized in two ways: by requiring compliance with existing rules (the German idea of *Gesetzmäßigkeit*) and the imposition of binding substantive limits to the law-making power.⁸⁶ We can elaborate the first principle of compliance with laws by imagining it as having “external” and “internal” boundaries: the external one requires that state organs possess no other powers besides those assigned to them by law (reflecting the attributive power of law); the internal limits pertain to the content and aims of the law, meaning that governmental officials not only have to operate within the limits imposed by law but also according to its content (directing power of law).

The second aspect, the imposition of limits on the source of law, namely law-making power, implies a different threshold. Governmental (or better, parliament’s) action may not only be invalid, as when it does not correspond to rules set by ordinary law, but even illegitimate, if acts outside of the sphere authority attributed to it. This happens, for instance, when legislative power is exercised in breach of higher-ranking rules, such as – ordered from the least to the most entrenched – constitutional provisions, international treaties or moral rules of natural law. Compliance with these requirements is more difficult to ensure: constitutional rules might be amended by supermajorities, treaties might be scot-free violated, and moral considerations are subject to interpretation and not directly enforceable.

Tamanaha’s distinction boils down into a twofold understanding of rule of law’s functions: on the one hand, procedural rules following laws’ enactment; on the other hand, substantial (or content) considerations pre-existing to laws’ production. This division entails both a timing (before or after legal rules are created), as well as a procedure-content division. As useful as it may be, this scheme suffers some shortcomings: a) it overlooks the

⁸⁶ Brian Z. Tamanaha, “A Concise Guide to the Rule of Law,” in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Portland, OR: Hart Publishing, 2009), 4.

distinctiveness of constraints across different state powers, which may differ;⁸⁷ b) it replicates the problem of constraints to a higher level; c) it fails to properly take into account the interpretative role of the judiciary as ex post “creator” of legal norms; d) it relies on a too clear-cut division between procedure and substance. This last point is the most important for the elaboration of our argument: which understanding of law, and therefore of rule of law, shall we take?

1.3 Formal and substantive rule of law. A useful classification?

Traditionally accounts of the rule of law have been divided between, on the one hand, formal (or “thin”) conceptions, expressed inter alia by several 19th century German jurists (Stahl,⁸⁸ Bähr,⁸⁹ von Mohl,⁹⁰ Mayer,⁹¹ etc.) and legal philosophers such as Joseph Raz,⁹² Lon Fuller;⁹³ on the other hand, substantive (or “thick”, or – to use Kelsen’s terms – “material”⁹⁴) ones, supported by Ronald Dworkin⁹⁵ Trevor Allan,⁹⁶ Danilo Zolo⁹⁷ and most of the “rule of law promoters” community. The first is usually described as rejecting the incorporation of

⁸⁷ In fact, out of historical, social and philosophical reasons, different institutional and legal contexts have attributed more emphasis to the constraint of some state powers than others. For instance the British and French traditions, which have usually considered the limitation of legislative power as a sort of institutional taboo, while constraints on the executive power are usually less controversial. See Goodhart, “The Rule of Law and Absolute Sovereignty,” *passim*.

⁸⁸ Friedrich Julius Stahl, *The Philosophy of Laws*, II, The doctrine of Law and State on the Basis of a Christian World-View, “Principles of Law”, [Heidelberg 1854], trans. Ruben Alvarado (Aalten: WordBridge Publishing, 2007).

⁸⁹ Otto Bähr, *Der Rechtsstaat* [1864], (Aalen: Scientia Verlag, 1961).

⁹⁰ Robert von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates* [1832], vol. 1, (Tübingen:Laupp, 1844).

⁹¹ See M. Fioravanti, “Otto Mayer e la scienza del diritto amministrativo,” *Rivista trimestrale di diritto pubblico* 33 (1983): 600 – 659.

⁹² Raz, “The Rule of Law and its Virtue,” 195 - 196.

⁹³ Fuller, *The morality of Law* [1964]. New Haven: Yale University Press, 1969 .

⁹⁴ The term is used for its semantic explanatory effect, although it may well be argued, that it is here used inconsistently. Hans Kelsen, as a legal positivist, would be ascribed to the stream of thought interpreting the Rule of Law in more formal terms. Yet, in his early *Allgemeinen Staatslehre*, he defined the *Rechtsstaat* in material sense as a State whose legal order entails “legal institutions, such as democratic legislative process, obligation for the head of State to have his executive acts undersigned by the relevant minister, fundamental liberty rights of the ruled ones, independent courts, judicial review of administrative law, etc.” (Hans Kelsen, *Allgemeinen Staatslehre* [Springer, Berlin 1925] (Österreichische Staatsdruckerei: Wien 1993), 93.). Although most of the elements he mentions in his definition could be considered as still “formal”, the inclusion of liberty rights makes the use of his terminology in this context not completely inappropriate.

⁹⁵ Dworkin, *A Matter of Principle*.

⁹⁶ Allan, Trevor R. S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1993).

⁹⁷ Zolo, “Rule of Law. A Critical Reappraisal.”

moral values (justice, equality, human rights, etc.) focusing on the formal-procedural constraints exercised by the rule of law on sovereign power (principle of legality, division of powers, legal certainty, etc.) but letting the state's action free to assume any substantive content. The opposite view, claiming that rule of law can be only meaningful as long as essential values are taken into account,⁹⁸ incorporates in the term also content-based limitations on governmental power, chiefly fundamental rights, democracy and so on.

1.3.1 Formal conceptions

Central to the formal conception of the rule of law is that rules shall remove uncertainty by providing a sufficient guidance to people's behaviour. Quoting Joseph Raz, "the rule of the law.... has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."⁹⁹

The focus here is on procedures, on formal intrinsic characteristics that the law and the state must have in order to obtain some degree of non-arbitrariness. The thin rule of law addresses

the manner in which the law was promulgated, ... the clarity of the ensuing norm ... and the temporal dimension of the enacted norm. Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself.¹⁰⁰

Perhaps the most well-known "formal" principles of a formal rule of law are those enounced by Lon Fuller¹⁰¹:

- Generality
- Promulgation (i.e. publicity)
- Prospectivity
- Clarity
- Consistency (absence of contradictions)

⁹⁸ Emmert, "Rule of Law in Central and Eastern Europe," 563.

⁹⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford : Oxford University Press, 1979), 212-213.

¹⁰⁰ Craig, "Formal and substantive conceptions of the rule of law," 467.

¹⁰¹ Fuller, *The Morality of Law*, 43 ff.

- Feasibility (they shall not require the impossible)
- Stability over time
- Congruence of the rule and official action (principle of legality)

Raz comes out with a similar list, adding procedural and institutional considerations as the principle of separation of powers and access to courts,¹⁰² a point further elaborated by Waldron in his elaboration of “procedural” elements of the rule of law, meant to supplement Fuller’s list.¹⁰³

This conception of the rule of law is what Ronald Dworkin calls the “rule book” conception,¹⁰⁴ which sets the rules according to which both government and citizens shall play. He argues that “those who have this conception of the rule of law do care about the content of rules ..., but they say that this is a matter of substantive justice, [which is] in no sense part of the rule of law.”¹⁰⁵ Supporters of substantive conceptions do not deny the functional virtue of this “rule book” interpretation, but they question whether it contains also moral values. The issue at stake here is to establish whether validity criteria (such as Fuller’s) encapsulate moral considerations and whether they are a sufficient feature of the rule of law. Pure legal positivism would maintain that morality and validity are two separate problems, and this is how the thin rule of law is usually understood, mainly by its detractors: given its instrumentality, it is supposed to be neutral to values and hence “consistent with formal legality, the government can do as it wishes, so long as it is able to pursue those desires in terms consistent with (general, clear, certain and public) legal rules.”¹⁰⁶ A law may be clearly, prospectively, and generally stated and yet it may infringe upon individual rights or envisage a disproportionate punishment. In fact, if the law is stripped from any normative prescription, it is allowed to assume any content, paving the way to exceedingly statist conceptions of rule

¹⁰² Craig, “Formal and substantive conceptions of the rule of law,” 469.

¹⁰³ See on this: Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” in *Getting to the Rule of Law*, ed. James E. Fleming (New York and London: New York University Press, 2011).

¹⁰⁴ Dworkin, *A Matter of Principle*, 11.

¹⁰⁵ *Id.*

¹⁰⁶ Tamanaha, *On the Rule of Law*, 95-96.

of law where individual freedoms exist only residually. As Peerenboom put it, “a thin rule of law is consistent with considerable injustice and the abuse of human rights and allows such wide variations in institutions and outcomes that ... [it] will not provide useful guidance on many important issues.”¹⁰⁷ As Raz himself wrote:

A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.¹⁰⁸

Legal positivism, however, is not the only key to interpretation of the formal rule of law. Fuller insisted on recognizing a moral value to his principles which he defined as “internal morality of law,”¹⁰⁹ to be contrasted with its external, contingent ones. This opposition between internal and external morality is well exemplified by Palombella:

One should conceive of the ‘inner moral’ value of such requirements, as a notion to be distinguished from ‘positive’ (or socially current) ethics, which is ‘external’ to the law itself and based on a range of varying choices and values.¹¹⁰

Fuller believed that observing these “inner moral” principles was a way –although admittedly not the only one – to respect human dignity and therefore pursued a moral goal.¹¹¹ Even a “thin” formal understandings of rule of law, in fact, by anchoring state action to certain rules of conduct, does “realize a piece of human dignity”.¹¹² principles such as generality and publicity of laws, non-retroactivity, legal certainty, presumption of innocence and justiciability in front of independent courts, etc., even if lacking an extrinsic normative content do by themselves provide individuals with a minimum core of fundamental guarantees against arbitrary power. Such a minimum core of Rule of Law is alone a great achievement, and constitutes a step ahead from the simple rule by law. It is in fact mistaken to

¹⁰⁷ Peerenboom, “Human Rights and Rule of Law,” 18.

¹⁰⁸ Raz, “The Rule of Law and its Virtue,” 211.

¹⁰⁹ Fuller, *The Morality of Law*, 43 ff.

¹¹⁰ Palombella, “The Rule of Law as an Institutional Ideal,” 27.

¹¹¹ Waldron, “The Rule of Law and the Importance of Procedure,” 14.

¹¹² MacCormick, “Der Rechtsstaat und die Rule of Law,” 68.

equate the thin conception of rule of law with mere rule by law,¹¹³ as the latter only refers to the external shell of the legal command, the former implies prerequisites of an intrinsic moral value. As Allan recognized, the foundation of the “formal” conceptions upon moral principles, and not merely on rules, puts into question the usefulness of the dichotomous division between form and substance.

Formal conceptions are dominant among legal theorists and constitute a common baseline upon which an overlapping consensus can be achieved. One of the main advantages of the minimal requirements of a thin rule of law, in fact, is that they are compatible with considerable diversity in institutions, rules and practices.¹¹⁴

1.3.2 Substantive conceptions

As we have said, normatively speaking, different rule of law tradition, understood both formally and substantively, can be said to share “common moral ideal concepts”¹¹⁵ of human dignity and autonomy, which shall be given primacy by state action and legal arrangements, shielding individuals’ sphere of self-determination from the otherwise absolute sovereign power. Substantive theories take seriously these principles of human dignity and autonomy and seek to incorporate into the thin version of the rule of law some moral values, such as rights, democracy, justice, etc. Non-arbitrariness and certainty, in fact, are necessary to be – to use Walker’s term¹¹⁶ – under the law, but not to be under the rule of law.¹¹⁷

Substantive conceptions deny the opposition between law and moral, and maintain that it is only through content-based limitations that law can implement ethical norms, reconciling

¹¹³ See, for example, Posner and Vermeule, who equate the distinction between thin and thick rule of law with the one between rule by law and rule of law. In *The Executive Unbound. After the Madisonian Republic*, (New York: Oxford University Press, 2010), 92. Or even Tamanaha: “when rules exist and are honored by the legal system formal legality operates” (*On the Rule of Law*, 97)

¹¹⁴ Peerenboom, “Human Rights and Rule of Law,” 29.

¹¹⁵ MacCormick, “Der Rechtsstaat und die Rule of Law,” 68.

¹¹⁶ Walker, *The Rule of Law*, 4. Walker uses the term rule under the law in the sense of Dworkin’s “rule book” conception of the rule of law and therefore coherently with our ‘thin’ or formal conception.

¹¹⁷ Palombella, “The Rule of Law as an Institutional Ideal,” 28,

ius and *lex*, *Gesetz* and *Recht*,¹¹⁸ form and principles. Dworkin calls this “thick” idea the “rights” conception of the rule of law, which has at its center an “accurate public conception of individual rights.”¹¹⁹ Recalling Tamanaha’s division of the functions of the rule of law (paragraph 2.1), we find ourselves now in the stage of forcing restraints on the *content* of the law produced by the sovereign. But the problem of which type of content-based restraint shall be imposed has yet to be resolved. Dworkin’s conception requires procedural rule of law to enforce moral rights, but as he himself acknowledges, moral rights are not unambiguous and free from contention, but rather open to debate, disagreement and conflict of values. The problem afflicting substantive conceptions of the rule of law that incorporate individual rights consists in the fact that “there is no uncontroversial way to determine what these rights entail.”¹²⁰ The risk is that political preferences would be picked up and transformed into substantive requirements of the rule of law, opening the gate for no worse strumentalization than those allowed by a formalistic understanding of the rule of law. Hayek, for example, inferred that connected with the rule of law is the endorsement of capitalism and the rejection of the welfare state.¹²¹ “The question of whether we should have a society based on Nozick’s individualism or Rawlsian social fairness is not an issue for the rule of law.”¹²² Raz’s critique of this thick approach as the “rule of good law” seems to be persuasive:

If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to believe that good should triumph.¹²³

¹¹⁸ See Soraya case, BVerfGE 34, 269. IV, 1: “Das Recht ist nicht mit der Gesamtheit der geschriebenen Gesetze identisch. Gegenüber den positiven Satzungen der Staatsgewalt kann unter Umständen ein Mehr an Recht bestehen, das seine Quelle in der verfassungsmäßigen Rechtsordnung als einem Sinngehalt besitzt und dem geschriebenen Gesetz gegenüber als Korrektiv zu wirken vermag; es zu finden und in Entscheidungen zu verwirklichen, ist Aufgabe der Rechtsprechung.”

¹¹⁹ Ronald Dworkin, “Political Judges and the Rule of Law”, *Proceedings of the British Academy* 64 (1978): 262.

¹²⁰ Tamanaha, *On the Rule of Law*, 103.

¹²¹ Friedrich von Hayek, *The Road to Serfdom*, (London: Routledge, 1944), ch. 6.

¹²² Palombella, “The Rule of Law and its Core,” 37.

¹²³ Raz, “The Rule of Law and its Virtue,” 211.

From this critique follows another pitfall of Dworkin's theory, namely that it allows no place for a separate concept of the rule of law as such at all,¹²⁴ but it rather collapses in a theory of rights and justice. Hence, in contrast with formal rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge.¹²⁵ This is why, aiming at a "workable" minimum necessary definition, authors such as Walker suggest to pragmatically keep the rights implicit in the rule of law (namely Fuller's "inner morality") separated from "the other recognized human rights [which] stem from values outside the rule of law."¹²⁶

1.4 Rule of law, democracy and fundamental rights. Do "all good things need to go together"?

The main shortcoming of excessively substantive understandings of the rule of law is that they overinflate the concept, making it extremely difficult to define what rule of law is *not*. We therefore need to keep in mind that although the rule of law is essential in realizing both human rights and democracy, yet they are not intrinsic in it.¹²⁷ They "cannot be justified as the necessary or inherent meaning of the rule of law; rather it is a common understanding of the phrase that developed only because those three elements came to work together in Western liberal democracies."¹²⁸ It is true that "we are more likely to find the rule of law in a democracy than in any other form of government, but it does not follow from this that there is an inevitable relationship between them."¹²⁹ Since "its rationale is meant to confront power regardless of its shape,"¹³⁰ the rule of law cannot be identified with a specific form of government.

¹²⁴ Craig, "Formal and substantive conceptions of the rule of law," 478.

¹²⁵ Peerenboom, "Human Rights and Rule of Law," 27.

¹²⁶ Walker, *The Rule of Law*, 5-6.

¹²⁷ Krygier, "Four Puzzles about the Rule of Law," 75.

¹²⁸ Tamanaha, *On the Rule of Law*, 112.

¹²⁹ Goodhart, "The Rule of Law and Absolute Sovereignty," 944.

¹³⁰ Palombella, "The Rule of Law as an Institutional Idea," 33.

The same has to be said of fundamental rights: although they constitute the main legal instrument to establish a relationship between the rule of law and individuals, it is not the rule of law *per se* as a directly normative principle, but rather the “the material norms reflected by particular fundamental rights where the *Rechtsstaat* principle comes into play, [that] determine whether [it] has the function of a civil right in a particular situation.”¹³¹ The rule of law, after all, does not *directly* prescribe moral values, but legal arrangements.

This does not mean that these concepts shall be expunged from the rule of law and that formal views are the maximum we can expect. The rule of law needs *both* procedural *and* substantive criteria. But it has to be clear that principles such as rights and democracy are comprehended within the *scope* of the rule of law, not its *definition*. As the incarnation of possible institutions that sustain the “state of affairs” of the rule of law can vary, so the substantive normative rationale has to be understood dynamically, against the background of changing social settings. After all, the concept of rule of law is ancient and it has outlived many different historical institutional arrangements with which it happened to be consistent with. It is true, on the one hand, that the historical development of the English Rule of Law – with the justiciability and enforceability of the “Englishmen’s freedoms”¹³² as a founding pillar – has drawn inspiration more often from the ‘content-based’ model rather than from the ‘formal’ model.”¹³³ This was, on the other hand, less obvious in the early German *Rechtsstaat* doctrine, where the markedly voluntaristic feature of state self-restraint and the “historicist-organicist paradigm” had the State, and not the individual, as its ontological starting point.

Principles such as democracy and individual rights are therefore only *contingently* related to the rule of law, and stay in *conceptual independence* from it. But their function is deeply interconnected with it, since they are crucial in giving to the rule of law a moral sense.

¹³¹ Blaau, “The Rechtsstaat Idea Compared With The Rule Of Law,” 87-88.

¹³² The problem with the early legal documents, such as the *Magna Charta Libertatum* was in fact the difficulty faced by their actual implementation. The English Rule of Law doctrine found a solution in the courts’ “common law”.

¹³³ Costa, “The Rule of Law. A historical introduction,” 135.

In other words, they are functional in reaching the rule of law idea of fostering human dignity by shielding it from the sheer will of the power. For this ideal to be realized, “‘another’ positive law should be available, which is located somehow outside the purview of the (legitimate) government, be it granted by the long standing tradition of common law or by the creation of a ‘constitutional’ higher law protection.”¹³⁴ While in Britain the Parliament (and hence the law) was originally understood as an institutional bulwark of the citizenry against the monarchic power, in 19th century Germany the monolithic concept of State prevented a cross-checking of powers and law maintained its merely coercive feature. This difference explains why in continental Europe it was the constitution, and not the legislation (or the courts’ common law) that represented “the only *possible* form of protection.”¹³⁵ It is therefore only through a positivization of a law *beyond* the ruler’s discretion, that rights descend from a pre-legal, moral claim of natural law, and gain that legally autonomous ground which enables them to directly impose limits to political power. Albeit maintaining a conceptual distinction from it, it is “with the constitutional state [that] the law and the relevant institutions appear to meet the conditions which must be satisfied in order for the rule of law to be achieved.”¹³⁶

¹³⁴ Palombella, “The Rule of Law as an Institutional Ideal,” 31.

¹³⁵ Palombella, “The Rule of Law and its Core,” 23.

¹³⁶ *Id.*, 40.

CHAPTER 2

CONSTITUTIONAL REVOLUTIONS: CONTINUITY AND CHANGE

Having sketched a workable framework for the concept of rule of law, this proceeds by contextualizing the theoretical analysis on the concept of law, and especially the rule of law, in the Central Eastern European transition. It will touch upon how it has evolved from the idea of “socialist legality” throughout the regime change, with the latter being investigated in terms of continuity/discontinuity dilemma and the consequences this entailed for the creation of a *Rechtsstaat*.

2.1 Socialist legality: role of law instead of rule of law

In the legal system of the communist states, the rule of law was rejected (implicitly or, in some cases, even explicitly) as inconsistent with the assumptions of socialist legality, which repudiated the idea that political will could be restrained by legal norms. The idea of a “legal state” in a constitutional architecture that sanctioned the Party’s supremacy over the state, was at best deceitful. Miklós Szabó even suggested – with some exaggeration – that “socialist law” could be perceived as a *contradictio in adiecto*, because Marxian theory conceived law as a mere instrument of oppression in the hands of the ruling class; as such, it had to be watered down with the very concept of state.¹ Coherently with the philosophical premises of historical materialism, law for Marx and Engels was a “superstructure,” whose ultimate source resides in the power relationships of the economy.² In the words of the

¹ Szabó, “New Constitutionalism Based on an Old Notion,” 295.

² Harold J. Berman. *Justice in the U.S.S.R. An Interpretation of Soviet Law* (Cambridge, MA: Harvard University Press, 1963), 16. See also

Latvian Bolshevik legal scholar Pēteris Stučka, law represents “a system of relations corresponding to the interests of the ruling class and to the safeguarding of those interests by organized violence.”³ However, in spite of the idea of “overcoming” the state, the real socialist states possessed articulated and sophisticated legal (or at least legal-like) orders, and institutions grounded on a sound political and ideological monopoly. How is this apparent contradiction to be resolved?

The key to this dilemma is to be found in the *function* that the law played in communist countries according to socialist legal theory. The official ideology conceived law as an instrument to build the communist ideal of society:⁴ until then, the law was to maintain a fundamental organizational role of the economic, political and social life along the Marxist-Leninist orthodoxy.⁵ This concept is clearly illustrated by the Soviet legal thinker Evgeny Pashukanis, according to whom law, as an inherently bourgeois ideology, was to wither away along with the abolition of market exchanges and economic individualism.⁶ However, until this process is over, “so long as the tasks of building a unified planned economy has not been completed ... the legal form too will remain in force.”⁷ Law, therefore, had a temporary (yet necessary) role in the “transition to communism,” with “the sole purpose of being utterly spent.” Law included not only commands, but also “statements of goals.”⁸ Given the dialectic, evolutionary character of socialist law, constitutions and statutes had to periodically “record” the progresses achieved in the socio-economic field and project new goals. This was clearly evident in the programmatic nature of the Soviet constitutions and their imitation in Eastern Europe, especially after the “constitutional round” of the ‘60s–‘70s which saw new

³ Pēteris Stučka, “The Revolutionary Part Played by Law and the State. A General Doctrine of Law”. In *Soviet Legal Philosophy*, tr. by Hugh W. Babb. (Harvard: Harvard University Press, 1951).

⁴ Csaba Varga, *Transition to the Rule of Law. On the Democratic Transformation in Hungary* (Budapest: Loránd Eötvös University, 1995), 7; Sajó, “New Legalism in East Central Europe,” 331.

⁵ Giuseppe De Vergottini, *Diritto Costituzionale Comparato*, Vol. II (Padova: Cedam, 2004), 9.

⁶ Evgeny B. Pashukanis, *The General Theory of Law and Marxism*. (New Brunswick: Transaction Publishers, 2003).

⁷ *Id.*, 132.

⁸ Berman. *Justice in the U.S.S.R.*, 92.

fundamental laws approved in Czechoslovakia (1960), and the existing one heavily amended in Hungary (1972) and Poland (1976). All these documents provided an assessment of the progress reached so far, claiming that socialism had been reached and praising their commitment to the achievement of communism. So, for instance, the Czechoslovak preamble:

Socialism has prevailed in our fatherland! We have entered a new era of our history, and we are determined to go forward to new, still higher goals. In bringing the socialist construction to a conclusion, we are moving towards the building of a mature socialist society and are gathering strength for the transition to communism.

The Hungarian preamble:

The socialist conditions of production became predominant in our country... The Hungarian people, in close national unity, are working on completing the building of socialism. The Constitution of the Hungarian People's Republic is the expression of the basic changes carried out in the life of our country.

And the Polish revised constitution, in article 4:

In the Polish People's Republic, the basic aim of the activity of the state is the universal development of a socialist society...

What has to be stressed here, is that in socialist legal systems law was not the legitimating background of the State's existence, meant to bound the government's action in accordance with the higher constitutional principles enforced through the rule of law, but an instrument for social and socioeconomic planning. The overlap between state institutions and party organisms meant that the constitutional text reflected and could be explained in terms of the political program of the Communist Party. Under these premises we can speak of a "role of law" rather than "rule of law".

At the same time, in the Leninist doctrine, law retained its positivist form as a "command of the sovereign".⁹ Similarly to the early German *Rechtsstaat*, it suffered from a lack of restraining mechanisms. Although formally coherent with the *corpus* of the legal order, the instrumental use of legality meant that power could be exercised arbitrarily. The

⁹ Berman. *Justice in the U.S.S.R.*, 25.

idea of “revolutionary unity of powers” as opposed to the “bourgeois” separation of powers, hid behind the doctrine of assembly supremacy a vertical power structure which allowed the executive to alter and redefine the law through quiescent legislatures. In this way, in spite of the legal form, law did not constrain power, but merely implemented its coercive capacity. Notwithstanding the emphasis on legislative assemblies, in fact “legislation had a minor role compared to regulation. Regulation by governmental, and partly secret, decrees were present to a greater or lesser degree in all these countries”¹⁰ (this preponderance of executive decrees, to some extent, still survives in many post-Soviet countries such as Russia).

Such a subordination of legal norms to political preferences entailed a distortion of the source of law, its justifications and reasoning.¹¹ Legislation in fact was not based on the principle of popular sovereignty and autonomy (the latter understood in the sense of *autonomos*, self-rule, whereby the ruled is the legitimizing source of rules), but rather on the superimposition of a “transcendent”, ideologically determined idea, defined as “class will”. Its nature was teleological, and therefore it had to provide guidance, entrusted upon the *avant-garde* of the proletariat, namely the Communist party. Not causally, the “constitutional round” of the ‘60s–’70s institutionalized in all constitutions the (*de facto* already institutionalized) “leading role” of the communist parties.¹² This obviously resulted in meta-legal sets of values within law’s justifications, lack of public accountability and, ultimately, a legal reasoning perpetually swinging from ideology to positive formalism typical of a rule *by* law. As highlighted in chapter 1, law may indeed function as an “instrument” also in a *Rechtsstaat*, but not as a *mere* instrument. “The reduction of the *ius* (including legal rights) to the *lex* (i.e., formal enactment) and, at the successive step, to mere means (subservient to any

¹⁰ András Sajó, “New Legalism in East Central Europe: Law as an instrument of social transformation.” *Journal of Law and Society* 17, no. 3 (1990): 331-32.

¹¹ Szabó, “New Constitutionalism Based on an Old Notion,” 295.

¹² Hungarian Constitution, art. 3; Polish Constitution, art. 3(1); Czechoslovak Constitution, art. 4.

political wish)”¹³ generated a law which – while retaining its authority to prescribe behaviour to its subjects – nonetheless lacked what Sajó calls “the dignity of law”, namely its internal morality, as illustrated by Fuller’s criteria. Core rule of law principles – and with them any pretension of generality - withered away under the pressure of practical political will.¹⁴

Nor was this legal system predictable, in spite of its high degree of bureaucratization:¹⁵ while some areas were meticulously regulated, others remained intentionally vague or simply not legislated. This increased legal uncertainty, as gaps in the norms were often arbitrarily filled by the same authorities applying the law. The subordination of law to social goals sanctioned in fact the use of extra- and nonlegal means.¹⁶ The proliferation of regulatory sources generated confusion in terms of legal hierarchy, which contrary to the Kelsenian model was not pyramidal. This was most obvious in the absence of mechanisms to constitutional review of statutes,¹⁷ perceived as an usurpation of people’s will, as exemplified by the Stalinist-era legal scholar Stefan Rozmaryn:

The constitutional control of statutes by extra-parliamentary bodies, particularly judicial and quasi-judicial, is a reactionary institution and because of that, there is no room for it either in a socialist State or in a State of people's democracy, which trusts the people's justice and the will of the people.¹⁸

Ordinary judges and courts themselves, in spite of their proclaimed autonomy, “acted as bureaucrats and ... were expected to promote the centrally determined public interest.”¹⁹ They

¹³ Csaba Varga, *Transition to the Rule of Law*, 7-8.

¹⁴ *Id.*, 21.

¹⁵ Sajó, “New Legalism in East Central Europe”, 341.

¹⁶ Berman. *Justice in the U.S.S.R.*, 266,

¹⁷ As a matter of fact, in Poland a constitutional tribunal was established in 1985, in the last years of the communist regime, although with strongly curtailed powers, while in Hungary a Constitutional Law Council, a sort of parliamentary committee, was created in 1984, but with limited competences and politically passive. In Czechoslovakia, the Court, which existed until 1948, briefly reappeared during the Prague Spring in 1968, although it remained only on paper. It shall be mentioned that also the Socialist Federal Republic of Yugoslavia had constitutional courts, both at the federal and at the local level, since 1963. See: Brunner, “Development of a Constitutional Judiciary In Eastern Europe.”

¹⁸ Stefan Rozmaryn, “Kontrola konstytucyjności ustaw [The Control of the Constitutionality of the Laws],” *Panstwo i Prawo* 12, no. 3 (1948): 20.

¹⁹ Sajó, “New Legalism in East Central Europe,” 332. And András Sajó and Vera Losonci, “Rule by Law in East Central Europe: Is the Emperor’s New Suit a Straitjacket?,” in *Constitutionalism and Democracy. Transitions in the Contemporary World*, ed. Douglas Greenberg et al. (New York: Oxford University Press, 1993), 324.

were not encouraged to directly apply constitutional provisions but rather statutes,²⁰ whose interpretation was often formalistic, dogmatic and syllogistic, careful not to overstep the authority of lawmakers, namely the political power.²¹ This practice, coupled with lack of review of statutes outside parliament itself, in practice reversed the hierarchy of laws,²² and the “the Constitution became subordinate to parliamentary statutes which conclusively determined the scope of imprecise constitutional clauses.”²³

This was coherent with the understanding of rights in socialist law, markedly distant from the liberal-democratic one. Although communist constitutions usually contained rather long bills of rights, even more extensive than those in Western Europe and the US, as they included a number of social rights (to the point that Stalin presented his constitution of 1936 as “the most democratic in the world”²⁴), yet those “rights” did not entail a shield for individual independence and autonomy. On the contrary, their enjoyment was based on the idea of reciprocity between state and citizens, between rights and obligations, where the latter (social obligations) represented the source and precondition for the former (the enjoyment of rights).²⁵ Differently from the liberal tradition, where the individual is put at the centre of a system of rights which, by empowering him or her, provides the state with legitimacy, socialist law was collective-interest-oriented,²⁶ based on an overarching teleological and super-imposed principle to which individual autonomy could be sacrificed under the condition of the “primacy of the political.”²⁷ Coherently with an instrumental view of law,

²⁰ Brzezinski, *The Struggle for Constitutionalism in Poland*, 136.

²¹ Szabó, “New Constitutionalism Based on an Old Notion,” 296.

²² *Id.*

²³ Brzezinski, *The Struggle for Constitutionalism in Poland*, 136.

²⁴ Martin McCauley, *Stalin and Stalinism* (Harlow: Pearson Education, 2008), 50.

²⁵ Sajó, “New Legalism in East Central Europe,” 331. For instance the 1976 amendment to the 1952 Polish Constitution introduced a provision that made the government obligation to respect the rights of the citizens “dependent on the citizens fulfilling their obligations towards the country.”

²⁶ Sajó and Losonci, “Rule by Law in East Central Europe,” 324.

²⁷ Trkulja, “Der Sozialismus und der Rechtsstaat,” 33.

individual rights were violated “in the name of vague socio-economic standards conceived as judicially non-enforceable developmental goals.”²⁸

Such legal practice found its theoretical justification in the idea that the distinction between public and private law is ultimately abstract, since “the egoistic interests of a man as a member of a civil society and the abstract universal interests of the political whole ... are interdependent, so that it is impossible to indicate the particular legal institutions which embody this much-trumpeted private interest entirely and in pure form.”²⁹ Soviet legal philosophy argued that the bourgeois private-public interests dichotomy needs to be broken down, in order to finally abolish the legal ideology (which is, by definition, the capitalist one) and, ultimately, the legal form itself.³⁰ In reality, however, the principle of the “withering away of the state” (and of the law with it), instead of making the state weaker, made it increasingly strong, while law – instead of withering away – was “degraded to a pre-modern form.”³¹

2.2 Constitutional revolutions. Continuity and change

The “great transformations” in Eastern Europe were, to a large extent, carried out on the constitutional level, to the point that they have often been called “constitutional revolutions.”³² The choice made by the negotiators at the roundtable agreements was to finally attribute to constitutions the foundational and rigid nature which they lacked in the communist legal practice. By doing this, constitutions became the *locus* where the outcomes

²⁸ Jacek Kurczewski, “Democracy and the Rule of Law: Poland after 1989,” in *Constitutionalism and Politics*, ed. Irena Grudzińska Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), 200.

²⁹ Pashukanis, *The General Theory of Law and Marxism*, 102.

³⁰ *Id.*, 104.

³¹ Trkulja. “Der Sozialismus und der Rechtsstaat,” 44.

³² See for instance Ulrich K. Preuss, *Constitutional revolution: The link between constitutionalism and progress* (Atlantic Highlands, NJ: Humanities Press, 1995); András Bozóki, ed., *Alkotmányos forradalom* [Constitutional revolution], vol. 7 of András Bozóki et al., eds, *A rendszerváltás forгатókönyve. A kerekasztal tárgyalások 1989-ben*. [Change of the regime in Hungary - Scenarios. The National Roundtable Negotiations of 1989] (Budapest: Új Mandátum, 2000); and Jiří Příbáň, “Oppressors and Their Victims: The Czech lustration law and the Rule of law”, in *Justice As Prevention, Vetting Public Employees in Transitional Societies*, ed. Mayer-Rieckh and De Greiff (Advancing Transitional Societies Series, Social Science Research Council, New York, 2007), 323-324.

of the political negotiations of 1989 could be secured, both at a symbolic and practical level. One should not underestimate the emblematic meaning that a change in the fundamental law represents for a political community. Constitutions are not written in an abstract space and time, but within specific historical and political coordinates. They are the product of their times, of the values and expectations carried by the dominant political actors, who see in the incorporation of certain core principles within the fundamental law a long-lasting recognition of their political struggle. Constitutions are created (or fundamentally amended) in correspondence with historical changes in the political regime,³³ in the system of beliefs³⁴ or in the territorial status of a country.³⁵ They exemplify “an ‘investive’ use of the energies which normally are released”³⁶ following revolutions, wars or regime changes. A new constitution, in other words, symbolically demarcates a discontinuity with the past, and represents a fundamental step in the establishment of the new (legal, political, social, economic and moral) order.

This consideration leads to the “practical” importance of constitution-making, as a necessary synthesis of the transition and the major tool for its institutionalization. Entrenching the new values and rules in a codified and not easily amendable document, which serves as the ideational and practical basis for the new polity, secures them against restorative attempts, ensuring the longevity of the changes. It commits future generations – although letting them participate in the constitution making process via constitutional amendments – through its “normative penetration of the polity to the effect that its institutions continue and operate

³³ E.g. when a republic follows a monarchy, like the 1793 French constitution, the 1787 American constitution, the Weimar constitution, the Irish constitution of 1937, the 1948 Italian constitution, etc.

³⁴ E.g. when parliamentary or liberal principles defeated the absolutist ones (such as in the 1791 French constitution, the Russian Constitution of 1906, the Swedish Instrument of Government of 1974), when socialist ones overcame absolutist ones (Russian Constitution of 1918) or when socialist ones were replaced by liberal democratic ones (such as in the constitutions of Central Eastern Europe and the Baltics).

³⁵ E.g. when a new subject of international law is created (such as the constitution of the Irish Free State of 1922, the constitutions of the Baltic states, the Czech and Slovak constitutions of 1993, the 2008 fundamental law of Kosovo), some territories are annexed (such as the 1924 Soviet Constitution) or lost (such as the Swedish Instrument of Government of 1809, the 2006 Serbian constitution).

³⁶ Jon Elster, Claus Offe and Ulrich K. Preuss, *Institutional design in post-communist societies: rebuilding the ship at sea* (Cambridge: Cambridge University Press, 1997), 63.

irrespective of changing majorities and of the vacillations of politics in general.”³⁷ For the way they have been amended and adopted, constitutions represent a fundamental, if not *the* fundamental, arena for these “constitutional revolutions”. In order to understand the nature of these regime changes and their relationship with the conception of rule of law that they engendered, the choices of the “founding fathers” deserve some closer attention.

2.2.1 The choice for continuity

Probably the main dilemma concerning constitution-making was the coexistence of the intention, on the one hand, to clearly break with the past and irreversibly establish a *novus ordo saeculorum* (as Hannah Arendt³⁸ would have put it) and, on the other hand, to avoid a legal rupture and the wholesale violation of legality. The choice of continuity was dictated by both practical and normative reasons, which Arato calls the “strategy of self-limitation”.³⁹ As for the first, the revolutionary forces that toppled the communist regime operated in an extremely insecure geo-political environment, where the non-intervention of Soviet tanks to suffocate revolutionary changes was far from obvious. This is why some countries opted for gradual and cautious change negotiated with the local communist elites according to “their” rules. This was especially true for the forerunner, the Polish round tables. Nevertheless, even when the signals from Moscow made clear the position of Soviet non-intervention, a revolution involving an interruption of legality and the possibility of open violence was still avoided as way too risky, especially considering that the Communist party was still in control of the means of violence. Besides, in most of the cases both parties at the negotiations were affected by a great uncertainty with regard to their actual strengths. The Polish government, for instance, greatly overestimated its popular support when it agreed to partially free

³⁷ Ulrich K. Preuss, “Democracy and Constitutionalism,” in *Constitutionalism and Politics*, ed. Irena Grudzińska Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), 76.

³⁸ Hannah Arendt, *On Revolution* (New York: Viking Press, 1965), 179,

³⁹ Arato, “Constitution and Continuity. Part I,” 98.

ballots,⁴⁰ while the Czechoslovak opposition overestimated the government's bargaining position.⁴¹

The normative reason behind legal continuity stemmed from the necessity to guarantee public freedom during the process of transformation and to ensure the (procedural) legitimacy stemming from the democratic origins of the new regime. The issue at stake is crucial for every revolution creating a new constitutional system. As noted by Arendt, the risks involved in individuating a legitimate source of power are too big, and the means to restrain the sovereign too fragile once legality has been broken and the polity is brought back to a legal state of nature.⁴² It was hence in the interest of all parties involved to avoid the ghost of a “permanent revolution.” Moreover, any attempt to institutionalize democratic freedoms in a revolutionary way would have necessarily run into a paradox, as any attempt to institutionalize the freedom to make constitutions would be seen as illegitimate, since it would necessarily have to create constitution-making authorities prior to the realization of the constitution itself, “usurping” in this way popular sovereignty.⁴³ Finally, the Communist “revolutionary” rhetoric and the nihilism of its legal system, made the opposition extremely wary about being revolutionary and rather interested in the rule of law, which was seen as “an act of resistance against a lawless regime.”⁴⁴

History, unfortunately, offered no guidance: “The classical historical examples of revolutions involved without exception a rupture in the legal order... The old legislative bodies were disbanded and new, revolutionary legislative organs were set up, without any appropriate authorization in terms of the old legal order.”⁴⁵ One workable precedent, as noted by Bozóki, may have come from the somehow similar experiences with “pacted transitions”

⁴⁰ Wiktor Osiatyński, “The Roundtable Talks in Poland,” in *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (Chicago and London: University of Chicago Press, 1996).

⁴¹ Miloš Calda, “The Roundtable Talks in Czechoslovakia,” in *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (Chicago and London: University of Chicago Press, 1996), 162.

⁴² Arendt, *On Revolution*.

⁴³ Andrew Arato, *Civil Society, Constitution and Democracy* (Lanham, MD: Rowman & Littlefield, 2000), 130.

⁴⁴ Preuss, *Constitutional Revolutions*, 8.

⁴⁵ János Kis, “Between Reform and Revolution,” *East European Politics & Societies* 12, no. 2 (1998):34.

in Southern Europe and Latin America.⁴⁶ Like in the other “third wave”⁴⁷ countries, during the transformative stage which precluded the adoption of the new constitution Central and Eastern European constitution-makers opted for a “legal” transition rather than creating new constitutions *ex nihilo*. They chose to keep their inherited constitutions and use their rules of revision, but with the aim of radically changing them.⁴⁸ The constitutional amendments which formalized the round table agreements were passed (although sometimes reluctantly as in Poland) by the old communist parliaments following their own procedural rules. The negotiating and reforming process created the premises of the rule of law by formally presuming it and going through those formal procedures of constitutional amendments which were supposed to embody it. The strategy then was to carry out a change in sovereignty by maintaining the “fiction” that the communist version of popular sovereignty was somehow valid. All parties acted “*as though* power were legitimate, *as though* its laws and orders were valid, *as though* the sanction received from the old parliament was adaptable to the transformation of the rules bargained by the new system into enforceable law.”⁴⁹ This allowed for a radical discontinuity (the abolition of one form of sovereignty and the instalment of a new one) by maintaining formal constitutional legality, avoiding the dangerous *intermezzo* of a return of power to a sovereign dictator (be it the people, a person, an assembly). No “sovereign dictator” was created, nor were proper constituent assemblies summoned (with the ensuing legitimacy problem which will be discussed in section 2.2.3). As noted by Ulrich Preuss, differently from the earlier revolutions, Central Eastern European “constitutional revolutions” changed the source of sovereignty without trying “to impose a homogeneous

⁴⁶ The analogy is made by András Bozóki (cited in Arato, *Civil Society, Constitution and Democracy*, 121). Of course the analogy is partial, and limited to the political dimension, since post-communist countries, differently from the other 3rd wave experiences, had to face the dilemma of simultaneity of multiple transitions (See Claus Offe, “Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe,” *Social Research* 58, No. 4 (1991): 865-892).

⁴⁷ The definition comes from the famous volume *The Third Wave: Democratization in the late twentieth century* by Samuel P. Huntington (University of Oklahoma Press, 1991).

⁴⁸ Arato, “Constitution and Continuity. Part I,” 96.

⁴⁹ Kis, “Between Reform and Revolution,” 45.

sovereign ‘will of the people’ ... and to carry out a particular political program.”⁵⁰ In a way, we can say that in the CEE transitions, the “procedural” rule of law was instrumental to the establishment of the “substantial” one.

The early constitutional amendments emerging from the round table negotiations in fact carry along a *substantial* rather than formal discontinuity, thus revealing a dissociation between the legal-constitutional and the political-strategic aspects of the transition. Patterns across countries, however, diverged considerably. In Hungary, about 90 per cent of the constitution was amended as a direct result of the negotiations between the government and the Opposition Roundtable (*Ellenzéki Kerekasztal*), while in Poland, and especially in Czechoslovakia, the modifications to the constitutional text agreed at the Roundtables were *per se* relatively limited. The abrogation of the references to the leading role of the communist party, for example, had a symbolic rather than practical meaning: after all, the Communist parties had played a leading role even before this was formalized in the fundamental laws.⁵¹ And yet, as highlighted by János Kis, “partial as these amendments have been in most cases, they had foundational significance. Rather than merely reforming the old regime, they put an end to it and laid the basis for a new one.”⁵² It was through these negotiated amendments, in fact, that free elections were introduced in Hungary, and partially free ones arranged in Poland, where the negotiators of the Polish United Workers Party agreed to a specific formula consisting of a “contracted Sejm” and a newly created Senate elected in free pluralist competition.⁵³ In Czechoslovakia, in contrast, free elections were set up by the president Václav Hável, whose election was the main result of the round table agreements.⁵⁴ The dogmatic and inflexible attitude of the Czechoslovak communists, in fact, did not go as far as

⁵⁰ Preuss, *Constitutional Revolution*, 96.

⁵¹ Which happened in Poland in 1976 through a constitutional amendment, in Czechoslovakia in 1960 and in Hungary in 1972 (See Kurczewski, “Democracy and the Rule of Law,” 200; and Calda, “The Roundtable Talks in Czechoslovakia,” 174, note 20).

⁵² Kis, “Introduction,” 1.

⁵³ Osiatyński, “The Roundtable Talks in Poland,”

⁵⁴ Elster, Offe and Preuss, *Institutional design in post-communist societies*, 68.

to allow constitutional modifications to the extent witnessed in Poland, not to mention those in Hungary.⁵⁵ Agreement was limited to a “power sharing” arrangement whereby new non-communist representatives were allowed into government and in the parliament, thus putting the Communist party in a minoritarian position for the first time in 42 years.⁵⁶ Constitution-making, therefore, did not take place significantly through roundtable talks, but was rather carried out afterwards by the federal and national parliaments (which soon ended in a conflict over the division of powers between the federation and the republics). This peculiar characteristic induced scholars to conclude that in Czechoslovakia, the mere presence of roundtable talks simply covered “what was in effect a revolutionary collapse or even overthrow of the old regime.”⁵⁷

Another crucial difference between Czechoslovakia and the other two People’s Republics is the ambiguous support for legal continuity. While in Poland and Hungary both sides at the roundtable agreed to follow the fiction of a legal state as if a *Rechtsstaat* were already put in place,⁵⁸ in Czechoslovakia, as it emerges from the accounts of the roundtable meetings, it was the Communist side, and not the opposition, who argued in favour of legalism. The government negotiators, Ladislav Adamec and Bohuslav Kučera, insisted that the requests of the Civic Forum had to be dealt “in accordance with the law”, in “strict adherence to legal procedures.”⁵⁹ This “rule of law strategy” denoted an attempt to buy time and retain control over the entire process, but was also a reaction to the radical nature of the dissidents’ requests: immediate dismissal of the top communist positions (including president

⁵⁵ The abolition of the article providing for the leading role of the Communist Party was one of the few modifications to the federal constitution that took place during the negotiations.

⁵⁶ Calda, “The Roundtable Talks in Czechoslovakia,” 165.

⁵⁷ Arato, “Regime Change, Revolution and Legitimacy,” 38-39.

⁵⁸ Jiří Příbáň, *Dissidents of Law: on the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract*. (Dartmouth: Ashgate Publishing, 2002), 88.

⁵⁹ Calda, “The Roundtable Talks in Czechoslovakia,” 137.

Húsak), quick institutional and constitutional changes, declaration of press freedom and release of all political prisoners.⁶⁰

In Poland and Hungary the method of legal continuity was maintained until the end (namely, the adoption of a new constitution in – respectively – 1997 and 2012), although more than a choice, the *prorogatio* of the old constitutional texts was the result of the protracted inability or unwillingness of the political parties to produce new ones. In Czechoslovakia, in contrast continuity was interrupted relatively early, due to the centrifugal forces that ultimately led to the split of the federation in 1992. The federal constitution, which had temporarily remained in effect with the idea of being soon rewritten, was replaced by two new constitutions and the federation dissolved by the Constitutional Act No. 542/1992 (instead by referendum, as a 1991 constitutional act required).⁶¹ The Czech constitution was even adopted 22 days *after* the dissolution act (on December 16), hence with a clear legal gap replenished just before the new republic originated on January 1.⁶² Continuity, in the Czech and Slovak case, shifted “from the continuity of the source of law, the inherited constitution, to the continuity of legitimate bodies, the two republican parliaments.”⁶³

2.2.2 Revolution, “refolution” or reform? A problem of concept formation

Referring to the Hungarian experience, the one that presents the strongest elements of legal continuity, Akos Szilágyi coined the expression “avoided revolution,” arguing that the most revolutionary aspect had been precisely the *absence* of a revolution.⁶⁴ The legal nature of these “constitutional revolutions” is indeed unique to the Third Wave transitions. The

⁶⁰ Interestingly from the point of view of policy learning, a similar attitude characterized the Czech position during the negotiations on the split of the Czechoslovak federation. Also in this case, praising legal continuity coincided with the Czech interest in retaining the *status quo*. See Eric Stein, panel speech delivered on September 26, 1996 at the symposium “Constitutional ‘Refolution’ in the Ex-Communist World: The Rule of Law.” Transcribed in *American University International Law Review* 12, no. 1 (1997): 67.

⁶¹ A fragment of the Czechoslovak constitution, however, survived in the Czech “*bloc de constitutionnalité*” as the bill of fundamental rights was retained from the previous federal legislation. We cannot really talk about legal continuity, however, as the bill was introduced after the regime change of 1989.

⁶² Jiří Grospič, “Some Constitutional Problems of the Czech Republic,” in *Constitutionalism and Politics*, ed. Irena Grudzińska Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), 223.

⁶³ Arato, “Constitution and Continuity. Part I,” 101.

⁶⁴ Akos Szilágyi, *Csendes? Forradalom? Volt?*, cited in Arato, *Civil Society, Constitution and Democracy*, p. 97.

absence of a clear break and the adherence to procedural rules seem to be characteristics that would hardly qualify as “revolutionary”. The adjectives that often precede the term “revolution” in the Eastern European transitions tell us much about the contested ontology of such changes: attributes like bloodless, velvet or peaceful refer to the absence (with the exception of Romania) of violence; negotiated, legal, constitutional, “under the rule of law” underline that no legal hiatus was created with the previous legal order. As both of these elements (violence and legal break) are usually associated with the idea of revolution, we should ask ourselves what kind of “revolution,” if any, did the events of 1989 in Central Eastern Europe imply? And what are the results in terms of the dichotomy between continuity and legitimacy? Answering these questions entails an exercise of concept formation in understanding what we mean by the term “revolution”.

An entire library would be necessary to hold the literature that has been generated across the centuries on revolutions. For obvious reasons of space constraints, in the present study the meaning of this term will be narrowed down and analysed primarily in its legal-normative aspects. This level of analysis is probably the one where paradoxes are more likely to emerge. Ulrich Preuss argues that the term “revolution” should apply to the CEE transitions, since they ultimately radically changed the source of sovereignty, although constitutional revolutions, differently from social ones, do not imply a fundamental change in the social order, in property rights, or a radical elite change, but rather the, at least temporary, retention of the existing constitution.⁶⁵ The apparently contradictory nature of the term “constitutional revolutions” is well expressed by Fairbanks, when he bluntly states that

revolutions ultimately cannot be legal or constitutional because a revolution is a change of regime, and the laws derive from the regime [...] Revolution is an idea that legitimizes unconstitutional and often violent paths to power.⁶⁶

⁶⁵ Preuss, *Constitutional Revolution*, 82.

⁶⁶ Charles H. Fairbanks, Jr., “Revolution Reconsidered,” *Journal of Democracy* 18, no. 1 (2007): 45-46.

According to this conception, the simple reliance on mechanisms proper of the previous regime are incompatible with the necessarily “unconstitutional” break that a revolutionary change of regime requires. Accordingly, the coexistence between legal continuity and substantial discontinuity, like the one witnessed in the CEE transitions, would be either impossible or at least not classifiable as a revolution. This popular argument has been largely used as a double-edged sword. For instance where continuity was the strongest, namely in Hungary, the non-revolutionary character for the transition was explicitly spelled out by the first democratically elected Hungarian prime minister József Antall⁶⁷ when dealing with the radical fringes of his party who demanded swift reforms (“If you are demanding quick changes, you should have made a revolution; now the transition must proceed on a slow, legal ground”⁶⁸). Conversely the radical right turned the argument on its head, arguing that by retaining legal continuity, the revolution had been “stolen.”⁶⁹ Continuity of rules, in fact, entails a series of constraints that preclude the complete and unbound transformation of the legal system according to exclusively normatively-based preferences (namely the above mentioned concept of a “self-limiting” revolution).

On the same line of argument, Hans Kelsen maintained that “a revolution ... occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself”⁷⁰ irrespectively of the duration, violent nature, motivation, social conditions or actors involved. The consequence of Kelsen’s premises is that even if the regime has been entirely altered, the system is preserved if procedural rules have been followed. This positivist definition not only forecloses the possibility that in CEE a revolution has ever happened, but also denies that a new legal system has been introduced. Carl Schmitt’s expectable disagreement with Kelsen relies on a

⁶⁷ The leader of the MDF (*Magyar Demokrata Fórum*) and first non-communist prime minister.

⁶⁸ Quotation by Josef Antall reproduced by Imre Kónya (*Magyar Nemzet*, October 11, 1990)

⁶⁹ Arato, *Civil Society, Constitution and Democracy*, 98.

⁷⁰ Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945): 117.

distinction between the legal and political dimension of revolution, which can easily be at odds with each other. He claims that political revolutions can happen even in spite of legal continuity, as the key principles of a legal system may be altered through its very same amendment mechanisms.⁷¹ The revolution in this case has simply been disguised under formalistic mechanisms. According to Schmitt, it is not legal discontinuity that defines revolutions, but rather the replacement of the constituent powers, or of the constitution, regardless of whether the rules of the existing system have been respected or not.

Schmitt's intuition helps us in building an operational framework that distinguishes the legal and political aspects of discontinuity. However, as explained by Andrew Arato, the presence or absence of legal continuity is not simply indifferent, as Schmitt seems to conclude.⁷² It has a crucial importance: because – as we have seen in section 2.1 – the Communist regime was legal but illegitimate,⁷³ the defining feature of the transitions in CEE resides precisely in the peculiar combination of a continuity in legality and discontinuity in legitimacy. This combination has prompted scholars to coin *ad hoc* categories describing what happened in CEE in 1989 as “more than reform but less than revolution.”⁷⁴ Timothy Garton Ash, for instance, introduced the curious word “refolution.”⁷⁵ János Kis employed the term “regime change” as an “autonomous slot between reform and revolution,”⁷⁶ whereby an institutional change takes place, leaving legality intact but creating a break in legitimacy (as opposed both to reform, where both are maintained, and to revolution, where both are interrupted).⁷⁷ With “break in legitimacy” he means something analogous to what in the

⁷¹ Carl Schmitt, *Verfassungslehre* (Berlin: Dunker & Humblot, 1928).

⁷² Arato, *Civil Society, Constitution and Democracy*, 90.

⁷³ Agnes Zsidai, “Systemwandel und Beseitigung von Ungerechtigkeiten: Politik im Grenzbereich von Recht und Moral,” *Rechtstheorie* 27 (1995): 501.

⁷⁴ András Bozóki, “Introduction: The Significance of the Roundtable Talks,” in *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy*, ed. András Bozóki (Budapest: Central European University Press, 2002), xxv.

⁷⁵ Timothy Garton Ash, “Refolution: The Springtime of Two Nations,” *New York Review of Books*, July 15, 1989.

⁷⁶ Kis, “Between Reform and Revolution,” 35.

⁷⁷ *Id.*, 42.

previous section I have called “substantial” discontinuity, i.e. a change in the source of legitimate authority, understood in terms of legitimate justification of law. Although Kis envisages only three combinations of the two variables, we can employ the double dichotomy of legal and legitimacy continuity-discontinuity to construct four interpretative categories:

Figure 1

	LEGITIMACY CONTINUOUS	LEGITIMACY RUPTURED
LEGALITY CONTINUOUS	Reform	Regime Change
LEGALITY RUPTURED	Revolutionary reform	Revolution

The types of transition that fill the boxes belong to Arato,⁷⁸ who besides Kis’ “regime change” individuates the fourth category of “revolutionary reform,” namely when a discontinuity in legitimacy coexists with a legal break (a rather rare case, exemplified by auto-coups, plebiscites or constitutional conventions). This type of transition, however, is alien to CEE, and falls beyond our interest. What has to be stressed here is the importance of the legitimacy factor. Although regime changes in CEE cannot be considered revolutions *tout court*, continuity is limited to the legal aspect, while a clear legitimacy break is envisaged. This legitimacy rupture is both an asset and a liability. An asset, as it creates a demarcating line *notwithstanding* the legal continuity, hence making clear that a regime change has happened. A liability, since once legitimacy of the old institutions has been broken, the new ones do not automatically gain it by virtue of the legal continuity. On the contrary, their difficult task is to achieve legitimacy *in spite* of its formal continuity with the previous regime.

2.2.3 The problem of legitimacy

Negotiated transitions like in Spain, Poland, Hungary, Bulgaria, etc. enjoy great advantages from the point of view of liberal democratic constitution-making. “The

⁷⁸ Arato, “Regime Change, Revolution and Legitimacy,” 36.

maintenance of the rule of law in all stages especially helps avoiding the revolutionary hiatus when all new institutions seem to be ‘built upon sand,’” argues Arato,⁷⁹ citing Hannah Arendt. However, “the very process that helped to avert violence and massive illegality in some countries, ... exposed the amended constitutions to revolutionary challenges that contest their legitimacy.”⁸⁰ In spite of the powerful normative significance of the principles of a legal state and human rights,⁸¹ formal-legal and normative legitimacy of the new constitutional arrangements were not self-evident, since their institutionalization through the means of the existing constitutions lacked the political legitimacy that new constituent assemblies enjoy, the legitimacy that only a true “new beginning” or, as Arendt would call it, the “pathos of novelty”⁸² would have brought about. This is particularly true in the CEE transitions, when “a new law-based state was born ... as a legitimate child” of a regime with little or no commitment to the rule of law.⁸³ This dilemma had no easy solution: how could they be at the same time revolutionary and legitimate? The “formal continuity-substantial discontinuity” formula only partially resolved it. If, on the one hand, these arrangements preserved formal legitimacy and avoided legal ruptures, on the other a more “sociological,” popular legitimacy still lacked. Moreover, although substantial changes in the political system were achieved, the necessity of a symbolic break was not yet fulfilled. As Preuss notes, in CEE no “clear designation of the revolution” is possible, “no particular day can be named as that on which the revolution began or on which the break with the old order became apparent.”⁸⁴

This problem was particularly acute in Hungary, where the idea that the self-limiting revolution was not revolutionary enough and that a “second revolution” was needed, soon started to circulate among the political right. As noted by the now president of the

⁷⁹ Arato, *Civil Society, Constitution and Democracy*, x.

⁸⁰ Arato, “Constitution and Continuity,” 102.

⁸¹ Příbáň, *Dissidents of Law*, 89.

⁸² Arendt, *On Revolution*, 34.

⁸³ Czarnota, “Lustration, decommunisation and the rule of law,” 314.

⁸⁴ Preuss, *Constitutional Revolution*, 92.

Constitutional Court, Péter Paczolay, the liability of legal continuity resided in the fact that when the legitimacy of the new order is founded upon the previous constitution, the former legal order is indirectly granted a character of legitimacy and legality, hence weakening the claims that a completely new legal system was being built.⁸⁵ This *vulnus* constituted an easy launching pad for populists to gather support by claiming that legal formalism “supports only the unjust *status quo ante*.”⁸⁶

Another related legitimacy problem stemmed from the extra-constitutional nature of the negotiations. Although the constitutional changes were ratified by the old Communist parliaments, what they performed was a merely procedural requirement confirming decisions taken by bodies with no legal status, namely the round tables,⁸⁷ both side of which suffered from a legitimacy deficit. On the one hand, the old institutions were discredited and possessed no political legitimacy whatsoever. None of the institutions created under the previous regime nor their normative production enjoyed a popular legitimacy apt to the creation of a new legal system based on the rule of law. On the other hand, nor did the unelected parties of the opposition have democratic credentials, although in some cases the popularity of their leaders (such as Lech Wałęsa in Poland or Václav Havel in Czechoslovakia) and the organizations (Solidarity and the Civic Forum, respectively) granted them an empirical, sociological legitimacy.

The opposition at the Roundtables did not perceive themselves as the new revolutionary government, but as the representatives of the unorganized, heterogeneous mass of citizens.⁸⁸ Since they possessed no mandate for constitution-making, proclaiming a “revolutionary legitimacy,” would have meant the (illegitimate) identification with the people they intended to represent and in whose interest they claimed to act. Choosing this option would have

⁸⁵ Péter Paczolay, “Constitutional and Legal Change during the Transition from Socialism to Democracy in Hungary”, *Rechtstheorie* 27 (1995): 288.

⁸⁶ Sajó and Losonci, “Rule by Law in East Central Europe,” 328.

⁸⁷ Arato, “Constitution and Continuity. Part I,” 97.

⁸⁸ Preuss, *Constitutional Revolution*, 94-95.

engendered a complete rupture with legal continuity, in clear contrast with the legalistic claims of the opposition. On the contrary, the opposition restrained itself (either out of awareness of its legitimacy deficit or impossibility to obtain further concessions) to specific demands, leaving “the task of creating a new constitution to an elected assembly”.⁸⁹ In Poland, the initial issue at stake was in fact simply the re-legalization of Solidarity and in Czechoslovakia the creation of a new government. Only in Hungary was the agreement on a wider systemic change a given from the beginning, although for the Communist reformers it was seen as a survival strategy.⁹⁰

The most straightforward way for the newly institutionalized anti-communist opposition to address the problem of legitimacy would have been the adoption of entirely new constitutions. The production of a final constitution by a democratically elected body would have created a sufficient discontinuity and, at the same time, filled the legitimacy gap that the round tables had left. The first, piecemeal stage of constitution-making by amendment, in fact, was generally followed by a second step, namely the substitution of the old fundamental law.⁹¹ The Czechoslovak constitution was frenetically amended several times by the federal parliament and later replaced by two brand-new constitutions after the “velvet divorce” in 1992-1993. In Poland, following some constitutional revisions in 1989, a provisional and essential “Small Constitution” was introduced in 1992 while the old one was kept valid and replaced by a new fully-fledged constitution only in 1997. Hungary, finally, has a different story: the amended constitution resulting from the round table negotiations of 1989, originally meant to be temporary, was not quickly replaced by a democratically legitimated one, since all subsequent attempts failed and the existing text proved to be a workable document,

⁸⁹ Kis, “Introduction,” 3.

⁹⁰ Sajó and Losonci, “Rule by Law in East Central Europe,” 327.

⁹¹ On the concept of constitutionalism in two stages, see Jon Elster, “Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea,” *Public Administration* 71 (1993): 187; Andrew Arato, “Constitution and Continuity in the East European Transitions, Part I: Continuity and its Crisis,” *Constellations* 1, no. 4 (1994): footnote 23; and János Kis, “Introduction: From the 1989 Constitution to the 2011 Fundamental Law,” in *Constitution for a Disunited Nation*, ed. Gábor A. Tóth (Budapest: Central European University Press, 2012).

keeping up with liberal democratic standards. It remained in effect (although with a high number of amendments) until 2012, when the ruling conservative party Fidesz single-handedly imposed a new constitution.⁹²

In all the above-mentioned cases, it was a *pouvoir constitué* (the president or the parliament), and not a constituent assembly that enacted the new constitution. Referenda were also carefully avoided. This meant that the body which is meant to live under the new constitution was the one that enacts it,⁹³ with all that this implies. It is true, however, that also the German Basic Law was approved simply as an act and was never legitimated by the German people, and still it gained legitimacy thanks to its proven effectiveness. However, the constitutional convention that created the *Grundgesetz* acted as a *pouvoir constituant* by all effects and constituted a separate body from the *Bundestag*.

2.3 The nature of law in the early stage of transition

The “fiction of legal revolution” had a fundamental impact on the political-legal system, and on the way the rule of law was understood and employed.⁹⁴ As long as acting according to the existing rules was interpreted as clear detachment from their hypocritical continuous violation by the previous regime, law and the rule of law gained suddenly a central importance “as an instrument of the transition.”⁹⁵ This entailed, logically, the renewed centrality of law-making bodies. National parliaments have witnessed, from the very early years of the transformation, a true and exceptional revival. The fictional importance of parliaments during the Roundtable talks became real as soon as – once free elections were held – they turned into the central arena of political life. This repositioning of parliaments is a

⁹² For a critical assessment of the Hungarian constitution-making process, from 1989 until 2012, see Gábor A. Tóth (ed.) *Constitution for a Disunited Nation* (Budapest: Central European University Press, 2012).

⁹³ A.E. Dick Howard, panel speech delivered on September 26, 1996 at the symposium “Constitutional “Refolution” in the Ex-Communist World: The Rule of Law.” Transcribed in *American University International Law Review* 12, no. 1 (1997): 57.

⁹⁴ Přibáň, *Dissidents of Law*, 89.

⁹⁵ Péter Paczolay. “Constitutional and Legal Change during the Transition from Socialism to Democracy in Hungary”, *Rechtstheorie* 27 (1995): 285.

result of the proclaimed commitment to democracy and conveyed with itself a renovation of the role of law within the system. While in the communist times they usually produced a few bills per year, parliaments became extremely prolific, issuing a surprising amount of legislation in a short time.

Nonetheless, those commitments to the creation of a legal system based on the principle of rule of law had to face the strong contextual constraints of a legal culture so far largely alien to it.⁹⁶ Law-makers and law-interpreters were required to go against the legal traditions precisely by relying on the principles of *Rechtsstaat* towards which the previous system was so ambiguous. This “circular” difficulty constituted a “collateral damage” to the importance attributed to the rule of law in the new system and political community, both as the goal and the means of all state actions.⁹⁷ In order to be reached, the rule of law had to become a matter of everyday praxis. This clashed with the “stigma on the mentality of post-socialist generations” where the enjoyment of new freedoms was not countered with a culture of respect and mutual acceptance, with the political battles often taking the shape of verbal (and occasionally physical) assault, defamation and slander.⁹⁸ At the societal level, a strong distrust towards the law and state authority, often perceived as a simple coercive power and not as a legitimate order worth respecting, went hand in hand with passivity of a public hardly touched by constitutional changes in its everyday – and increasingly difficult – reality.⁹⁹ Creating constitutional traditions is a long and uncertain path, whose final destination is often unknown even to its own authors. To be successful, it must rely at least partially on a “shared political ideal that amounts to a cultural belief.”¹⁰⁰ The latter, however, is hard to change, and rooting

⁹⁶ Sajó, “New Legalism in East Central Europe,” 336.

⁹⁷ Hartwig, “Die Legitimation des Staates durch Verfassungsrezeption in Mittel-und Osteuropa,” 937.

⁹⁸ Rett R. Ludwikowski, “Constitutional Culture of the New East-Central European Democracies,” *Georgia Journal of International and Comparative Law* 29 (2000): 12-13.

⁹⁹ *Id.*

¹⁰⁰ Tamanaha, “A Concise Guide to the Rule of Law,” 11.

the rule of law is a hard task, especially in societies with experience of authoritarian rule. In the words of A. E. Dick Howard,

What it requires is overcoming the disrespect, the distrust, the cynicism that citizens naturally felt about law and lawyers and courts and judges in the communist world, precisely because the law was seen to be an instrument of party policy. That legacy is deep and bitter, I think, in many of the people of the region. You can't expect they will suddenly abandon those assumptions overnight.¹⁰¹

Building the *Rechtsstaat* starting from the principles, down to societal entrenchment was not easier than building a house starting from the roof. The contrast between rule of law precepts and legal practice was substantial. After all, this divergence between procedural and normative character of the legal system (understood as a *summa* of both legal culture and positive law) is typical of the new orders created in, or imposed on, a society which had been so far extraneous to it. No actors within the legal arena could simply step over the past legacies of the socialist juridical culture by a simple decision, especially in the context of legal continuity dictated by the peaceful and negotiated nature of the regime change. The challenge in post-communist transitions, then, was not so much the creation of new rules (many constitutional norms of the previous regime were in fact compatible with democratic rule of law, but simply disregarded in practice) but rather to “give these words ... a different meaning ... from that which had prevailed under communism.”¹⁰²

2.3.1 Formalism and substantive justice, an apparent contradiction?

The dual character of the “constitutional revolutions” implied the emergence of two, apparently opposite conceptions of constitutionalism - and consequently of rule of law: on the one hand, legal continuity justified the idea of a constitution as a formal set of rules and a faith in the legal reasoning as an instrument *per se* of legitimation and change. On the other hand, the substantial discontinuity in legitimacy contributed to a strongly normative reading

¹⁰¹ A.E. Dick Howard, panel speech delivered on September 26, 1996 at the symposium “Constitutional ‘Refolution’ in the Ex-Communist World: The Rule of Law.” Transcribed in *American University International Law Review* 12, no. 1 (1997): 57.

¹⁰² Dupré, *Importing the law in post-communist transitions*, 38.

of the constitution as a program for a “brand-new moral, political and social order”¹⁰³ of quasi-transcendental character. Perhaps due to the communist legal heritage, the understanding of law and *Rechtsstaat* was in some cases deformed: legalism as the basis for a renewed instrumental use of law, normativism as the driving force for political justice claims.

2.3.1.1 Formalism and law as an instrument

The idea of law in all analysed countries was not contrary to formalism, and often “revolutionary vocabulary went hand in hand with legal positivist vocabulary.”¹⁰⁴ The reliance on legalism was partly an answer to the legitimation needs of the new authority and partly to “the collapse of other normative communication systems.”¹⁰⁵ As Přibáň reminds us, the legalistic structure of human rights and freedoms and the democratic legal state were a “fundamental, although not exclusive, legitimizing framework of the revolutionary changes.”¹⁰⁶ However, the idea of continuity let old formalism survive and engender a rather doctrinal understanding of rule of law, not too dissimilar from the “administrative” 19th century German view of *Rechtsstaatlichkeit*. And like the early German concept, as well as the socialist legal system, it was prone to be instrumentally used. It is then not surprising that both the dissident opposition and the communist politicians “considered the legal system as territory to be used and conquered for their purposes.”¹⁰⁷ However, this is not to be understood in terms of an attempts of power grab. The legal guarantees were rather used in order to minimize the threats that the uncertainty of the upcoming elections created for both sides of the roundtable.¹⁰⁸ This was especially true in Hungary and Poland, where legal reforms were jointly handled by two opposing factions within a regulated, although

¹⁰³ Jacek Kurczewski, panel speech delivered on December 14, 1992 at the session organized by the American Council of Learned Societies in Warsaw. Transcribed in *Constitutionalism in East Central Europe: Discussions in Warsaw, Budapest, Prague, Bratislava*, ed. Irena Grudzińska-Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1994), 13.

¹⁰⁴ Přibáň, *Dissidents of Law*, 90.

¹⁰⁵ Sajó, “New Legalism in East Central Europe”, 342.

¹⁰⁶ Přibáň, *Dissidents of Law*, 89.

¹⁰⁷ Sajó, “New Legalism in East Central Europe”, 334.

¹⁰⁸ János Kis, Interview with the author. Budapest, 14 May 2013.

unofficial, negotiation framework and only later transformed into law. In Czechoslovakia, where the *caesura* has been stronger, the instrumental element was equally, or even more strongly present, but since minimal bargaining took place with the outgoing communists and the constitutional renovation took place within the legislative institutions, this remained rather a one-sided prerogative of the former opposition.

When, for instance, Ludwikowski talks about a “politicization of the constitution,”¹⁰⁹ he refers precisely to the practice, common in the first years of transition, to mix ordinary and constitutional politics in a way detrimental to the latter. The communist disregard for the rigidity and primacy of the constitution survived in the conviction that constitutions reflect political will and can be amended by political forces. Constitution-making, as we have seen in section 2.2.3, was carried out by parliaments.¹¹⁰ This approach has been openly supported by Stephen Holmes, who advocated a “flexible” constitution which would have allowed political majorities a wider room of manoeuvre in fulfilling what he perceives as the main tasks of transition: decommunization and the creation of a market economy.¹¹¹ Holmes’ thesis, however, implies the danger of a majoritarian imposition of constitutional decisions by a parliament acting as a permanent constituent power. Whenever this happens, the fundamental law – although amended following scrupulously all procedural rules – is manipulated for purely temporarily political goals and loses the character of stability and foreseeability that the “inner morality” of the rule of law is supposed to grant. For instance Poland was characterized until 1993 by a power struggle between the executive and the legislative, which had repercussions on the interpretation of law. It is in this period that the concept of “Falandisation of law” (from Lech Falandysz, the president’s legal adviser) came to existence, as Wałęsa tried repeatedly to broaden his presidential prerogatives through a quirky

¹⁰⁹ Ludwikowski, “Constitutional Culture of the New East-Central European Democracies,” 21.

¹¹⁰ Darina Malová, “Constitutionalism in Postcommunist Transition: Selflimiting Activities of the State,” in *Constitutionalism and Politics*, ed. Irena Grudzińska Gross (Bratislava: Slovak Committee of the European Cultural Foundation, 1993), 341.

¹¹¹ Stephen Holmes, “Back to the Drawing Board,” *East European Constitutional Review* 2, no. 1 (1993).

interpretation of the letter of the law, hence subordinating law to political aims. As a result, “from the set of orders of the People’s Republic era, law became an even more complex set of “hyper instructions.”¹¹² Similarly in 1990 in Hungary, in response to an unfavourable decision of the Constitutional Court regarding the electoral law, the Parliament agreed to modify the constitution in order to avoid the technical difficulties of bringing the law’s effects in conformity with the constitution before the elections’ date.¹¹³ The culture vacuum left by a decline in normativity of law fostered “a purely instrumental attitude” towards law, where “rights are regarded as goods distributed by law.”¹¹⁴

2.3.1.2 Normativism and substantive justice

In addition to these formalistic outcomes of the legal transformation, one can trace another opposite strategy, that of anchoring ethical discourse and natural law principles in the language of the constitution. The conviction – given by the experience with communist “dual constitutionalism” – that “not every law was a law and not every right a right” persuaded constitutional drafters that the formal features of the law alone would not suffice. “Rather, it was much more important to tie legal normativity to the normativity of liberal-democratic political morality.”¹¹⁵ The coexistence of this attitude, which expressed the need for discontinuity, with the commitment to continuity ultimately produced “tensions between the demands of legality and those of preserving the revolutionary ethos, with its commitment to material justice.”¹¹⁶ While the doctrinal reading of rule of law concealed the risk of an instrumentalisation of law, likewise the danger enshrined in a morally overloaded reading of the constitution was the desire for historical justice, with little interest on the complex form of liberal legal culture based on the conception of attitudinally neutral law, granting access to

¹¹² Marek Zirk-Sadowski, “Transformation and Integration of Legal Cultures and Discourses – Poland,” in *Spreading Democracy and the Rule of Law?*, ed. Wojciech Sadurski, Adam Czarnota and Martin Krygier (Dordrecht: Springer, 2006), 305.

¹¹³ Sajó, “Reading the Invisible Constitution,” 257.

¹¹⁴ Zirk-Sadowski, “Transformation and Integration of Legal Cultures and Discourses – Poland,” 307.

¹¹⁵ Přibáň, *Dissidents of Law*, 93.

¹¹⁶ Czarnota, “Lustration, decommunisation and the rule of law,” 314.

courts to everybody, granting vast guarantees of formal justice and non-retroactivity.¹¹⁷ The paradox was, that while the negative experiences with a legal system of blatant abuse of the term “law” made the formal rational criteria of the rule of law attractive, the tradition made and still makes east European societies particularly eager to considerations of material justice.¹¹⁸ This feature reveals an interesting ambivalence in the role of law in the early transition period: while, on the one hand, it was used as a symbolic means to create a *Rechtsstaat* through a procedural legitimation (which unfailingly entailed elements of self-evident importance such as democratic decision-making and judicial review), on the other hand it failed to take into necessary consideration the Fullerian “inner morality” of law. In order to construct and enhance their (sociological) legitimacy, post-communist legislators were sometimes pressured to meet the demands for substantive (“revolutionary”) justice, notwithstanding the core elements of the (thin) rule of law. This seems to prove that a merely procedural understanding of the rule of law may be compatible with potentially unrestrained material-substantial demands.

To conclude, as long as the shortcomings of the context of the socialist legality were relevant, a conflict emerged between legal norms and other normative conceptions. While a legal positivist attitude to law emphasized the need to look for criteria inside and not outside the legal order, it rejected any attempt to grasp a concept of “justice,” interpreted as a mere formal criterion for validity. This facilitated an instrumental use of legal mechanisms, as no criteria exists to ascertain what moral value is desirable. “Justice according to laws” was an impoverished justice, but substantive justice “in spite of laws” conflicted with the rule of law. For this reason, the creation of a *Rechtsstaat* system at the outset of the “constitutional revolutions” was incomplete, or at least misunderstood. In its travel from a from a rule *by* law regime it either became stuck in a formal reading of law where the *Rechtsstaat* was a means,

¹¹⁷ Zirk-Sadowski, “Transformation and Integration of Legal Cultures and Discourses – Poland,” 305 and Sajó, “New Legalism in East Central Europe,” 342.

¹¹⁸ Sajó, “New Legalism in East Central Europe,” 342.

but not an aim; or conversely it “jumped” to the substantive elements of the “thick” rule of law, neglecting the “inner morality” of the “thin” one, hence seeing it as an aim, but not as a means.

CHAPTER 3

CRAFTING THE RULE OF LAW: THE ROLE OF CONSTITUTIONAL COURTS

This last chapter will address the question of how constitutional jurisprudence contributed in shaping the rule of law in the first years of the democratic transition. It will first analyse the specificity of the Constitutional Courts' function in the transitional context and assess the main normative and institutional constraints they had to face. A special attention will be then paid to two "testing grounds" where the rule of law came directly into play in the court's jurisprudence: 1. the "transitional justice" literature; 2. those rulings where the *Rechtsstaat* principle was used as a directly enforceable provision in order to "fill the gaps" of constitutional texts. Aim of this chapter is finally to single out distinctive patterns in the ways the *Rechtsstaat* concept came to be understood, as well possible explanatory variables accounting for such a variety.

3.1 *The role of Constitutional Courts: Rebuilding the ship in open sea*

In a context where constitutional provisions, as discussed in the previous chapter, suddenly regained a central role, the need for a mechanism that would have preserved the constitutionality of state action, both past and future, soon emerged. It is not the purpose of the present work to analyse the rationale behind setting up constitutional courts.¹ We can nevertheless assume that – by endorsing the liberal-constitutional tradition – a firm conviction

¹ Among the many studies dedicated to this issue, it is worth mentioning Wojciech Sadurski's "Postcommunist Constitutional Courts in Search of Political Legitimacy" *East European Case Reporter of Constitutional Law* 6 (1999): 38-129 and "Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?," *Isr. L. Rev.* 42 (2009): 500-527.

existed that constitutional courts represented an indispensable institution in the new constitutional order.² Faced with an often turbulent political landscape and a legacy of disrespect for the rule of law, “post-Communist constitutional courts were expected to become the ultimate guarantors of the fundamentals of newly crafted democratic constitutions, guarding institutional arrangements ... and fundamental rights alike.”³ The courts, thanks to their power of judicial review, would have finally guaranteed the primacy of the constitution over ordinary statutes and by doing so protected the rule of law.⁴ It was in this capacity to limit parliaments’ law-making and the regulatory power of the executives that the emergence of constitutional courts represented a radical break with the prior constitutional system.⁵

3.1.1 Institutional constraints

As we have seen, communist regimes operated in what Arato called “double constitutional reality,”⁶ namely the coexistence of formal constitutional guarantees and unwritten authoritarian practices. With the repositioning of the constitutional text in the centre of the political transformations after 1989, the new Courts were entrusted with the task of elaborating a new meaning for the old laws, including the constitutional text,⁷ as well as for the new concepts introduced by the constitutional amendments.⁸ With the exception of the Polish Tribunal, which suffered from procedural limitations,⁹ the Courts took an active stance in repealing unconstitutional laws from communist time, by gauging them against the letter

² Brunner, “Development of a Constitutional Judiciary in Eastern Europe,” 536.

³ Renáta Uitz, “Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?” *Juridica International* XIII (2007): 50.

⁴ Rainer Arnold, „Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts,” *Jahrbuch für Ostrecht* 43 (2002), 22.

⁵ Teitel, “Post-Communist Constitutionalism,” 169.

⁶ Arato, “Constitution and Continuity in the East European Transitions. Part I,” 99.

⁷ Wojciech Sadurski, “Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?,” *Isr. L. Rev.* 42 (2009): 510.

⁸ Dupré, *Importing the law in post-communist transitions*, 38.

⁹ Until the entry into force of the 1997 constitution, the Polish Constitutional Tribunal could not review laws older than 5 years (a clause included by the communists in order to prevent the Tribunal from reviewing martial law’s era laws) and could not check the conformity of laws with international treaties.

and the values of the constitution. In doing so, they contributed in supplying with legitimacy the new institutions and the fundamental law itself.¹⁰

Only by maintaining their *super partes* role could the Courts maintain their legitimacy and hence expect the enforcement of their decision. However, as soon as Courts started reviewing the post-communist legislation. They entered into bitter conflicts with the parliament and the executive, which could claim – differently from the Courts – democratic legitimacy. The often accessible standing procedures,¹¹ multiplied the occasions for politically controversial legislations to be brought under the Court’s scrutiny. Also the possibility to perform abstract review of norms, either *ex ante* or *ex post*, emphasized the confrontational relationship with the legislative, attributing to Constitutional Courts the role of a “Third (or Second) Chamber”. One first institutional constraint, therefore, was the risk for the Courts to be drag into the political arena by transforming political questions into constitutional questions (judicialization or juridification of politics¹²), thereby undermining court’s effectiveness and legitimacy vis-à-vis the public opinion and the other state’s branches. The decisions on distribution of powers,¹³ on social security,¹⁴ on elections and referenda,¹⁵ on abortion,¹⁶ the numerous cases related to transitional justice (lustration laws,¹⁷ retroactive justice¹⁸ and property restitutions and compensations¹⁹) are clear cut examples of the

¹⁰ Howard, "Constitutional 'Refolution' in the Ex-Communist World: The Rule of Law," 58.

¹¹ The main example being here the Hungarian Constitutional Court’s *actio popularis*, granting virtually to anybody, even without a specific interest, the right to petition the Court.

¹² Grote, “Rule of Law, Rechtsstaat and Etat de Droit,” 288; Sajó, “New Legalism in East Central Europe”, 342; Tamanaha, *On the Rule of Law*, 110.

¹³ Hungarian Constitutional Court, decision 48/1991.(IX.26.)AB. Slovak Constitutional Court, decision I. ÚS 39/93.

¹⁴ Polish Constitutional Tribunal, decision K 7/90, of 22 August 1990.; Decision K 14/91 of February 11, 1992. 1992(I) ; Hungarian Constitutional Court, decision 43/1995. (VI. 30.) AB.

¹⁵ Especially heated was the situation in Slovakia, where 1994 elections the Court was petitioned by several parties following the trying to exclude rival coalitions from parliament on procedural grounds (PL.US 16/94 and PL.US 17/94)

¹⁶ Polish Constitutional Tribunal, decision U 1/92 of 7 October 1992.

¹⁷ Hungarian Constitutional Court, decision 60/1994.(XII.24.)AB.

¹⁸ Hungarian Constitutional Court, decision 11/1992.(III.5.)AB., Polish Constitutional Tribunal Decision S 6/91 of 25 September 1991.

¹⁹ Czech Constitutional Court, decision Pl. ÚS 3/94; Hungarian Constitutional Court , decision 21/1990(X.4.)AB.

disruptive potential of these conflicts. In some occasions the Courts themselves overstepped their role of “negative legislators,” offering the parliament specific guidelines²⁰ or by interpreting the constitution in a particularly activist way.

3.1.2 Normative constraints

Creating institutions is surely much easier and self-evident than instilling the values that such institutions are purported to uphold. Post-communist Courts had to fulfil precisely this task, and they did this by “putting flesh on the bones” of constitutional texts, i.e. through a coherent interpretation of the principle of the rule of law. This endeavour, however, implied serious normative difficulties, as they had to cope with “three different, and difficult to harmonise, demands of seeking to instantiate the rule of law in the present, to repair consequences of its absence in the past, and to establish conditions for it in the future.”²¹

First of all Courts had to reconcile the tensions between continuity and change, whose respective demands, as we know, can be contradicting. As Sólyom noted, the conceptual differences in the understanding of the rule of law manifest themselves most clearly “in the cases in which unavoidable themes of the system change are decided upon and in which formal guarantees and the demand for justice necessarily conflict.”²² The area where this conflict between “legality” and “justice” was most visible was transitional justice. The particular dilemma that it posed was the following: “how much deviation may be allowed from ordinary ... principles of constitutionalism and the rule of law in the name of transition to democracy?”²³

²⁰ Hungarian Constitutional Court, decision 11/1992. (III.5.)AB. and decision 53/1993.(X.13.)AB. Polish Constitutional Tribunal, decision S 1/91 of February. 13, 1991.

²¹ Czarnota, “Lustration, decommunisation and the rule of law,” 314.

²² László Sólyom, “Introduction to the Decisions of the Constitutional Court,” in *Constitutional Judiciary in a New Democracy: the Hungarian Constitutional Court*, ed. László Sólyom and Georg Brunner (Ann Arbor: University of Michigan Press, 2000), 39.

²³ Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” 73-74.

While transitional justice looked at the past, another difficulty stemmed from the present and the future of the rule of law, namely what we may call, paraphrasing Jon Elster,²⁴ a “simultaneity dilemma”. The problem was that the definition of a conception of rule of law and its establishment had to be proceed simultaneously with its application in practice: nothing less than rebuilding a ship in open seas. The system change in fact had enthroned a normative commitment to the rule of law. But while this could only be achieved gradually, the everyday practices required to be consistent with the rule of law from the very outset.²⁵ As Walker put it, “[s]ome of the elements of the rule of law are, admittedly, ideals which can be seen as general standards... [o]n the other hand, some of the ingredients are actually everyday legal rules.”²⁶ This means that Constitutional Court had to apply in their reasoning the general principles of rule of law *while* formulating them.

3.2 “Transitional” rule of law: exception or rule?

Our first “testing ground” for the rule of law will be the jurisprudence on transitional justice, namely those “legal mechanisms adopted in order to help come to term with the legacy of a an immediate authoritarian past by a successor democratic regime.”²⁷ The legal and peaceful nature of transitions left largely untouched the personnel and legal relations of people compromised with the previous regime even in the completely changed political context. Those tensions produced two opposite imperatives: on the one hand, the need to respect existing rules and unequivocally endorse the basic principles of the rule of law; on the other hand the urgency to address the injustices perpetrated by the previous political order. Addressing past injustices often requires exceptions to constitutional rules and principles,²⁸ but this “collided with a higher-order normative commitment to the rule of law, which was

²⁴ Jon Elster, “The Necessity and Impossibility of Simultaneous Economic and Political Reform,” in *Philosophy of Social Science*, ed. Piotr Polzajski (Warsaw: IfiS Publishers, 1990), 309–316.

²⁵ Arato, *Civil Society, Constitution and Democracy*, 102.

²⁶ Walker, “The Rule of Law,” 8.

²⁷ Sadurski, *Rights Before Courts*, 223.

²⁸ Uitz, “Constitutional Courts in Central and Eastern Europe,” 52.

one of the defining ideas of the post-communist revolution”.²⁹ In fact, certainty of law (as the fundamental feature of the “thin” rule of law) would require rules to be predictable, non-arbitrary, non-exceptional and to be applied according to the principles of universality and generality. Substantive justice on the contrary considers the merits of the case and searches beyond legal formulas for the morally just solution. Particularly slippery from a rule of law perspective was the problem of retroactive criminal laws. A liberal take would in fact consider them as completely repugnant to legal certainty. As Benjamin Constant wrote,

Retroactivity is the greatest crime the law can commit; it is the tearing up of the social pact, the annulment of the conditions by virtue of which society may demand obedience from the individual. ... Retroactivity takes away from the law its character; the retroactive law is no law.³⁰

The debate on this issue has been framed dichotomously. One possible answer would be to accept, as Ruti Teitel does, that “ideals of rule of law ... are inapplicable to these exceptional circumstances without making a variety of adjustments.”³¹ This solution gives precedence to the political discontinuity over legal certainty and thus admits that the principle of *Rechtsstaat* is only compatible with an established constitutional democracy and not with regimes in transition.³² Another answer would be, on the opposite, to exclude that political exceptionality could allow for a departure from the rule of law principles and thus justice can only be served within the limits allowed by the *Rechtsstaat*. The choice between substantive justice and the guarantees of positive constitutional law was, indeed, “one of the dividing lines between the attitudes of the courts”³³ and the way they dealt with this logical and normative difficulty was extremely diverse.

²⁹ Kieran Williams, “Lustration as the Securitization of Democracy in Czechoslovakia and the Czech Republic,” *Journal of Communist Studies and Transition Politics* 19, no. 4 (2003): 7.

³⁰ Benjamin Constant, *Le Moniteur Universel*, June 1, 1828, p. 754, col. 3.

³¹ Teitel, “Transitional Rule of Law,” 279-280.

³² Of this opinion was Zsolt Zétényi, the sponsor of the Hungarian legislation on the retroactive criminal prosecution: “in a revolutionary process, in an exceptional situation, it would be better to pay more attention to the people’s sense of justice and the substantive principle of justice than to apply mechanisms appropriate only to long-standing rule-of-law states” (Cited in: Arato, *Civil Society, Constitution and Democracy*, 103.)

³³ Sólyom, “The Role of Constitutional Courts in the Transition to Democracy,” 138.

3.2.1 Hungary

The Hungarian “non-revolutionary, organic transformation”³⁴ implied the “fiction” of a continuous constitutional development, which the Court attested by asserting the possibility to use the amendment rules of the old system in order to create an entirely new one.³⁵ According to the Court,

[t]he politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system’s regulations of the power to legislate, thereby gaining their binding force. The old law retained its validity. 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; ... Irrespective of its date of enactment, each and every valid law must conform with the new Constitution.³⁶

By ignoring the source of legitimacy in establishing the constitutionality of rules, the Court implied that the “dilemma of simultaneity” could only be resolved “by acting at all moments of the transformation *as if* the rule of law already existed.”³⁷ Therefore the pursue of purges and retroactive criminalization was more difficult,³⁸ as they had to be justified not only on moral grounds, but also in accordance with those procedures that the choice of continuity has streamlined. The court’s position has been explicated most clearly in a landmark decision on a draft law which would have allowed to retroactively reopen the statutes of limitations for the crimes committed during the repression of the 1956 revolution which were not punished at the time due to political connivance of the state organs.³⁹ In a highly contested decision,⁴⁰ the Court found the act to be unconstitutional, as it violated one of the essential elements of the rule of law, namely legal certainty. As already mentioned, the Court did not take the

³⁴ János Mólnar, interview with the author. Personal interview. Budapest, 22 May 2013.

³⁵ Arato, *Civil Society, Constitution and Democracy*, 103.

³⁶ Hungarian Constitutional Court, Decision 11/1992 AB. (III, 3).

³⁷ Arato, *Civil Society, Constitution and Democracy*, 102.

³⁸ Arato, *Civil Society, Constitution and Democracy*, 90.

³⁹ Act of Parliament of 4 November 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.

⁴⁰ Decision 11/1992 AB.

regime change as a valid criterion to discriminate between legal validity of norms. Therefore even transitional justice measures

were to be resolved in conformity with the fundamental rule of law, a principle of which was legal certainty that required, inter alia, the protection of rights previously conferred, the non-interference with the creation or termination of legal relations, and the limitation of the ability to modify existing legal relations to constitutionally-mandated provisions.⁴¹

Accordingly, the principle of legal certainty must precede any consideration of material justice, as “only by adherence to the procedural norms can the administration of justice operate constitutionally.”⁴² The Court endorsed the liberal assumption that retroactivity is repugnant to the principle of the rule of law and permitting it implies that at present there is no *Rechtsstaat*.⁴³ As the Court put it, “[a] rule of law state cannot be created by violating the rule of law.”⁴⁴

It would be however unfair to call the Court’s stance “positivist”,⁴⁵ as the judges did not avoid the problem of principles by relying on mere formalism. They conceived (criminal) law in abstract terms as both a basis for state repressive power and a guarantee against arbitrariness. They saw in law’s “inner morality” the real source of principles it is supposed to embody, as opposed to the “external morality,” which is contingent and contextual:

In a constitutional state the criminal law is not merely an instrument but it protects and embodies values: the principles and guarantees of the constitutional criminal law. ... Though criminal law protects values, as a guarantee of freedom it cannot become an instrument for moral purges in the process of protecting moral values.⁴⁶

The Court’s jurisprudence remained coherent also in the 1994 ruling on lustration.⁴⁷ The Hungarian “mild” version of lustration required individuals occupying posts defined by

⁴¹ *Id.*

⁴² *Id.* (IV).

⁴³ Arato, *Civil Society, Constitution and Democracy*, p. 113.

⁴⁴ Decision 11/1992 AB. (III, 5).

⁴⁵ Ganev, “Foxes, Hedgehogs, and Learning,” 80.

⁴⁶ Decision 11/1992 AB. (IV, 3).

⁴⁷ Decision 60/1994 (XII. 24.) AB.

law to be called upon to resign if they were proven that they had previously been informers of the Communist secret police. In case of refusal, the information would have been made public.⁴⁸ The Court turned down a consistent part of the bill, making clear that the law had to be assessed according to the principles of the rule of law, which entail the principle of non-discrimination and the balancing of individual rights with public interests: the specific circumstances of transition were not used to justify a departure from legal guarantees, but rather as an element to be considered while assessing the limits to the protection of privacy.

The Hungarian Court perceived itself as the repository of the paradox of the “revolution under the rule of law,”⁴⁹ which meant, as we have seen, the coexistence of legal continuity and legitimacy break. The constitutional judges believed that any kind of revolutionary legality would have represented no break at all with the inherited legal tradition. Paradoxically, it was the choice of “continuity with a fiction,” namely legal certainty, that produced the break, not a radical approach.⁵⁰ Hence the “constitutional revolution” could not be followed by “revolutionary justice.”⁵¹ This approach is, admittedly, “less revolutionary, because it proclaims legal continuity, but also more radical, as it breaks immediately with the past without allowing for exceptions”.⁵²

3.2.2 Poland

Judicial review of old laws in Poland was initially impossible due to procedural constraints.⁵³ Thus legal continuity in Poland was a structural “given” rather than a normative choice. The Polish constitutional Tribunal had the chance to elaborate its doctrine on legal certainty and retroactivity in a case involving the 1990 Pension Act, which reduced the

⁴⁸ Act XXIII/1994 on Background Checks for Individuals Holding Certain Key Offices.

⁴⁹ Hungarian Constitutional Court, Decision 11/1992 AB. (III, 5).

⁵⁰ Andrew Arato, “Constitution and Continuity in the Eastern European Transitions. Part II: The Hungarian Case,” *Constellations* 1, no. 2 (1994): 307.

⁵¹ Lembke and Boulanger, *Between Revolution and Constitution*, 277.

⁵² Arato, *Civil Society, Constitution and Democracy*, 103.

⁵³ See footnote 9.

(generous) pensions of former high-ranking officials of the communist regime.⁵⁴ Similarly to its Hungarian counterpart, the Tribunal held that that legislative enactments that infringe upon the “principle of nonretroactivity of laws” and the “principle of vested rights” violate the *Rechtsstaat* clause enshrined in article 1 of the (amended) Polish constitution.⁵⁵ In its reasoning, the Tribunal held that:

[n]onretroactivity of law is one of the basic components of the principle of a state based on the rule of law ... Another important aspect is citizens’ confidence in the State, which requires ... that vested rights be protected from the retroactive application of the law.⁵⁶

However, differently from their Hungarian colleagues, the Polish judges were ready to take into consideration the specific circumstances in which the legal relationships came into being. The Tribunal in fact ultimately found the act non-retroactive, by distinguishing between “vested rights” and “privileges obtained in an unfair manner” and holding that the latter did not deserve the protection offered by the rule of law clause.⁵⁷ Although disguised in a neutral anti-discriminatory reasoning,⁵⁸ the Tribunal clearly operated a moral reading.

This rather ambiguous doctrine of legal continuity was confirmed in the ruling on the act on the prosecution of “Stalinist crimes.”⁵⁹ Here the Tribunal recognized that the principle of non-retroactivity may be derogated in exceptional historical circumstances, albeit under extremely strict conditions.

The Constitutional Tribunal is aware of the unusual historical nature of the recent transformation. The Tribunal is equally well aware that the unlimited application of the principle of non-retroactivity to those guilty of Stalinist crimes would be incompatible with basic principles of justice [...] Nevertheless, it is the opinion of the Tribunal that any departure from the

⁵⁴ Law of 24 May 1990, on Changes in Some Regulations Concerning Pensions, *Dz. U.* No. 36/1990, item 206.

⁵⁵ Brzezinski, *The Struggle for Constitutionalism in Poland*, 166.

⁵⁶ Decision K 7/90, of 22 August 1990, 1990 *OTK* 42, at 51-52.

⁵⁷ *Id.*, 53-54.

⁵⁸ The decision reads: “the legislation conforms with the constitution ... because it separates the right to a pension from any consideration of previously held positions of power”

⁵⁹ The Law Amending the Law on the Establishment of the Main Commission to Investigate Hitlerite Crimes in Poland of 4 April 1991 (*Dz. U.* No. 45/1991, Item 195) defined Stalinist crimes as “crimes against individuals or groups of individuals committed by authorities of the communist state, or tolerated and instigated by those authorities” perpetrated before 31 December 1956.

principle of *lex retro non agit* in order to achieve justice demands a very precise definition of the specific crimes addressed.⁶⁰

In its advisory opinion, the Tribunal then found the law unconstitutional on the basis of legal certainty. However, the infringement of this rule of law precept did not consist, as for the Hungarian Court, in the departure from the principle of non-retroactivity, but rather in the lack of clarity of the legal definition of “Stalinist crimes”.⁶¹

The invocation of a “moral legitimization” argument was even more clearly employed in a decision on the 1990 bill providing for the nationalization without compensation of the communist party properties. In this case the Tribunal concluded that the principle of vested rights, stemming from the *Rechtsstaat* clause, could only be enforced “with regard to those rights acquired in a lawful and morally unquestionable manner.”⁶² This definition clearly excluded the majority of the Communist Party’s assets.

With respect to de-communization laws, in a 1993 decision on an act allowing “executive removal of judges who violated the principle of judicial independence”⁶³ the Tribunal supported the idea that “the shift from an authoritative state to the rule of law may exceptionally assume forms which would not be justified in normal conditions.”⁶⁴ However, it deemed the act unconstitutional precisely on the basis of judicial independence. The case reappeared in February 1998. Tribunal once again agreed that judges “who subordinated the most basic values of the judiciary independence and impartiality to the purposes of political repression” may be removed. However it emphasized “that such regulations must be exceptional in nature and applied only to drastic circumstances.”⁶⁵ Similarly to the decision

⁶⁰ Decision S 6/91 of 25 September 1991, 1991 *OTK* 290, 294

⁶¹ Brzezinski and Garlicki, “Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?” *SJIL* 31, no. 13 (1995)38-39.

⁶² Decision K 3/91 of 25 February 1992, 1992(I) *OTK* 9

⁶³ Schwartz, *The Struggle for Constitutional Justice*, 68.

⁶⁴ Decision K 11/93 of 9 November 1993, 1993(II) *OTK* 37.

⁶⁵ Decision K 3/98 of 24 June 1998, 1998 *OTK* 4.

on Stalinist crimes, the Tribunal ruled that in such circumstances rules must be stricter and hence it stroke down the law on procedural grounds.⁶⁶

Properly speaking, lustration laws were introduced in Poland only in 1997. The 1997 lustration act⁶⁷ required candidates for senior positions to publicly declare whether they served as informants of the secret police. The loss of office was only envisaged in case of a false statement. In its first ruling the Tribunal dismissed all the petitioners' objections, mostly on the basis that the lustration procedure does not represent a criminal proceeding and thus it cannot claim the same types of protection.⁶⁸ Moreover, people applying for public offices shall calculate a more limited protection of private life.⁶⁹ The question on the nature of lustration remerged in 2000, when a lustration judge raised the question of constitutionality of the lustration procedure as differently from criminal law procedures it did not entail the guarantee of presumption of innocence. Unfortunately, the Tribunal avoided the question, as the specific case object of the dispute had been discontinued.⁷⁰

3.2.3 Czechoslovakia and the Czech Republic

The Czechoslovak and later the Czech constitutional courts have taken a radically different approach. Perhaps the most important decision issued by the Constitutional Court of the Czech and Slovak Federal Republic during its short existence was the one lustration. The "Czechoslovak model" was the first and most radical in the region: it consisted of two lists, encompassing a broad number of respectively current and past offices in the state administration and determined a total incompatibility between the two. The Federal Constitutional Court, while upholding the lustration bill, "came down heavily on the side of

⁶⁶ Namely, that the National Council of the Judiciary was not consulted, as the Constitution required.

⁶⁷ Law of 11 April 1997 on disclosing of work for state security agencies or co-operation with them during 1944-1990 of people being in charge of public functions *Dz. U.* No. 70, item 443; modification *Dz. U.* No. 88, item 554.

⁶⁸ Decision K 39/97 of 10 November 1998. 1998 *OTK* 26.

⁶⁹ Decision K 39/97 of 10 November 1998. 1998 *OTK* 26 and decision 24/98 of 21 October 1998. 1998 *OTK* 6.

⁷⁰ Decision P 3/00 of 14 June 2000. 2000 *OTK* 5.

material rather than formal justice”.⁷¹ The Court considered the peculiarity of the post-communist transition and contextualized the need for the rule of law in the post-totalitarian context.

The law-based state which [...] is tied to the democratic values enthroned after the collapse of totalitarianism, cannot in the final analysis be understood as amorphous with regard to values [...] from this perspective not even the principle of legal certainty can be conceived in isolation, formally and abstractly, but must [...] consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt a criteria of formal-legal and material-legal continuity which is based on a differing value system [...] Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.⁷²

The Czechoslovak judges rejected a formal interpretations of legal certainty precisely because old laws embodied the values of the old system. It was only through a departure from the values of old rules that the new legal system could distance itself from the preceding one, *in spite of* the legal continuity. Hence, for the Czechoslovak Court formal legal continuity represents an obstacle, and not an instrument of the rule of law. In the transition from authoritarianism, employment limitations upon certain category of “untrustworthy” people were seen as necessary for the consolidation of democracy and the rule of law⁷³ and to “avert the risk of subversion or of a possible relapse into totalitarianism.” The exceptionality of the measure was to be derived from the time limit (5 years) originally envisaged by the law, after which lustration was deemed not to be necessary anymore.

Shortly after the split of the federation, in 1993, the Czech Parliament adopted the so called “Act on the Illegality of the Communist Regime and Resistance Against It”⁷⁴ which, at

⁷¹ Sadurski, *Rights Before Courts*, 237.

⁷² Decision Pl. ÚS 1/92 (federal) of 26 November 1992.

⁷³ According to the Court, their aim “is not to threaten the democratic nature of the constitutional system, the value system of a constitutional and law-based state, nor the basic rights and freedoms of citizens, rather the protection and strengthening of just those things.” Decision Pl. ÚS 1/92 (federal) of 26 November 1992.

⁷⁴ Act no. 198/1993 Coll.

art. 5 provided that the statute of limitations period shall not elapse for criminal offenses committed in the period between 25 February 1948 and 25 December 1989 if not prosecuted due to political reasons. Once again Court strongly relied on a substantive understanding of the rule of law,⁷⁵ as inextricably linked with the (new) values of the system:

The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of “old laws” there is a discontinuity in values from the “old regime”. This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state.⁷⁶

In accordance to its interpretation of legal continuity, the Court maintained that substantive considerations about the moral illegitimacy of the previous regime and its unwillingness to prosecute offenders had to be taken into account.⁷⁷ Differently from its Hungarian counterpart, the Czech Court refused to appeal to the “continuity fiction” and rejected “legalistic conceptions of political legitimacy.” In upholding the statute, it based its reasoning on the content of the act itself which deemed the previous regime as “criminal, illegitimate and abominable.”⁷⁸ The Communist regime intentionally failed to prosecute certain crimes and therefore the limitation period cannot be said to have actually run. According to the Court, two mutually-exclusive “legal certainties,” were at stake: that of offenders and the one of citizens.⁷⁹ Besides the legal rationality of *nullum crimen sine lege* and *nulla poena sine lege*, “the constitutional and democratic rule of law also involves the

⁷⁵ See, among others, Sadurski, *Rights Before Courts*; Pavel Holländer, “Die Gerichtsbarkeit in der Tschechischen Republik (unter besonderer Berücksichtigung der Verfassungsgerichtsbarkeit),” in *Revolution und Recht*, see Introduction, footnote 22, 114.

⁷⁶ Decision Pl. US 19/93 of 21 December 1993.

⁷⁷ “If the state does not want to prosecute certain criminal acts or certain offenders, then the limitation of actions is pointless: in such cases, the running of the limitation period does not take place in reality and the limitation of actions, in and of itself, is fictitious” (Decision Pl. US 19/93 of 21 December 1993).

⁷⁸ Art. 2 (1).

⁷⁹ Decision Pl. ÚS 19/93 of 21 December 1993.

principle that no individual is above the law and all criminal acts shall be prosecuted.”⁸⁰ Having to choose between the two, “the Constitutional Court gives priority to the certainty of civil society.”⁸¹ In this way, a departure from the procedural guarantees of the rule of law could be justified on the premises of a “thick” rule of law conception.

3.3 *Filling the (normative) gaps*

An analysis of an “exceptional” jurisprudences such as those described so far would not suffice to understand the function and the shape that the rule of law took in the post-communist countries. “Retrospective” jurisprudence, in fact, constitutes only a fraction of the activity of the new courts and the lesson it offers comes “from the periphery”⁸² of what may be *prima facie* considered as isolated cases. As noted by the President of the Hungarian Constitutional Court László Sólyom, the stress caused to the rule of law by invoking “exceptional circumstances” is not only restricted to the specific context of political transition. Such arguments are common also in “normal times” when lawmakers wish to justify their actions in case of difficult socio-economic situations.⁸³ In order to ascertain whether the *transitional Rechtsstaat* doctrine elaborated by the courts constitutes a simple and temporary deviation or not, it is necessary to review also cases from the “ordinary jurisprudence”. As mentioned in section 3.1.2, in the early years of transition courts were busy elaborating a rule of law-standard during the process of its application to specific cases. Given the piecemeal (in Hungary and Poland) or hurried (in the Czech and Slovak Republics) constitution-making process, courts occasionally had to “fill the gaps” left by the drafters by relying on general principles such as of rule of law as a normative “source of unwritten constitutional rights and obligations.”⁸⁴ According to Szabó, in fact, the rule of law – besides

⁸⁰ Přibán, “Constitutional Symbolism and Political (Dis)continuity,” 301.

⁸¹ Decision Pl. ÚS 19/93 of 21 December 1993.

⁸² Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” 78.

⁸³ Sólyom, “Introduction to the Decisions of the Constitutional Court,” 41.

⁸⁴ Uitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” 87.

being a normative aim and an institutional fact – is also a norm, in the sense that “decisions can be deduced from it directly if no other norm can be referred to it.”⁸⁵ In these cases the Courts were forced to “expose” themselves and outline a *Rechtsstaat* doctrine with little constitutional references.

3.3.1 Hungary

Given the piecemeal nature of constitutional amendments and the inner contradictions that this created,⁸⁶ one of the main tasks of the Court was to bring coherence to the constitutional system through interpretation,⁸⁷ sometimes by substantial activism. The Court did this by constructing a comprehensive doctrine that partly departed from the formal constitution and created a material one⁸⁸ based on the Court’s case-law. The Court was aided in this by a very broad jurisdiction, including the power to initiate *sua sponte* proceedings on constitutional omissions. However, in the political camp and among the public opinion, such activism occasionally propelled discontent as it seemed that the court too easily disregarded the will of the democratic majority.⁸⁹

The Hungarian court’s doctrine took shape already in one of its first decisions regarding the constitutionality of capital punishment. The Hungarian constitution at art. 54(1) prohibited any “arbitrary deprivation of human life,” thus leaving the possibility of “non-arbitrary” deprivations open.⁹⁰ The Court, however, pronounced the unconstitutionality of death penalty since *ex art. 8(2)* no limitations to the essential content of rights are admissible. In this case of a conflict between two constitutional provisions, the antinomy (the definition

⁸⁵ Szabó, “New Constitutionalism Based on an Old Notion,” 300.

⁸⁶ For instance the coexistence of the “liberal” principle of division of powers and the “socialist” supremacy of the parliament.

⁸⁷ See: Paczolay, “The Role of Constitutional Adjudication in Legal Change,” 295 and Andrew Arato, “Constitution and Continuity in the Eastern European Transitions. Part II: The Hungarian Case,” *Constellations* 1, no. 2 (1994): 307.

⁸⁸ For the concept of formal and material constitution, see Costantino Mortati, *La costituzione in senso materiale* (Milano: Giuffrè, 1940).

⁸⁹ Lembke and Boulanger, *Between Revolution and Constitution*, 276.

⁹⁰ Sadurski, *Rights Before Courts*, 131.

of arbitrariness) was resolved by the court on the basis of a “choice of values.” In his eloquent concurring opinion, Justice Sólyom wrote:

The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality - an “invisible Constitution” - beyond the Constitution, which is often amended nowadays by current political interests.⁹¹

The coherence of the constitution, an essential element of the *Rechtsstaat*, was thus provided not by the changing and contradictory constitutional text, but rather by a judge-made “invisible” one, resulting from a normative interpretation of the constitutional provisions and from the import of foreign jurisprudence.⁹²

As part of the “invisible constitution,”⁹³ the principle of the rule of law “developed rapidly to become on its own a sufficient basis of unconstitutionality.”⁹⁴ This was most clearly expressed in the decision which abolished the “protest of illegality,”⁹⁵ a communist-era extraordinary appeal admissible at the discretion of the highest judicial authorities. The protest of illegality – theoretically meant to be an exceptional measure – was found to be in practice a *sui generis* “third instance” legal remedy⁹⁶ and as such violating the rule of law concept of legal certainty. The interpretation of the Court envisaged legal certainty and predictability as an indispensable component of the rule of law, since “only by following the formal rules of procedure may a valid legal rule be created, only by complying with the procedural norms do legal institutions operate in a constitutional manner.”⁹⁷ The judges, however, admitted that “the rule of law also demands the realization of other principles, some of which may conflict with the requirement of legal certainty.” Their realization, however,

⁹¹ Concurring opinion of Judge László Sólyom in the decision 23/1990 (X.31.) on the abolition of death penalty.

⁹² Dupré, *Importing the law in post-communist transitions*, *passim*.

⁹³ János Kis, Interview with the author. Personal interview. Budapest, 14 May 2013.

⁹⁴ Sólyom, “Introduction to the Decisions of the Constitutional Court,” 41.

⁹⁵ Decision 9/1992(I.30.)AB.

⁹⁶ In its reasoning president Sólyom invoked the principle of “living law,” a concept derived from the Italian jurisprudence of the “*costituzione vivente*” meaning that the court is not only entitled to review the normative text itself, but also the way the norm is applied in the judicial practice.

⁹⁷ *Id.*

must remain “within the institutions and guarantees ensuring legal certainty” which are clarified in advance by the law. “The Constitution does not confer a right for ‘substantive justice’” and it is therefore theoretically possible for a judgment to have an incorrect outcome, but the procedural safeguards stemming from the rule of law are designed to reduce as much as possible such risk.

In its later jurisprudence the Court further elaborated the concept of legal certainty as requiring the fulfilment of the *reasonable expectations* of citizens and other parties to disputes based on existing law. The court applied this criterion in an extremely broad way, making rule of law arguments the main tool to solve even social security cases. The main famous is the case reviewing the constitutionality of a government austerity program (the so-called “Bokros package”) introduced in 1995.⁹⁸ The judges claimed that for those welfare provisions not based on an insurance-scheme, the principle of legal certainty protects welfare recipients from any sudden and unexpected termination or diminution of entitlements. The act failed to provide a sufficient transition period and a sufficient justification, as economic considerations do not constitute a sufficient ground to violate citizens’ acquired social rights.

3.3.2 Poland

The conditions for judicial activism in re-creating the meaning and application of the rule of law principle were extremely favourable in Poland. Until 1997 in fact the old amended constitution was partly preserved while the relationship between state powers were regulated by the “small constitution.” No real bill of right existed in this period, thus the Court often had to “fill the gaps” in this fragmentary *bloc de constitutionnalité* by making reference, in its interpretation, to general principles such as the *Rechtsstaat* clause enshrined in art. 1 of the

⁹⁸ Decision 43/1995 [VI.30.] AB. Reviewing the Act CLVIII/1995 on the Amendment of Certain Laws to Promote Economic Stabilization, *MK* 1995/ 74.

constitution.⁹⁹ Differently from the Hungarian one, however, in this period the Polish Tribunal had rather weak powers, without binding adjudicatory powers in the case of parliamentary statutes¹⁰⁰ and with no standing for individual citizens. This was paradoxically due to the Tribunal's precocious establishment, as it was not the result of the epochal changes carried by the Roundtables, but rather a "stillborn by design"¹⁰¹ created by the Communist authorities as a compromise solution.¹⁰² The small room of manoeuvre did not prevent the Tribunal from instilling normative substance in Polish constitutionalism.¹⁰³ In 1989 the Tribunal was empowered to issue generally binding interpretations of statutes¹⁰⁴ and it soon it collected a jurisprudential doctrine sufficiently elaborated to resolve the apparent irreconcilability of the inherited constitutional provisions with the principle of the rule of law.¹⁰⁵ The *Rechtsstaat* clause allowed the Tribunal to define limits on law-making particularly in those areas untouched by constitutional reform.¹⁰⁶

This was the case in one of the numerous decisions in which the Polish Tribunal had to deal with abortion.¹⁰⁷ The judges struck down the legal provisions allowing abortion in "difficult financial and personal circumstances" by relying directly on the principle of the rule of law.¹⁰⁸

The binding Polish constitutional regulations do not contain any provision that would directly address the protection of life. Nevertheless, it does not mean that human life is not a value protected under the Constitution. The fundamental provision from which the constitutional protection of human life should be inferred is article 1 [...] and, in particular, the democratic rule

⁹⁹ The old constitution at art. 1 (as modified in 1989) read: "The Republic of Poland is a democratic state, ruled by law and implementing principles of social justice."

¹⁰⁰ The tribunal's decisions could be overridden by a 2/3 vote of the Sejm.

¹⁰¹ Bond, "Concerning Constitutional Courts In Central And Eastern Europe," 11.

¹⁰² Brunner, "Development of a Constitutional Judiciary In Eastern Europe," 538.

¹⁰³ Brzezinski, "The Emergence of Judicial Review in Eastern Europe," 194.

¹⁰⁴ Law on the transfer of existing powers of the State President of the Polish People's Republic and other state bodies of 29 May 1989 *Dz. U.* No. 34/1989, item 178.

¹⁰⁵ Justice Leonard Lukaszuk, cited in Brzezinski, "The Emergence of Judicial Review in Eastern Europe," 195-196.

¹⁰⁶ Michal Pietrzak, "Demokratyczne panstwo prawne," *Gazeta Prawnicza*, 16 May 1989, 9. Cited and translated in Brzezinski, *The Struggle for Constitutionalism in Poland*, 166.

¹⁰⁷ Decision K 26/96 of 28 May 1997

¹⁰⁸ See Sadurski, *Rights Before Courts*, 135; Uitz, "The Rule of Law in Post-Communist Constitutional Jurisprudence," 88.

of law. Such a state can only exist as a commonwealth of people and only people can be recognized as the actual carriers of rights and obligations [...]. Life is the fundamental attribute of a human being. When that life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of the rule of law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, [...] therefore, the first such directive must be the rule of law's respect for the value, i.e. human life from its outset, as its absence excludes the recognition of a person before the law. The supreme value of a state under the democratic rule of law shall be the human being and his/her interests of the utmost value: Life is such an interest and, in a state under the democratic rule of law, it must be covered by constitutional protection at every stage of development.

By using an overstretched and syllogistic reasoning, the Court derived the protection of human life from the rule of law principle. The protection of life from the moment of conception was introduced through a formidable example of judicial activism,¹⁰⁹ which is even more remarkable considering that not only the existing constitutional *corpus* was silent on the issue, but even the already adopted 1997 constitution (due to come into force five months later) deliberately avoided including the protection of foetal life.¹¹⁰ As noted by Renáta Úitz, the Tribunal employed “heavily value-laden narratives conveniently appended to a constitution's rule of law clause.”¹¹¹

In an earlier decision – to many respect similar to the Hungarian “Bokros case” – the Polish court derived a broad understanding of vested rights from the *Rechtsstaat* principle to invalidate the 1991 Pension Act.¹¹² The statute abruptly changed the pensions calculation scheme, thus reducing the amount of the benefits. According to the Court, “under the rule of law, the law is a phenomenon that is, to a great extent, autonomous of the State as an organization implementing defined political tasks.”¹¹³ As such, “the possibility to revoke

¹⁰⁹ It is worth recalling that even the traditionally activist Hungarian Court, in its first decision on abortion No. 64/1991 (XII. 17.)AB., ruled that the status of the foetus – being an essentially political question – cannot be derived through constitutional interpretation but it was rather up to the parliament to decide.

¹¹⁰ See article 38 on the inviolability of human life.

¹¹¹ Úitz, “The Rule of Law in Post-Communist Constitutional Jurisprudence,” 89.

¹¹² Act of 17 October 1991 on the Revaluation of Retirement and Disability Pensions, the Principles of Setting Retirement and Disability Pensions and Amendments to Certain Acts, *Dz. U.* 104, Item 450.

¹¹³ *Id.*, (III).

benefits once granted is very restricted, regardless of the financial situation of the state.”¹¹⁴ As in the Hungarian decision, the Tribunal considered the protection of acquired rights as an essential element of the rule of law apt at “maintaining the confidence of citizens in the State.” The latter is jeopardized when citizens are “suddenly surprised by regulations that are to their disadvantage.” This jurisprudence was later maintained in all the cases involving the infringement of vested rights.

The rule of law principle has further been invoked in many other decisions including right to access to court, due process, financial and budget laws, Presidential competences, etc. Responding to criticism that the *Rechtsstaat* principle has been relied on too easily, Andrzej Zoll, the former President of the Tribunal, contended that the Court has been forced to do so “because this was the only norm that conformed to the new legal order.”¹¹⁵ The Tribunal had admittedly a wide margin of appreciation in interpreting this clause and it used it with considerable discretion. The rule of law was also instrumental in overcoming the Tribunal’s limited jurisdiction: although it had no right to refer to international norms, it did it anyway “precisely by relying on the democratic *Rechtssaat*.”¹¹⁶

3.3.3 Czech Republic

Before the split of the federation, the Czechoslovak parliament succeeded in adopting a bill of rights, the “Charter of Fundamental Rights and Freedom,” and a system of constitutional justice.¹¹⁷ After independence, an entirely new constitution was created incorporating the federal bill. The Czech Court, then, did not have to struggle much to remedy inconsistencies in the legal texts. The use of appeal to general rule of law principles in order to solve procedural questions not covered by explicit provisions has been selective and always

¹¹⁴ Decision K 14/91 of February 11, 1992. 1992(I) OTK 93.

¹¹⁵ Andrzej Zoll, cited in Ryszard Cholewinski, “The Protection of Human Rights in the New Polish Constitution,” *Fordham International Law Journal* 22, 2(1998): 253.

¹¹⁶ Irena Grudzinska-Gross, “Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal,” *E. Eur. Const. Rev.* 6 (1997): 77.

¹¹⁷ Přibáň, “Judicial Power vs. Democratic Representation,” 376.

purposeful. In the already mentioned decision on the statutes of limitations the Court noted that

neither the Constitution nor the Charter of Fundamental (and not of other) Rights and Basic Freedoms resolve detailed issues of criminal law, but set down, in the first place, uncontested and basic constitutive principles of the state and of law. Article 40, para. 6 of the Charter of Fundamental Rights and Basic Freedoms deals with the issue of *which* criminal acts may in principle be prosecuted (namely those which were defined by law at the time the act was committed) and does not govern the issue of *for how long* these acts may be prosecuted. [emphasis added]¹¹⁸

In this case, the absence of an explicit constitutional rule (albeit in the presence of criminal procedural norms) on the length of the limitation period was not “filled” by the Court through an interpretative application of the rule of law guarantees. On the contrary, as we have seen, the moral reading of the rule of law sanctioning substantive justice paradoxically implied the Court’s restraint from filling this gap (or rather filling it in a way which would have excluded the punishability of the crimes object of the act).

A different approach was taken in 1997 when the court had to deal with constitutionally mandated time limitations. According to the Czech constitution the president has the right to send a bill back to the parliament within 15 days from its publication. In the specific case the presidential veto was exercised on the last available day (a Saturday) and presented to the Chamber on the following working day. In adjudicating the controversy the Czech court exposed a whole theory about the role of law in a democratic society. According to the Court,

A modern democratic written constitution [...] cannot exist outside of the context of publicly accepted values, conceptions of justice, as well as conceptions of meaning, purpose and the manner of functioning of democratic institutions.¹¹⁹

According to this understanding, “[m]echanical application [of the law] without any regard to the purpose and meaning of the legal norm [...] makes the law a tool of alienation and absurdity.”¹²⁰ The Court stressed that the literal interpretation of legal norms is only the

¹¹⁸ Decision Pl. US 19/93 of 21 December 1993.

¹¹⁹ Decision Pl. ÚS 33/97 of 17 December 1997.

¹²⁰ *Id.*

first step. Since the constitution did not contain any provision regulating this issue, in order to avoid legal uncertainty, general *praeter legem* principles of law must be applied (such as *ignorantia legis non excusat*, *lex retro non agit*, proportionality rule, etc.). Hence, differently from its 1993 decision, the Czech judges were here ready to complement the text of legal provisions with general rule of law principles. But although diverging in their solutions, both ruling shared a strongly purposive reading of norms.

3.3.4 Slovakia

The hastily drafted Slovak constitution revealed itself rather unclear and contradictory in many respects.¹²¹ Notwithstanding the adoption of a new fundamental law, then, the Slovak Constitutional Court had to deal with similar problems as the Polish and Hungarian ones. “Like other courts in the region, the Slovak Court, too, used to rely on the *Rechtsstaat* clause mostly when explicit textual imperatives were lacking.”¹²² In the first politically turbulent years after independence the Court had mostly to clarify its own function and procedures, as well as issues on which the fundamental law was silent, such as the discretionary powers of the President,¹²³ the competences of local governments, solving disputes on elections and referenda. As noted by Procházka, in Slovakia the definition of a rule of law doctrine stemmed from the transitional situation of inter-branch disputes and not from rights-oriented issues as in the other courts.¹²⁴

The most controversial cases regarded the distribution of competences between the president and the prime minister. In 1996 the parliament dominated by Vladimír Mečiar’s “Movement for a Democratic Slovakia” transferred the competence to nominate the Chief of the General Staff of the Slovak Army from the president to the government. The Court, as in most of the cases on presidential power, had to struggle with a lack of normative guidance

¹²¹ Malová, “The Role and Experience of the Slovakian Constitutional Court,” 357.

¹²² Procházka, *Mission accomplished*, 255.

¹²³ Slovak Constitutional Court, decisions I. ÚS 39/93, I. ÚS 5/94

¹²⁴ Procházka, *Mission accomplished*, 255.

and therefore invoked the rule of law principle, stating that this implies the supremacy of the constitution over lower-ranking laws.¹²⁵ The decision, however, was reached through legal analogy therefore the appeal to the rule of law was only supplemental. The court had then to rely mostly on the rule of law principle of separation of powers, as the decision on the creation of parliamentary investigative committees shows:

The Constitution establishes the proportions and limits of power sharing between State authorities. The unilateral extension of the powers of one component of power can distort by the Constitution established relationships not only between them but also with the citizens. Parliament extending its scope beyond the Constitution cannot limit the scope of other State authorities, or take their responsibilities in a way that is inconsistent with the principle of the *Rechtsstaat*, the separation of powers and the system of checks and balances in defining the scope State authorities.¹²⁶

The contingent nature in which the formulation of the rule of law principle took place and the Court's caution in order to avoid accusations of politicizations was one of the main reasons why "the variety of tenets of non-written constitutional law that the Slovak Constitutional Court inferred from [the rule of law clause] is smaller than that developed by other courts in the region."¹²⁷

¹²⁵ Decision Pl. ÚS 32/95 of 7 November 1996.

¹²⁶ Decision Pl. ÚS 29/95 of 29 November 1995.

¹²⁷ Procházka, *Mission accomplished*, 255.

DISCUSSION AND CONCLUSION

The first chapter of the present thesis has provided a theoretical review and an operative framework to analyse the rule of law as a complex “state of affairs” rather than a clearly defined set of institutions and practices. Moreover, notwithstanding the essential core of the rule of law which consists in the protection from arbitrary (albeit legal) power, the chapter has brought to the attention the normative divergence that the concept has assumed in the course of its evolution and interpretation. It has further questioned the validity of the common dichotomy which would consider formal rule of law understandings as devoid of moral considerations and the substantive ones as values-loaded. “Thin” conceptions of the rule of law, in fact, contain a morally-significant and normatively productive “inner morality.” Finally, it has argued that the rule of principle, although functional to and partly dependent on liberal-democratic principles such as fundamental rights and democratic government, enjoys a “conceptual independence” from them. It is only through the creation of an “higher law,” a positive constitutional document or the common law of the courts that the rule of law comes to serve these supreme values and thus gains that “outer moral” nature that characterizes modern constitutional democracies under the rule of law.

With these premises in mind, we have then moved on to the specific context of this study, namely post-communist Central and Eastern Europe, or the “Visegrád 4” countries. Chapter 2 has taken a “step back” in order to analyse the historical constraints of the socialist legal culture and the peculiarity of the constitution-making process. The East European “constitutional revolutions” have been characterized by the paradox of creating a substantively novel political and values systems while maintaining formal legal continuity.

This implied the retention of many “old laws” but a completely different approach towards the foundations of the legal system, first of all the “injection” of rule of law principles in the legal framework. This however also engendered two diverging attitudes toward law: as a set of formal rules and as acts imbued in moral values. Both entailed a risk for the rule of law. While the first run the risk of degenerating into instrumentalism, the latter threatened legal certainty through its commitment to material or “revolutionary” justice. The challenge was to assume *Rechtsstaat* guarantees both as the aim and as the means of the transition.

The third and final chapter has reviewed how this challenge was addressed by one of the most important actors of the “constitutional revolutions”: constitutional courts. By protecting the constitutional arrangements – or better, the principles of democratic constitutionalism thereby enshrined – against the incursions of the parliament and the executive power, they have played a fundamental role in establishing a “legal state”. The dilemmas raised by the particular mode of extrication and of constitutional genesis resurfaced in the constitutional rule of law jurisprudence in several occasions. By analysing transitional justice cases (where rule of law principles entered into conflict with issue of substantive justice) and interpretative decisions based on the rule of law principle (where the courts had to “bridge” legal gaps in the constitutional text), the chapter outlined the different understandings of the rule of law adopted by constitutional courts. The results are now here discussed.

4.1 How many Rules of Law?

The analyses of cases, although a mere selection of the whole case-law of the courts, allow us to identify some tendencies in the way the rule of law clause was understood and employed by constitutional courts.

For the Hungarian Constitutional Court, rule of law meant first of all legal certainty, albeit broadly understood. Claims stemming from material justice and specific socio-

economic circumstances had to be subordinated to it and pursued within the limits of a formal, although not strictly positivist, *Rechtsstaat*. For the Court, it *did not matter* whether the regime under which some rules came into being was illegitimate. In the new *Rechtsstaat* every law had to fulfill the same standards of constitutionality. Therefore it shall not sound surprising that in the early period of activity of the Court the rate of legislation stroke down was the same for laws enacted before and after 1989.¹ The court resisted any appeal to exceptionalism, preferring a logical, impartial reasoning. The court came to play a strongly counter-majoritarian role, continuously reminding to the parliament the limits of statutory law's prerogatives. This was most striking in the status granted to criminal law guarantees, which the Court derived from the rule of law clause in the constitution. In the words of the Court's president,

[i]n a constitutional state, the State does not and cannot have unlimited punitive powers. This is especially so because the sovereign power itself is not limitless.²

In Czechoslovakia, and later in the Czech Republic, the approach was diametrically opposite. The Court stressed in many occasions that the constitutional text and the legal norms had to be interpreted in light of their "substantive purpose," not as value-neutral. The judges were therefore ready to accept moral and political justifications, opting for a substantive understanding of the rule of law. By giving precedence to the *telos* of law over formal legality, the Czech judges held that although "old laws" had maintained their validity, they had nevertheless to be interpreted in light of the new values. As made clear in the "Lawlessness case", legal certainty must not be a mechanical tool to imbue with legitimacy an illegitimate regime. Differently from the Hungarian Court, for the Czech Court *it did matter* which regime enacted the laws, clearly separating legality from legitimacy. As noted by Přibáň, it is striking "the intensity and urgency with which the Czech constitutional court

¹ Scheppele, "Democracy by Judiciary," 44.

² Decision 11/1992 AB. (IV, 2).

speaks about democratic legitimacy and natural rights, [...] in order to define and shape [...] the space of democratic politics and morality.”³

While the Czech attitude denoted a strong reaction against the positivist tradition, in Slovakia it was rather different. Here the rule of law meant the respect for the constitutionally stated limits, first of all the principles of separation of powers, of non-retroactivity and of legality. The Slovak court did not develop an elaborate normative content for the *Rechtsstaat* principle. It rather had to struggle to protect the text and the supremacy of the constitution against the numerous transgressions. The numerous inconsistencies in the fundamental law were mostly of an institutional nature and the court filled them through an analogical rather than philosophical interpretation.

Poland remains somehow an intermediate case. Although the Tribunal upheld in many circumstances the primacy of legal certainty, especially when this is functional to the protection of vested rights, it was at the same time extremely open to extra-legal considerations dictated by exceptional circumstances. The broad use of the rule of law clause allowed the Polish judges to charge it with extremely diverse content, using it “as a fountain of unenumerated rights and as the supreme orientation principle.”⁴ Similarly to the Czech Court, the Tribunal upheld most of the laws aimed at establishing a new political, economic and social paradigm, although far less enthusiastically. When the principles that the Court derived from the rule of law clause conflicted with the transitional agenda, such as in the 2000 lustration case, the Tribunal merely avoided facing substantive issues by relying on “procedural gambits.”⁵ This ambiguous attitude seems to show a dissonance between the transitional *Rechtsstaat* and the ordinary one. The judges shifted from a formal to a substantial conception of the rule of law according to goal they had set. The flexibility that the rule of law concept assumed, in fact, made it possible for the Tribunal to use moral

³ Přibáň, *Dissidents of Law*, 96.

⁴ Procházka, *Mission accomplished*, 226.

⁵ Sadurski, *Rights before Courts*, 247.

considerations both to assist the government in its transitional justice program (as in the communist officials' pensions case) as well as to trump ethically deplored choices (as the abortion case shows).

4.2 Explaining variance

The observations above constitute a significant “puzzle” for the students of comparative constitutionalism and raise the immediate question of *why* approaches diverged so greatly. In the course of the present study many arguments have been incidentally presented. I will here summarize what I perceive to be being the main – although certainly not the only – factors behind such a variance: the approach to the pre-communist age; the mode of extrication from communism and the constitutional genesis; the Court's “opportunity structure.”

4.2.1 Approaches to the pre-communist age

I do not intend to argue that the interwar experiences with constitutionalism had a durable fallout and a direct influence on the understanding of the rule of law after the fall of communism. This claim has too shaky empirical foundations and often overestimates constitutional traditions (which were, even for Czechoslovakia, indeed very limited). It is much more useful to see how this past was perceived and how this influenced the legal responses to the regime change. Ulrich Preuss⁶ and Lázlo Sólyom⁷ have provided a persuasive distinction between a “restorative” and a “prospective” approaches to the effort of “domesticating” the rule of law. The former prevailed where the political discourse could rely on a (real or imagined) pre-communist *Rechtstaatlichkeit*. In this case, law had the task of reverting the illegitimate changes brought about by the previous regime to the *status quo ante*. The 40 years of communism simply did not exist from a legal point of view and the invocation of the principle of the rule of law sanctioned the urgency to redress previous

⁶ Preuss, *Constitutional Revolution*, 9

⁷ Sólyom, “The Role of Constitutional Courts in the Transition to Democracy,” 140-141.

injustice. Discontinuity of values had the precedence over legal continuity and therefore justice over positive law guarantees. The “prospective” view, on the opposite, emphasized the unprecedented “novation” brought about by the transition to the rule of law, without retrospective references, but rather as desirable principle by virtue of its normative superiority. In this case the imperative was not just to establish a *Rechtsstaat*, but also to carry out the transition according to its dictates. While acknowledging legal continuity and the “contractual” nature of the transition, it marks discontinuity with the previous regime precisely by enthroning the core values and principles of a democratic rule of law constitution. As such, no substantive justice considerations can take priority over the founding principles of the new order.

It is relatively easy to equate the “restorative” approach with the Czech Republic and the “prospective” one with Hungary. Poland and Slovakia, on the other hand, are more problematic. While sharing the common Czechoslovak heritage, in Slovakia references to the past were much less frequent and the attitude towards the communist regime less radical for a “restorative” approach to be worth of consideration. The (Czech-dominated) interwar common state had little to offer to a newly independent country in search of an identity, so no real “restorative” sentiment emerged. Poland could claim some constitutional tradition in the 18th century, although this would have hardly been a credible reference. The Tribunal started its operations under the communist regime and therefore reclaiming the pre-communist past through a restorative approach would have been self-destructive. The rather substantial values it instilled in the *Rechtsstaat* clause do not however reach “Hungarian” standards, therefore we may conclude that the Polish approach was partially, or “morally prospective.”

4.2.2 Degree of legal continuity and the constitutional genesis

Constitution-making experiences were found to be diverging on many aspects: while continuity was the outcome of the Hungarian and Polish “constitutive” roundtables,

Czechoslovakia experimented a less contractual transition. The Czech and Slovak constitutions were drafted *after* the victory of the opposition, while the Hungarian one and the Polish “constitutional bloc” were shaped in agreement with the previous elite *before* the creation of democracy, of which it represented the founding document. Therefore, while the latter were marked by compromise and continuity, the former were in their nature more innovative, if not revolutionary.

The “constitutional revolution” in Hungary implied the “fiction” of continuity with the previous system *as if* it had been a legitimate one. For the Hungarian court, the choice of legal continuity bridged the “before” and the “after”,⁸ no procedural rules had been broken and there was simply no reason to invoke any form of exceptionality. Although of epochal importance, the changes had taken place in a context of constitutional normality: the revolution formally “limit[ed] itself, its desire for substantive justice in particular, by submitting to the rule of law.”⁹ The Court maintained this attitude even in cases unrelated to transitional justice, giving priority to certainty over contingent necessities (even if this meant disregarding the financial consequences of its decisions).

Although the Polish transition was also characterized by the “fiction” of legal continuity, this was more a contingency than a choice. Its effects were, in fact, more limited than in the Hungarian case: the share of constitution-making effort taking place in the roundtable talks was smaller and less “constituent,” as the compromise reached at the talks only sanctioned a “partial” transformation. Moreover, differently from Hungary, the tensions between revolutionary *ethos* and legality were stronger. Poland could count on a solid and sizable anti-communist civil society organized under the banners of Solidarity and represented by the leadership of Lech Wałęsa. Legal certainty and non-retroactivity, both essential elements of the rule of law, were therefore understood in a less doctrinaire way.

⁸ Ganey, “Foxes, Hedgehogs, and Learning,” 79.

⁹ Arato, *Civil Society, Constitution and Democracy*, p. 103.

Preference was rather given to the right to court and other substantive rights. The *Rechtsstaat* principle was, in a final analysis, selectively and inconsistently adopted: although its rhetoric dominated the court's discourse, it was often employed to elaborate moral considerations.

For the Czechoslovak Court, discontinuity was already sanctioned *ante litteram* even before its material realization (by the adoption of new constitutions in the two separating republics), by a fundamental change in values. It was precisely from this *political* and *substantive* discontinuity that the whole constitutional framework gained legitimacy. In Czechoslovakia the roundtable talks did not reach any constitutional compromise, and the Communist elite resisted the institutionalization of a new type of regime until the very end. Legal continuity was the tool of the old elite to slow down change, *vis-à-vis* a strongly legitimated and radical opposition (led by a figure of high moral stature as was Václav Havel) claiming quick changes. The lesson of the federal court was recoiled by the Czech Republic, where the *caesura* with the past legal order was embraced by the Court to a much greater degree than any other, including its former sister republic Slovakia. The discontinuity with the past consisted in the different attitude to legal certainty, relinquishing the old formalism and embracing a substantive considerations based on the democratic legitimacy of the new regime. It is important to stress that all courts, even the Hungarian one, acknowledged the ground-breaking extent of the legitimacy discontinuity in spite of the legal one. But differently from the Czechs, the Hungarian judges decided to keep the "fiction" alive and to make it reality, in order to instantiate the rule of law. No contradiction existed between legal continuity and the new regime. For the Czechs, the contradiction was clear. Although "old laws" had had to be maintained for *horror vacui*, they had nevertheless to be interpreted in light of the new values, as the latter marked the real and most fundamental discontinuity with the past. The rule of law, for the Czech Court, was first of all a value-laden normative aim, but the way to get to it could derogate from some of its (formal) principles.

4.2.3 Opportunity structure

The Court's activity and choices were also strongly influenced by structural and contingent factors, especially their range of competences, the features of the constitutional text they had to refer to and the specific political circumstances.

The Hungarian court was, by far, the best equipped one in terms of jurisdiction, review and standing procedures. This gave it sufficient occasions and self-confidence to elaborate its own "constitution" and assiduously rely on its own precedents. The Polish Tribunal, on the opposite, was born weak and even after the 1989 amendment which granted it the power to issue binding interpretations, it remained greatly constrained until the 1997 constitution came into effect. For the Tribunal, interpretative boldness was a "survival strategy" as the only truly strong card it could play. The Czech and Slovak Courts were a middle-case, as they cannot perform no *a priori* review. Paradoxically this meant they had less stimuli as the Hungarian and the Polish one to develop jurisprudential doctrines.

Due to the limited revolutionary nature of the Hungarian and Polish transitions, constitution-making negotiations produced fragmentary texts meant to be only provisional. This was "instrumental in inducing these courts to step beyond the available texts and develop an elaborate jurisprudential corpus deriving in large part from legal theory and political philosophy rather than merely the law's letter."¹⁰ Due to the Velvet divorce and the following constitutional processes, the Czech and Slovak Courts had to work with definitive, systematic (although not necessarily coherently) and legitimate texts. For this reason the Courts refrained from supplementing or departing from the text, preferring the role of constitutional guardians.

It is remarkable to notice that although in Hungary the opportunity structure favoured the development of an "invisible constitution" beyond the text, this did not translate into a substantial and moral-normatively loaded understanding of the rule of law, as the Polish

¹⁰ Procházka, *Mission accomplished*, 275.

Tribunal did. The opposite surprise is provided by looking at the Czech Republic. Inversely to Hungary, the “preservationism”¹¹ of the court of Brno nevertheless engendered a fundamentally “thick” rule of law conception, while it did not so in Slovakia. The differences between Hungary, Poland and the Czech Republic can only be understood in light of the continuity-discontinuity choices discussed above. In order to understand the Slovak case, however, we must introduce a third “opportunity structure”, namely the political context.

The rule of law doctrine of the Slovak Constitutional Court and its scarcely constructivist attitude were heavily affected by the country’s political development. During the premiership of Vladimír Mečiar the lack of consideration for constitutional limits by the governing parties forced the Court to assume the function of “bastion” of the rule of law. It did so by upholding the text of the constitution and refraining from taking a too political stance. The continuous judicialization of politics in which the Court found itself trapped exposed the constitutional judges to accusation of being “politicised.” Therefore the Court avoided the elaboration of an autonomous jurisprudential philosophy and concentrated on explaining and re-defining the competences and relationship among state institutions. Through its ruling, although not always observed, the Court struggled to keep the rule of law respected during the difficult Mečiar period. Finally, in Slovakia lustrations had been abandoned until the 2000s, therefore the Court had little occasions to elaborate a transitional justice jurisprudence.

A graphic representation of these results is presented in figure 2.

¹¹ *Id.*, 235.

Figure 2



4.3 Final Remarks

The challenges in establishing an effective *Rechtsstaat* regime have been numerous and the ways to address them heterogeneous. In a period in which the newly established legal system was still struggling with structural and normative questions, the role of Constitutional Courts have been determinant in providing guidance. They did this, however, in a very different ways. Most of the Courts developed a sort of “political hypertrophy”,¹² i.e. they actively shaped the new legal and political paradigm either by creating a thick rule of law imbued in normative and moral values (as the Czech Republic) or by elaborating a complex system super-positive law (as in Hungary) or both (as in Poland). The difference resided in the content with which the new principle of the rule of law was filled. All Courts were firmly persuaded that the way to the rule of law had to be in accordance with the constitution and by respecting rule of law itself, but the interpretation given to the latter was different: legal certainty in some cases, substantive justice in others. The diversity in approaches has been

¹² Přibáň, *Dissidents of Law*, 96.

often framed in a dichotomous manner, with formalism versus moralism. The present thesis has tried to challenge this simplistic *aut-aut* by illustrating the complexity of the questions as well as of their answers. After all, the Hungarian Court was not “formalist” or positivist in the way we understand the German 19th century *Rechtsstaat*, namely that justice is *simply* what is prescribed by a law adopted through correct procedures. No European Court held this view after World War II. If we want to understand the rationale behind the different incarnations that the concept of the rule of law has witnessed, we have to recognise that the choice between its “formal” and “material” versions “is ultimately not between law and morality, but between two different moralities.”¹³

¹³ Arato, *Civil Society, Constitution and Democracy*, p. 114.

BIBLIOGRAPHY

- Allan, Trevor R. S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, 1993.
- American University International Law Review. "Constitutional 'Refolution' in the Ex-Communist World: The Rule of Law." *American University International Law Review* 12, no. 1 (1997): 45-143.
- Appel, Hilary. "Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe." *East European Politics and Societies* 19 no. 3 (2005): 379-405.
- Arato, Andrew. "Constitution and Continuity in the East European Transitions, Part I: Continuity and its Crisis." *Constellations* 1, no. 4 (1994): 92-112.
- . "Constitution and Continuity in the Eastern European Transitions. Part II: The Hungarian Case," *Constellations* 1, no. 2 (1994): 306-325.
- . "Parliamentary Constitution Making in Hungary," *East European Constitutional Review* 4 (1995): 45.
- . *Civil Society, Constitution and Democracy*, Lanham, MD: Rowman & Littlefield, 2000.
- . "Regime Change, Revolution and Legitimacy." In *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, edited by Gábor A. Tóth, 35-57. Budapest: Central European University Press, 2012.
- Arnold, Rainer, "Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts," *Jahrbuch für Ostrecht* 43 (2002): 17-29.
- Basta-Posavec, Lidija R. "Anmerkungen zur Beziehung zwischen Rule of Law und Rechtsstaat," *Rechtstheorie* 24 (1993): 227-229.

- Bähr, Otto. *Der Rechtsstaat* [1864]. Aalen: Scientia Verlag, 1961.
- Berman, Harold J. *Justice in the U.S.S.R. An Interpretation of Soviet Law*. Cambridge, MA: Harvard University Press, 1963.
- Blaau, Loammi C. "The Rechtsstaat Idea Compared With The Rule Of Law As A Paradigm For Protecting Rights", 107 *S. African L.J.* 76 (1990): 76-99.
- Bond, Jonathan. "Concerning Constitutional Courts in Central and Eastern Europe" *International Public Policy Review* 2, no. 2 (2006): 5-25.
- Boulanger, Christian. "Constitutionalism in East Central Europe? The Case of Slovakia under Meciar." *East European Quarterly* 33 (1999): 21-50.
- Bozóki, András, ed. *Alkotmányos forradalom* [Constitutional revolution], vol. 7 of *A rendszerváltás forgatókönyve. A kerekasztal tárgyalások 1989-ben*. [Change of the regime in Hungary - Scenarios. The National Roundtable Negotiations of 1989], edited by András Bozóki et al. Budapest: Új Mandátum, 2000.
- . "Introduction: The Significance of the Roundtable Talks." In *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy*, edited by András Bozóki, xv-xxxiv. Budapest: Central European University Press, 2002.
- Bröstl, Alexander, Ján Klučka and Ján Mazák. *Das Verfassungsgericht der Slowakischen Republik: Organisation, Prozess, Doktrin*. Košice: Constitutional Court of the Slovak Republic, 2001.
- Brunner, Georg. "Development of a Constitutional Judiciary In Eastern Europe" *Rev. Cent. & E. Eur. L.* 18, No. 6 (1992): 535-553.
- Brzezinski, Mark F. "The Emergence of Judicial Review in Eastern Europe: The Case of Poland." *American Journal of Comparative Law* 41 (1993): 153-200.
- . *The Struggle for Constitutionalism in Poland*. New York: St. Martin's Press, 1998.
- Brzezinski, Mark F. and Leszek Garlicki, "Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?" *Stanford Journal of International Law* 31, no. 13 (1995): 13-59.

- Burg, Elliot M. "Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'," *American Journal of Comparative Law* 25 (1977): 492.
- Calda, Miloš. "The Roundtable Talks in Czechoslovakia." In *The Roundtable Talks and the Breakdown of Communism*, edited by Jon Elster, 135-177. Chicago and London: University of Chicago Press, 1996.
- Cholewinski, Ryszard. "The Protection of Human Rights in the New Polish Constitution." *Fordham International Law Journal* 22, no. 2 (1998): 236-291.
- Coke, Edward. *The Second Part Of The Institutes Of The Laws Of England*, [1642], edited by R.H. Helmholz & Bernard D. Reams, Jr. William S. Hein Co. 1986.
- "Constitution Watch: Czech Republic," *East European Constitutional Review* 4 no. 4 (1995): 8-10.
- Costa, Pietro. "The Rule of Law. A historical introduction." In *The Rule of Law. History, Theory, Criticism*, 73-199, edited by Pietro Costa, Danilo Zolo. Dordrecht: Springer, 2007.
- Craig, Paul P. "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Pub. L.* (1997): 467 – 487.
- Czarnota, Adam. "Lustration, decommunisation and the rule of law." *Hague Journal on the Rule of Law* 1 (2009): 307-335.
- Della Porta, Donatella. "Comparative analysis: case-oriented versus variable-oriented research." In *Approaches and Methodologies in the Social Sciences. A Pluralist Perspective*. Edited by Donatella della Porta and Michael Keating, 198-222. Cambridge: Cambridge University Press, 2008.
- De Vergottini, Giuseppe. *Diritto Costituzionale Comparato*. Vol II. Padova: Cedam, 2004
- Dicey, Albert Venn. *Introduction to the study of the law of the constitution*. Indianapolis : Liberty Fund, 1982. Originally published in London: Macmillan, 1915.
- Dupré, Catherine. *Importing the law in post-communist transitions: The Hungarian constitutional court and the right to human dignity*. Vol. 1. Oxford & Portland: Hart Pub Limited, 2003.
- Dworkin, Ronald. "Hard Cases" *Harvard Law Review* (1975): 1057-1109.

- *A Matter of Principle*, 9th edition. Cambridge: Harvard University Press, 2000.
- Elster, Jon. “The Necessity and Impossibility of Simultaneous Economic and Political Reform.” In *Philosophy of Social Science*. Edited by Piotr Polszajski, 309–316. Warsaw: IfiS Publishers, 1990.
- “Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea.” *Public Administration* 71 (1993): 169-217.
- Elster, Jon, Claus Offe and Ulrich K. Preuss. *Institutional design in post-communist societies: rebuilding the ship at sea*. Cambridge: Cambridge University Press, 1997.
- Emmert, Frank. “Rule of Law in Central and Eastern Europe.” *Fordham International Law Journal* 32, no. 2 (2008): 551 – 586.
- Fuller, Lon L. *The Morality of Law* [1964]. New Haven: Yale University Press, 1969.
- Ganev, Venelin I. “Foxes, Hedgehogs, and Learning: Notes on the Past and Future Dilemmas of Postcommunist Constitutionalism.” In *Rethinking the Rule of Law after Communism*. Edited by Adam Czarnota, Martin Krygier, and Wojciech Sadurski, 75-90. Budapest and New York: Central European University Press, 2005.
- Garlicki, Leszek Lech. “The Experience of the Polish Constitutional Court.” In *Constitutional Justice, East and West*, 265-282
- Goodhart, Arthur L. “The Rule of Law and Absolute Sovereignty,” *University of Pennsylvania Law Review* 106, no. 7 (1958): 943 – 963.
- Grospič, Jiří. “Some Constitutional Problems of the Czech Republic.” In *Constitutionalism and Politics*, edited by Irena Grudzińska Gross, 220-229. Bratislava: Slovak Committee of the European Cultural Foundation, 1993.
- Grote, Rainer. “Rule of Law, Rechtsstaat and Etat de Droit.” In *Constitutionalism, Universalism and Democracy – Comparative Analysis*, edited by Christian Starck. Baden-Baden: Nomos Verlagsgesellschaft, 1999.
- Grudzińska-Gross, Irena (ed.) *Constitutionalism in East Central Europe: Discussions in Warsaw, Budapest, Prague, Bratislava*. Czecho-Slovak Committee of European Cultural Foundation, 1994.

-
- “Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal,” *East European Constitutional Review* 6 (1997): 77-78.
- Hartwig, Matthias. “Die Legitimation des Staates durch Verfassungsrezeption in Mittel-und Osteuropa.” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 59, no. 4 (1999): 919-940.
- von Hayek, Friedrich. *The Road to Serfdom*. London: Routledge, 1944.
- Holländer, Pavel. “Die Gerichtsbarkeit in der Tschechischen Republik (unter besonderer Berücksichtigung der Verfassungsgerichtsbarkeit).“ In *Revolution und Recht. Systemtransformation und Verfassungsentwicklung in der Tschechischen und Slowakischen Republik*, edited by Joseph Marko, Alfred Ableitinger, Alexander Brörtl and Pavel Holländer, 87-115. Frankfurt a. M., Berlin, Bruxelles , New York and Vienna: Lang, 2000.
- Holmes, Stephen. “Back to the Drawing Board.” *East European Constitutional Review* 2, no. 1 (1993).
-
- “Judicial Independence as Ambiguous Reality and Insidious Illusion,” in *From Liberal Values to Democratic Transition. Essays in Honor of János Kis*. Edited by Ronald Dworkin, 3 – 14. Budapest: CEU Press, 2004.
- Huntington, Samuel P. *The third wave: Democratization in the late twentieth century*. Vol. 4. University of Oklahoma Press, 1991.
- Ismayr, Wolfgang. “Die politischen Systeme Osteuropas im Vergleich”, in *Die Politischen Systeme Osteuropas*, edited by Wolfgang Ismayr. Opladen: Leske+Budrich, 2002.
- von Jhering, Rudolf. *Law as a Mean to an End*. Translated by Isaac Husik. Boston: The Boston book company, 1913.
- Jellinek, Georg. *System der subjektiven öffentlichen Rechte*. Aalen: Scientia Verlag, 1979.
- Jurgens, Erik (rapporteur). *The principle of the Rule of Law*. Council of Europe Parliamentary Assembly, Doc. 11343, 6 July 2007.
- Kelsen, Hans. *Allgemeinen Staatslehre* [Springer, Berlin 1925]. Wien: Österreichische Staatsdruckerei, 1993.

- Krygier, Martin. "The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law." In *Out of and Into Authoritarian Law*, edited by András Sajó. The Hague: Kluwer, 2002.
- . "The Rule of Law: Legality, Teleology, Sociology." In *Relocating the Rule of Law*. Edited by Gianluigi Palombella and Neil Walker, 45 – 69. Oxford, UK and Portland, OR: Hart Publishing, 2009.
- . "Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?" In *Getting to the Rule of Law*, edited by James E. Fleming, 64 – 104. New York and London: New York University Press, 2011.
- Kis, János. "Between reform and revolution." *East European Politics & Societies* 12, no. 2 (1998): 300-383.
- . "Introduction: From the 1989 Constitution to the 2011 Fundamental Law." In *Constitution for a Disunited Nation*, edited by Gábor A. Tóth, 1-21. Budapest: Central European University Press, 2012.
- . Interview by Matteo De Simone. Personal interview. Budapest, May 14, 2013.
- Kitschelt, Herbert. *Post-communist party systems: Competition, representation, and inter-party cooperation*. Cambridge University Press, 1999.
- Kurczewski, Jacek. "Democracy and the Rule of Law: Poland after 1989." In *Constitutionalism and Politics*, edited by Irena Grudzińska Gross, 200-219. Bratislava: Slovak Committee of the European Cultural Foundation, 1993.
- Lach, Kasia and Wojciech Sadurski. "Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity." *Journal of Comparative Law* 3, no. 2 (2008): 212-233.
- Lembcke, Oliver W. and Christian Boulanger. "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court." In *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, edited by Gábor A. Tóth, 269-299. Budapest: Central European University Press, 2012.
- Linz, Juan and Alfred Stepan. *Problems of Democratic Transition and Consolidation: South America, Southern Europe, and Post-Communist Europe*. Baltimore: Johns Hopkins University Press, 1996.

- Locke, John. "Second Treatise of Civil Government," §219. In *The Second Treatise of Government and A Letter Concerning Toleration*. Mineola, NY: Courier Dover Publications, 2002. Originally published in John Locke, *Two Treatises of Government* (London: Printed for Awnsham and John Churchill, at the Black Swan in Pater-Noster-Row, 1698).
- MacCormick, Neil D. „Der Rechtsstaat und die Rule of Law“, *Juristenzeitung* 50 (1984): 65-70.
- Magen, Amichai and Morlino, Leonardo, "Hybrid regimes, the rule of law, and external influence on domestic change." In *International actors, democratization and the rule of law: anchoring democracy?* Edited by Amichai Magen and Leonardo Morlino, 1 - 25. Abingdon: Routledge, 2008.
- Malová, Darina. "Constitutionalism in Postcommunist Transition: Selflimiting Activities of the State." In *Constitutionalism and Politics*, edited by Irena Grudzińska Gross, 339-349. Bratislava: Slovak Committee of the European Cultural Foundation, 1993.
- . "The Role and Experience of the Slovakian Constitutional Court." In *Constitutional Justice, East and West: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective*. Edited by Wojciech Sadurski, 349-372. The Hague : Kluwer Law International, 2002.
- McCauley, Martin. *Stalin and Stalinism*. Harlow: Pearson Education, 2008.
- Merryman, John Henry. "Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement." *American Journal of Comparative Law* 25 (1977): 457.
- von Mohl, Robert. *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates* [1832], vol. 1. Tübingen: Laupp, 1844.
- Mólnar, János. Interview with the author. Personal interview. Budapest, 22 May 2013.
- Mortati, Costantino. *La costituzione in senso materiale*. Milano: Giuffré, 1940.
- O'Donnell, Guillermo A. "Why the rule of law matters." *Journal of Democracy* 15, no. 4 (2004): 32-46.
- Offe, Claus. "Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe." *Social Research* 58, No. 4 (1991): 865-892.

Osiatyński, Wiktor. "The Roundtable Talks in Poland." in *The Roundtable Talks and the Breakdown of Communism*, edited by Jon Elster, 21–68. Chicago and London: University of Chicago Press, 1996.

——— "Paradoxes of Constitutional Borrowing," *International Journal of Constitutional Law* 1 (2003): 244.

Paczolay, Péter. "The Role of Constitutional Adjudication in Legal Change." In *Constitutionalism and Politics*, edited by Irena Grudzińska Gross, 293-300. Bratislava: Slovak Committee of the European Cultural Foundation, 1993.

——— "Constitutional and Legal Change during the Transition from Socialism to Democracy in Hungary". *Rechtstheorie* 27 (1995): 265 – 290.

Palombella, Gianluigi. "The Rule of Law and its Core." In *Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker, 17 – 42. Oxford, UK and Portland, OR: Hart Publishing, 2009.

——— "The Rule of Law as an Institutional Ideal." In *Rule of Law and Democracy: Inquires into Internal and External Issues*, edited by Gianluigi Palombella and Leonardo Morlino, 3 – 40. Boston: Brill, 2010.

Pashukanis, Evgeny B. *The General Theory of Law and Marxism*. New Brunswick: Transaction Publishers, 2003.

Peerenboom, Randall. "Human Rights And Rule Of Law: What's The Relationship?" *Georgetown Journal of International Law* 36, no. 3 (2005): 809-945.

Posner, Eric A. and Vermeule, Adrian. *The Executive Unbound. After the Madisonian Republic*. New York: Oxford University Press, 2010.

Preuss, Ulrich K. "Democracy and Constitutionalism." In *Constitutionalism and Politics*, edited by Irena Grudzińska Gross, 72-88. Bratislava: Slovak Committee of the European Cultural Foundation, 1993.

——— "Die Rolle des Rechtsstaates in der Transformation postkommunistischer Gesellschaften." *Rechtstheorie* 24 (1993): 181-204.

——— *Constitutional revolution: The link between constitutionalism and progress*. Atlantic Highlands, NJ: Humanities Press, 1995.

- “The Political Meaning of Constitutionalism”, in *Democracy and Sovereignty: American and European Perspectives*, 11-27. Edited by R. Bellamy. Aldershot: Avebury, 1996.
- Příbáň, Jiří. *Dissidents of Law: on the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract*. Dartmouth: Ashgate Publishing, 2002.
- “Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System.” In *Constitutional Justice, East and West: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective*. Edited by Wojciech Sadurski, 373 – 394. The Hague: Kluwer Law International, 2002.
- “Constitutional Symbolism and Political (Dis)continuity: Legal Rationality and Its Integrative Function in Postcommunist Transformations.” In *Rethinking the Rule of Law after Communism*. Edited by Adam Czarnota, Martin Krygier and Wojciech Sadurski, 295-322. Budapest and New York: Central European University Press, 2005.
- “Oppressors and Their Victims: The Czech lustration law and the Rule of law.” In *Justice As Prevention, Vetting Public Employees in Transitional Societies*, edited by Alexander Mayer-Rieckh and Pablo De Greiff, 323-324. Advancing Transitional Societies Series. New York: Social Science Research Council, 2007.
- Procházka, Radoslav. *Mission accomplished: on founding constitutional adjudication in Central Europe*. Budapest: Central European University Press, 2002.
- Raz, Joseph. “The Rule of Law and its Virtue.” *Law Q. Rev* 93 (1977): 195 – 211.
- *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press, 1979.
- Rozmaryn, Stefan. “Kontrola konstytucyjności ustaw [The Control of the Constitutionality of the Laws].” *Panstwo i Prawo* 12 no. 3 (1948).
- Sadurski, Wojciech. “Postcommunist Constitutional Courts in Search of Political Legitimacy.” *East European Case Reporter of Constitutional Law* 6 (1999): 38-129.
- *Rights Before Courts. A study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer, 2005.

- “Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?,” *Isr. L. Rev.* 42 (2009): 500-527.
- Sajó, András. “New Legalism in East Central Europe: Law as an instrument of social transformation.” *Journal of Law and Society* 17, no. 3 (1990): 329-344.
- “Reading the Invisible Constitution: Judicial Review in Hungary”. *Oxford Journal of Legal Studies* 15, No. 2 (1995): 253-267.
- Sajó, András. and Vera Losonci. “Rule by Law in East Central Europe: Is the Emperor’s New Suit a Straitjacket?” in *Constitutionalism and Democracy. Transitions in the Contemporary World*, edited by Douglas Greenberg et al. New York: Oxford University Press, 1993.
- Scheppele, Kim Lane. “Democracy by Judiciary. Or, why Courts Can be More Democratic than Parliaments.” In *Rethinking the Rule of Law after Communism*, edited by Adam Czarnota, Martin Krygier, and Wojciech Sadurski, 25-60. Budapest: Central European University Press, 2005.
- Schmitt, Alexander. “Die Rolle der Verfassungsgerichte im verfassungspolitischen Transformationsprozess in Polen, Ungarn und Russland.” *Jahrbuch für Ostrecht* 43 (2002): 31-52.
- Schmitt, Carl. *Verfassungslehre*. Berlin: Dunker & Humblot, 1928.
- *Legality and Legitimacy*. Translated by Jeffrey Seitzer. Durham and London: Duke University Press, 2004. Originally published as “Legalität und Legitimität”. In Carl Schmitt, *Verfassungsrechtliche Aufsätze aus dem Jahren 1924 – 1954*. Berlin: Dunker & Humblot, 1932.
- Schwartz, Herman. “The New Courts: An Overview,” *E. Eur. Const. Rev.* 2 (1993): 28.
- *The Struggle For Constitutional Justice In Post-Communist Europe*. Chicago: University of Chicago Press, 2000.
- Sólyom, Lázlo. “Introduction to the Decisions of the Constitutional Court of the Republic of Hungary.” In *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*. Edited by Lázlo Sólyom and Georg Brunner, 1-64. Ann Arbor: University of Michigan Press, 2000.

- “The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary” *International Sociology* 18 (2003): 133 – 161.
- “Constitutional Justice – Some Comparative Remarks” in *Constitutional justice and the rule of law*, 104 – 110. Edited by Naujokaitis, Rolandas. Vilnius: Constitutional Court of the Republic of Lithuania, 2004.
- Stahl, Friedrich Julius. *The Philosophy of Laws*, II, *The doctrine of Law and State on the Basis of a Christian World-View*, “Principles of Law”, [Heidelberg 1854], trans. Ruben Alvarado. Aalten: WordBridge Publishing, 2007.
- Stark, David and Laszlo Bruszt. *Postsocialist Pathways: Transforming Politics and Property in East Central Europe*. Cambridge: Cambridge University Press, 1998.
- Stučka, Pēteris. “The Revolutionary Part Played by Law and the State. A General Doctrine of Law.” In *Soviet Legal Philosophy*, translated by Hugh W. Babb, 17-69. Harvard: Harvard University Press, 1951.
- Szabó, Miklós. “New Constitutionalism Based on an Old Notion. The Rule of Law in the Mirror of the Decisions of Hungarian Constitutional Court”. *Rechtstheorie* 27 (1995): 291-303.
- Tamanaha, Brian Z. *On the Rule of Law. History, Politics, Theory*. Cambridge: Cambridge University Press, 2004.
- “A Concise Guide to the Rule of Law,” in *Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker, 3 – 15. Oxford, UK and Portland, OR: Hart Publishing, 2009.
- Teitel, Ruti. “Post-Communist Constitutionalism: A Transitional Perspective.” *Columbia Human Rights Law Review* 26 (1994-1995): 167-190.
- “Transitional Jurisprudence: The Role of Law in Political Transformation,” *The Yale Law Journal* 106, No. 7 (1997): 2009-2080.
- “Transitional Historical Justice”, in *Justice in Time: Responding to Historical Injustice*, edited by Lukas Meyer. Baden-Baden: Nomos, 2003.
- “Transitional Rule of Law.” In *Rethinking the Rule of Law after Communism*. Edited by Adam Czarnota, Martin Krygier and Wojciech Sadurski, 279-294. Budapest and New York: Central European University Press, 2005.

- Trkulja, Jovica. "Der Sozialismus und der Rechtsstaat." *Rechtstheorie* 24 (1993): 33-53.
- Trubek, David M. "The Rule of Law in Development Assistance: Past, Present, and Future." In *The New Law and Economic Development: A Critical Appraisal*. Edited by David M. Trubek and Alvaro Santos, 74 -94. New York: Cambridge University Press, 2006.
- Waldron, Jeremy. "The Rule of Law and the Importance of Procedure." In *Getting to the Rule of Law*, edited by James E. Fleming. New York and London: New York University Press, 2011.
- Walker, Geoffrey de Q. *The Rule of Law. Foundation of Constitutional Democracy*. Melbourne: Melbourne University Press, 1988.
- Uitz, Renáta. "Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?" *Juridica International* XIII (2007): 47-59.
- . "The Rule of Law in Post-Communist Constitutional Jurisprudence." In *Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker, 71 – 98. Oxford, UK and Portland, OR: Hart Publishing, 2009.
- Varga, Csaba. *Transition to the Rule of Law. On the Democratic Transformation in Hungary*. Budapest: Loránd Eötvös University, 1995.
- . "Varieties of Law and Rule of Law." *Archiv für Rechts- und Sozialphilosophie* 82 (1996): 61 – 72.
- Zirk-Sadowski, Marek. "Transformation and Integration of Legal Cultures and Discourses – Poland." In *Spreading Democracy and the Rule of Law?* Edited by Wojciech Sadurski, Adam Czarnota and Martin Krygier. Dordrecht: Springer, 2006.
- Zolo, Danilo. "Rule of Law: A Critical Reappraisal" in *The Rule of Law. History, Theory, Criticism*, edited by Pietro Costa and Danilo Zolo. Dordrecht: Springer, 2007.
- Zsidai, Agnes. "Systemwandel und Beseitigung von Ungerechtigkeiten: Politik im Grenzbereich von Recht und Moral." *Rechtstheorie* 27 (1995): 493-506.

Constitutional and statutory sources

Czechoslovakia

Constitution of the Czechoslovak Socialist Republic. *Sbírka zákonů Československá socialistická republika* 1960 No. 100, as amended 1968 Nos. 143, 144; 1969 Nos. 57, 155; 1971 No. 43; 1978 No. 62. Translated by Th. J. Vondraček, in *The Constitutions of the Communist World*, edited by William B. Simon, Alphen aan den Rijn: Sijthoff & Noordhoff, 1980.

Constitutional Act on the Czechoslovak Federation of 27 October 1968 (143/1968 Coll.)

Constitutional Act No. 542/1992 Coll. On the dissolution of the Czech and Slovak Federal Republic.

Czech Republic

Act no. 198/1993 Coll. On the Lawlessness of the Communist Regime and on Resistance Against It.

Hungary

Constitution of the Hungarian People's Republic , *Magyar Közlöny* 1972 No. 32, and subsequent amendment in *Magyar Közlöny* 1975 No. 23. Translated by William Sólyom-Fekete, in *The Constitutions of the Communist World*, edited by William B. Simon, Alphen aan den Rijn: Sijthoff & Noordhoff, 1980.

Act II of 27 December 1983 on the amendment of the Constitution, *Magyar Közlöny* 1983 No. 60.

Act I of 26 April 1984 on the creation of a Constitutional Council, *Magyar Közlöny* 1984 No. 18.

Draft Act of 4 November 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. [translated in *J. Const. L. E. & Cent. Eur.* 1 (1994): 131].

Draft Act XC of 1993 on the procedure concerning certain crimes committed during the October 1956 revolution and freedom fight.

Act XXIII of 1994 on the Screening of Holders of Some Important Positions, Holders of Positions of Public Trust and Opinion-Leading Public Figures, and on the Office of History, *Magyar Közlöny* 1994 No. 36.

Act CLVIII of 1995 on the Amendment of Certain Laws to Promote Economic Stabilization,
Magyar Közlöny 1995 No. 74.

Poland

Constitution of the Polish People's Republic, *Dziennik Ustaw* 1976 No. 7 item 36. Translated by Hanna and Richard Szawlowski, in *The Constitutions of the Communist World*, edited by William B. Simon, Alphen aan den Rijn: Sijthoff & Noordhoff, 1980.

Constitutional Tribunal Act of 29 April 1985, *Dziennik Ustaw* 22/1985, item 98

Parliament Resolution of 31 July 1985 on the Special Mode of Proceedings Before the Constitutional Tribunal, *Dziennik Ustaw* 39/1985, item 184.

Law of 29 May 1989 on the transfer of existing powers of the State President of the Polish People's Republic and other state bodies, *Dziennik Ustaw* No. 34/1989, item 178.

Law of 24 May 1990 on Changes in Some Regulations Concerning Pensions, *Dziennik Ustaw* No. 36/1990, item 206.

Law of 4 April 1991 Amending the Law on the Establishment of the Main Commission to Investigate Hitlerite Crimes in Poland, *Dziennik Ustaw* No. 45/1991, item 195.

Law of 17 October 1991 on the Revaluation of Retirement and Disability Pensions, the Principles of Setting Retirement and Disability Pensions and Amendments to Certain Act, *Dziennik Ustaw* No. 104/1991, Item 450.

Resolution of the Sejm of 28 May 1992 obligating the Minister of Internal Affairs to provide complete information regarding government officials, deputies, senators, prosecutors, barristers, township councillors and members of township management boards who collaborated with the UB Security Bureau and SB Security Services over the years 1945-1990.

Constitutional Act of 17 October 1992 on Mutual Relations between the Legislative and the Executive Institutions of the Republic of Poland and on Local Government (a.k.a. "Small Constitution"), *Dziennik Ustaw* No. 84/1992, item 426.

Constitution of the Republic of Poland of 2 April 1997, *Dziennik Ustaw* No. 78/1997, item 483.

Law of 11 April 1997 on disclosing of work for state security agencies or co-operation with them during 1944-1990 of people being in charge of public functions *Dziennik Ustaw* No. 70/1997, item 443; modification *Dziennik Ustaw* No. 88/1997, item 554.

List of cases

Supreme Court of Canada

Re Manitoba Language Rights, [1985] 1 S.C.R. 721

Constitutional Court of Germany

Princess Soraya case, BVerfGE 34, 269 (1973)

Constitutional Court of Hungary

Decision 21/1990. (X. 4.) AB. On privatization

Decision 23/1990. (X. 31.) AB. On death penalty

Decision 48/1991. (IX. 26.) AB. On presidential powers.

Decision 64/1991 (XII. 17.) AB. On abortion

Decision 9/1992. (I. 30.) AB. On the protest of illegality

Decision 11/1992. (III. 5.) AB. On retroactive criminal legislation

Decision 53/1993. (X. 13.) AB. On war crimes and crimes against humanity

Decision 60/1994 (XII. 24.) AB. On lustration

Decision 43/1995. (VI. 30.) AB. On welfare reform

Constitutional Court of the Czech Republic

Decision Pl. ÚS 19/93 of 21 December 1993. On the Act of Lawlessness of the Communist Regime and Resistance against it.

Decision Pl. ÚS 3/94 of 12 July 1994. On the citizenship requirement for property restitution claims.

Decision Pl. ÚS 33/97 of 17 December 1997. On the Calculation of the Time Period Allotted the President to Exercise his Power of Veto over Legislation.

Constitutional Court of Czechoslovakia

Decision Pl. ÚS 1/92 (federal) of 26 November 1992. On lustration

Constitutional Court of Slovakia

Decision I. ÚS 39/93 of 2 June 1993. Interpretation of Article 116 sect. 4 of the Constitution of the Slovak Republic. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 5/93.

Decision I. ÚS 5/94 of 22 February 1994. On the power of the President to return a law with comments to the National Council. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 23/94.

Decision PL. ÚS 16/94 of 27 October 1994. Case of electoral dispute/Parliamentary election. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 51/94

Decision PL. ÚS 17/94 of 27 October 1994. Case of petition against the results of election brought to the Court by the political party *Demokratická únia*. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 52/94.

Decision PL.ÚS 29/95 of 29 November 1995. The investigating committee of the National Council and interference with constitutionally guaranteed rights to the inviolability of the person and his/her privacy. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 2/96.

Decision PL. ÚS 32/95 of 7 November 1996. The appointment of the Chief of General Staff as a higher state official by the President of the Slovak Republic. *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* 10/96.

Constitutional Tribunal of Poland

Decision K 7/90, of 22 August 1990. 1990 *Orzecznictwo Tryb. Konst.* 42. On the lowering of pensions of former communist officials.

Decision S 1/91 of February 13, 1991. 1991 *Orzecznictwo Tryb. Konst.* 274-75. On abortion.

Decision K 3/91 of February 25, 1992. 1992(I) *Orzecznictwo Tryb. Konst.* 9. On nationalization of properties of the former communist party.

Decision S 6/91 of 25 September 1991. 1991 *Orzecznictwo Tryb. Konst.* 290, 294. On Stalinist Crimes.

Decision K 14/91 of 11 February 1992. 1992(I) *Orzecznictwo Tryb. Konst.* 93. On Pensions Act.

Decision U 6/92 of 19 June 1992. 1992 *Orzecznictwo Tryb. Konst.* 13. On secret collaboration.

Decision K 11/93 of 9 November 1993. 1993(II) *Orzecznictwo Tryb. Konst.* 37. On judicial independence.

Decision K 26/96 of 28 May 1997. 1997 (II) *Orzecznictwo Tryb. Konst.* 19. On abortion.

Decision K 39/97 of 10 November 1998. 1998 *Orzecznictwo Tryb. Konst.* 26. On lustration.

Decision K 3/98 of 24 June 1998. 1998 *Orzecznictwo Tryb. Konst.* 4. On judicial independence.

Decision P 3/00 of 14 June 2000. 2000 *Orzecznictwo Tryb. Konst.* 5. On lustration.