

Justice After Transition: Constitutional Courts and the ‘Rule of Law’ After the Collapse of Communist Regimes in Europe

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Kaushik H.M.

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Abstract

This thesis aims to investigate the factors which influence the adjudication of constitutional courts during political transitions. By assessing judgements from the constitutional courts of Germany, Czech Republic and Hungary after the collapse of the communist regimes in Europe, the thesis grounds philosophical debates of ‘rule of law’ in socio-political realities. This thesis identifies the theoretical and practical influences the courts were under while deciding these cases.

Four factors were found to be influential in understanding the courts’ decisions. First, the nature of transition shed light on why a particular constitutional court opts for a retributive approach and others do not. The higher the involvement of the masses during the transition, the more likely was there to be a punitive approach. Second, recent historical experience of dealing with transition from an authoritarian regime also affects the judicial approach to the case. As was evident from the German case, the political/judicial approach adopted to come to terms with the Nazi past was influential while dealing with the authoritarianism of the communists. Third, most prominent in the Hungarian case, how the president of the constitutional court conceives the authority of judiciary held significant explanatory power while assessing the judgement. Lastly, it was found that constitutional courts attempt to convey the symbolic value of ‘rule of law’ after a political transition. This motive of the courts is itself a factor which explains the outcomes and reasoning of the cases selected.

Table of Contents

I. Introduction	1
Case Selection and Methodology	3
II. Historical Background – The Iron Curtain and Its Collapse	7
Communist rule in the Comparators	8
The end of the cold war.....	13
Conclusion.....	14
III. The Constitutional Courts and The Cases Before Them	16
Constitutional Courts and Transitions.....	16
Facts and Question before the Court.....	19
IV. Analysis of the Decisions on the Principle of Non-Retroactivity.....	25
Rule of law & The principle of nulla poena sine lega.....	26
Legitimacy of the old regime	31
Analysis of Statutory texts & Constitutional texts	32
The use of international law	34
V. Factors Influencing the Decisions.....	36
Transition process and Emotions	37
Historical Experience- The Influence of Nazi Era and Nuremberg Trials.....	40
President of the Constituional Court-László Sólyom and The Invisible Constitution.....	43
The Symbolism of Rule of law	46
VI. Findings and Summary	49
VII. Radbruch’s Principle and Legal Philosophy	51

The Hart-Fueller debate on Radbruch's principle.....	52
John Finnis and the double life of law	53
Bibliography	56

I. Introduction

At the heart of criminal jurisprudence lies the principle of non-retroactivity. Aptly captured by the maxim *nullum crimen sine lege* (no crime without law)¹, this principle which is recognized across jurisdictions is considered fundamental to the rule of law as it ensures certainty and predictability within a legal system². For illustration, consider that in a legal system there is no punishment for the possession of marijuana. A subsequent change in the law made by the legislature punishing the possession of marijuana, cannot be applicable to any act committed before the law came into force. In this case, a retroactive application of law would be unjust as it makes punishment unpredictable and paralyzes human action. In ordinary times, predictability and fairness within a legal regime is ensured by legal continuity. One widely accepted function of a constitution, perhaps its most important, is to ensure that power is not exercised in an arbitrary fashion. This includes the protection against retroactive prosecution³. In common law systems, the concept of legal continuity is further captured through the respect for legal precedents. However, in periods of political change such as in post-war re-building, or change in regimes of various kinds, we encounter a dilemma concerned with the rule of law since the formal understanding of legal continuity is severely tested. Author Ruti G. Teitel encapsulates this dilemma in her book *Transitional Justice* in the following words⁴:

“Law is caught between the past and the future, between backward looking and forward-looking, between retrospective and prospective, between the individual and the collective.”

¹ Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (1st edn, OUP 2009)

² Jeremy Waldron, ‘The Concept and the Rule of Law’ (2007) 43 *American Journal of Jurisprudence* 1

³ Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’ in James E Fleming (ed), *Getting to the Rule of Law: Nomos L* (NYU Press 2011) 3–31

⁴ Ruti G Teitel, *Transitional Justice* (OUP 2000) p.6.

The ordinary function of law to provide order and stability is challenged by the political upheaval during transitions since rule of law at once defines and is defined by the transition. The conceptualisation of the rule of law during transition is integral to our understanding of how justice plays out in transitioning political regimes. Transformative political periods are often confronted with the question of prosecuting perpetrators of previous regimes. In authoritarian regimes, many unjust acts are aided by law. Those who perpetuate injustice are often compliant with the black letters of the law. The successor regime, thereby has a challenging paradoxical task of reconciling justice with rule of law, which often is conceived to go hand-in-hand. The emerging field of transitional justice focuses on precisely this concern. Transitional justice refers to the varied judicial and non-judicial measures adopted by societies in response to massive human rights violations especially in the context of the emergence of a new socio-political order which is often the case after the fall of a previous regime⁵.

To illustrate the tension between rule of law and justice during political transitions, the Hart-Fuller debate over the prosecution of Nazi era atrocities in the Nuremberg trials is beneficial. For Hart, the Nazi laws, however immoral, were still legally valid under the prevailing legal system⁶. In the positivist account defended by Hart, rule of law in transitioning periods must proceed with the same continuity as it does during ordinary times. In contrast, Lon L. Fuller, a proponent of natural law, contended that Nazi laws were not "law" in the true sense, as they violated fundamental principles of morality and justice⁷. He supported the retroactive prosecution of Nazi officials, arguing that legal systems must be grounded in moral legitimacy to be valid.

⁵ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) UN Doc S/2004/616, para 8

⁶ Ibid., p. 13

⁷ Ibid., p.13

This debate leads us to a series of questions regarding the nature of rule of law: Does the rule of law demand legal continuity, even at the cost of justice, or does justice demand breaking with the past, even at the cost of legality? Is retroactive application of law a necessary component of transitional justice? What is the interdependence of rule of law and political transitions?

This thesis aims to investigate these interrelated questions through the aid of judgements of various constitutional courts that have had to deal with ex post facto laws. A survey of judgements from various courts will help us ground these philosophical debates of rule of law in socio-political realities. By understanding the various approaches courts have taken, I aim to identify the theoretical and practical influences the courts were under while deciding these cases. Additionally, I believe that this approach will also help us gain conceptual clarity on the term ‘rule of law’, its role in negotiating political transitions, and the accompanying moral dimensions associated with it.

Case Selection and Methodology

The thesis will focus on transitions in post-communist regimes of Germany, Hungary and Czechoslovakia(former).

The following are the details of the case studies to be compared:

Country	Case	Description
Germany	<i>German Border Guard Case</i> 1996 ⁸	This case involved the prosecution of former East German border guards who

⁸ *Border Guard Case* (BVerfG, 24 October 1996) BVerfGE 95, 96.

		were involved in the deaths of people attempting to escape East Germany during the Cold War.
Hungary	<i>Statute of limitation and Prosecution of Crimes 1992</i> ⁹	The Hungarian government passed a law in 1991 that extended the statute of limitations to allow prosecution of behaviour under the communist regime.
Former Czechoslovakia	<i>Constitutionality of the Act on the Illegality of the Communist Regime 1993</i> ¹⁰	This case involved questions about a law that lifted the bar by statute of limitations on criminal proceedings thereby allowing individuals to be criminally prosecuted for actions committed under the previous regime.

Germany, Hungary, and the Czech Republic are strong comparators for this thesis due to their shared experience of having to deal with transitions from communist regimes. The similarity

⁹ Magyar Kozlony No.23/1992 (Hungary Constitutional Court,1992), trans. In *Journal of Constitutional Law in Eastern and Central Europe 1* (1994)

¹⁰ *Judgment on the Illegality of the Communist Regime* (Czech Constitutional Court, Pl ÚS 19/93, 21 December 1993). trans. in Kritz, Neil J. (Ed.) – *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995, 3 Vols.)

with regards to the kind of regime that they dealt with and the fact that the transitions and integration (in the case of Germany) occurred during the same time period provide for a good comparative foundation. Additionally, all of these countries had a constitutional court that was at the centre of addressing the legality of these transitions. This provides for important material to address the question of the relationship between rule of law and political transitions. The case selections, addresses the themes of legal continuity and rupture as they all deal with the question regarding the permissibility of retroactive application of criminal law, and thereby provides us with insights into how courts have positioned law, in contrast to or in combination with morality.

The research question I aim to address through the thesis is as follows:

What are the factors that affected the decision of the constitutional courts in the comparators in the chosen cases concerned with retroactivity and rule of law?

The above-mentioned cases will be analysed considering the following metrics:

1. What conception of the “rule of law” did the court prefer to justify their verdict?
2. What opinion did the court have of the communist regime?
3. How did the courts make use of the constitutional text and statutory law?
4. To what extent did the court rely on international law?

By addressing these questions through a comparative approach, the thesis will help shine light on the similarities and differences between the comparators with regards to their approach to transitional justice. A study of the legal justification of the courts would be accompanied by providing the relevant political and historical context to enable a holistic view of the justification. Understanding the functioning of judiciary during transitional times enables us to re-evaluate the role of judiciary. In ordinary times, courts are expected to be a body interpreting

law. Attempted adventurous at law making is contentiously frowned upon by legal scholars. Teitel provides two broad reasons¹¹. First, retroactivity in judicial decisions challenges the rule of law as settled law. Second, judicial law making simply lacks the democratic legitimacy which is associated with other branches of government. Do these objections apply during transitional periods? What role do constitutional courts play in establishing rule of law post transition? Is there one uniform way of establishing the rule of law or is the multiplicity of options available all equally valuable? Through the analysis of politically sensitive cases during transitory periods, this thesis will attempt to contribute to the scholarship on transitional adjudication.

In Chapter II, I provide the necessary historical and political context of the comparators describing the entry, functioning and exit of the communist regime in the comparators. In Chapter III, I position the constitutional courts of the comparators and identify the relationship between the political transition either to their formation (as in the case of Hungary and Czech Republic) or to their established functioning (as in the case of Germany). Through this chapter I also introduce the particular facts of the cases to be analysed and unpack how all three courts had to address the concern of the principle of non-retroactivity. In chapter IV, I analyse comparatively the judgements of the courts through observing the courts position across four tangents: (i) rule of law and retroactivity (ii) legitimacy of the previous regime (iii) use of statutory and constitutional text and (iv) use of international law. In Chapter V, I bring forth the non-legal factors that influenced the decision making of the courts. In Chapter VI, a brief summary of the findings is presented. Finally, in Chapter VII, I comment on Radbruch's principle and its implications for legal philosophy.

¹¹ supra n. 4, p.23

II. Historical Background – The Iron Curtain and Its Collapse

In this chapter I aim to contextualize the post-communist transition of East Germany, Czech Republic and Hungary. To understand the communist influence in this region it is pertinent to attend to the dynamics of Europe shaped by WWII and its aftermath. In June 1941, Nazi Germany invaded the Soviet Union thereby breaking the Molotov–Ribbentrop Pact signed in 1939¹². This pact was concerned with an agreement concerning territorial division of Eastern Europe along with a non-aggression clause between Germany and Soviet Union. The importance of this pact is two-fold. First, it laid down the framework for Hitler’s invasion of Poland in September 1939 thereby triggering WWII. Second, the attack on the Soviet Union and subsequent breaking of this pact by Nazi Germany, allowed for greater military presence of the Soviet Union across Eastern and Central Europe, both as a necessity to push back against the Nazi troops and simultaneously to ensure greater influence in the region¹³. After being invaded in both WWI and WWII, Joseph Stalin considered it important to create and control a buffer zone between Western Europe and the Soviet Union to safeguard the interests of the USSR. The military influence accorded by the dynamics of the war proved to be a fruitful leverage for Stalin to negotiate with other allied powers after the end of the war. In the Yalta and Postdam conferences held among the allied powers in 1945, Stalin was able to assure Soviet political influence in East Germany and across eastern Europe including Czechoslovakia and Hungary¹⁴. Though it was agreed in the conference that there would be free elections, it soon became clear that Eastern Europe would be under authoritarian control managed via

¹² N M Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945–1949* (Harvard UP 1995)

¹³ Ibid.

¹⁴ Tony Judt, *Postwar: A History of Europe Since 1945* (Penguin 2005)

Moscow. The ideological divide between capitalism and liberal democracy on one hand and communism and authoritarianism on the other hand eventually came to be known as the Iron Curtain, a metaphor used by Winston Churchill to denote the divided status of Europe¹⁵. The creation of the Berlin Wall in 1961 to prevent East Germans from fleeing to West Berlin, physically and ideologically symbolized the distinction between eastern and western Europe.

Communist rule in the Comparators

There are both similarities and differences in the history of the communist regime in East Germany, Hungary and Czech Republic (formerly Czechoslovakia). In this section, I will trace the factors that shaped the communist history of the comparators. These factors are significant to understand the historical and political context which influenced the nature of transitional justice in these countries. Constitutional courts, during transitional phases have to contend with particular historical facts. What the bearing of these historical facts are on the decisions of the constitutional courts is subject to analysis in further chapters.

Communist parties, secret police and political suppression

The first common feature of the communist regime in the comparators is the rule of soviet backed communist parties. East Germany also known as the German Democratic Republic (GDR) was ruled by the Socialist Unity Party (SED). Even though other political parties like the Christian Democratic Union (CDU) and the Liberal Democratic Party formally existed, they had to remain subservient to the SED¹⁶, effectively making GDR a one-party state. Most

¹⁵ Winston S Churchill, 'The Sinews of Peace' (Speech, Westminster College, Fulton, Missouri, 5 March 1946) <https://www.westminster-mo.edu/about/history/churchill/pages/sinews-of-peace.aspx> accessed 10 June 2025

¹⁶ Lea Haro, 'Entering a Theoretical Void: The Theory of Social Fascism and Stalinism in the German Communist Party' (2011) 39 *Critique: Journal of Socialist Theory* 563

of the power lied with the Central Committee along with Politburo—a small circle of senior party officials responsible for day-to-day governance. Another factor to note is that the Soviet military administration was in control of the region and the intelligence operations of the soviet monitored the political activities. Due to the proximity of borders with Western Europe, the GDR was of significant strategic interest to the Soviet Union¹⁷.

In Hungary, it was the Hungarian Communist Party (later the Hungarian Working People's Party) led by Mátyás Rákosi that gained power¹⁸. The non-communist parties were pushed out of competition by infiltration and internal disruption wherein the most courageous members of the party were gradually pushed out by labelling them “fascists” or “fascist sympathizers”. Such political tactics coupled with other intimidation tactics came to be known as ‘salami’ tactics¹⁹. The regime was infamous for its Stalinist policies, including collectivization, nationalization, and political purges, a trait common among all countries in the eastern bloc.

In former Czechoslovakia, Communist Party of Czechoslovakia (KSČ) initially shared power in a post-war coalition government. However, in 1948 a coup d'état was orchestrated by the communists effectively monopolizing power. The governance structure was similar to that of GDR with Party Congress, Central Committee and Politburo holding significant influence. It was also a common feature of this era to conduct political purges and show trials. The Slánský trial in Czechoslovakia was one of the most notorious trials of the era. The General Secretary of the KSČ, Rudolf Slánský and 13 others were accused of espionage, treason, sabotage and

¹⁷ supra n.12

¹⁸ Terry Cox, ‘Hungary 1956’ (2006) 14(3) *History Ireland* 38 <http://www.jstor.org/stable/27725463> accessed 1 May 2025

¹⁹ Heino Nyssönen, ‘Salami Reconstructed: “Goulash Communism” and Political Culture in Hungary’ (2006) 47 *Cahiers du Monde Russe* 153 <http://www.jstor.org/stable/20174994> accessed 13 June 2025

for being agents of Western Imperialism and Zionism²⁰. Ten of them were sentenced to death and executed based on confessions extracted through coercion.

The totalitarianism in all of these regimes were aided by the secret police. The Stasi in GDR, ÁVH (or AVO) in Hungary and StB (Státní bezpečnost) in Czechoslovakia were all instrumental tool in maintaining the authoritarian hold of the state. The secret police maintained a vast networked of informants to monitor dissent, and intellectual and political activity. People suspected of disobedience were often imprisoned without fair trials.

These factors consisting of one-party role, political suppression, soviet economic models and use of secret police were common features in the comparators.

Hungarian Revolution of 1956

The revolution of 1956 in Hungary was perhaps the largest and most notable attempt to overthrow the communist regime during the cold war. The oppressive nature of the regime starting from arrests and execution of opposition figures, the thwarting of freedom of expression, the forced movement of the middle class in Budapest to the countryside had all mounted discontent in the general populace²¹. The death of Stalin in 1953 acted as one of the important triggers for the discontent to come at the forefront as there was division between the reformists and conservatives within the communist leadership as to in what regards eastern Europe must follow the lead of the Soviet Union. An organic display of opposition began to emerge from various corners of the civil society. Writers, youth organizations, university students all began to openly criticize the regime and have discussions on widespread issues

²⁰ Vladimir Tismăneanu, *Romania Confronts Its Communist Past: Democracy, Memory, and Moral Justice* (CUP 2023)

²¹ supra n.18

such as literature, economics history and ideology. The Petofi circle was notably able to garner attention from the public and was fundamental in building momentum²². The election of reformist Wladyslaw Gomulka in Poland further inspired the movement, and calls for complete reform including civil rights, a multi-party parliamentary democracy and national independence began to emerge. Reformists within the communist party such as Imre Nagy began to grow in prominence. A radical movement for reform soon turned into an armed uprising when the government sent in troops and secret police to defend a radio station which was stormed by protesters who were keen on using the radio station to broadcast their demands²³. A small band of armed street fighters emerged and fought against the troops and secret police. Soon after this violent turn, a state of emergency was declared and the reformist Imre Nagy was offered the post of the prime minister. Nagy declared Hungary's withdrawal from the Soviet-dominated military alliance (Warsaw-Pact), appealed to the UN for international recognition of Hungary's non-alignment. These positive developments did not last long enough as Hungary was soon attacked by a large fleet of the Soviet army and soviet loyalist János Kádár was in-charge of the government²⁴. Throughout the revolution thousands of lives were lost, over 200,000 people left the country and fled mostly across the western border with Austria. Over 35,000 people were arrested, 13,000 were imprisoned and around 350 were executed. Despite its failure, one could argue that the revolution played a role in the regime adopting more moderate policies compared to other eastern bloc countries. Under Kádár, Hungary participated in what came to be known as 'Goulash Communism' where limited market reforms were introduced and greater cultural freedom was allowed. This relative freedom persisted until the end of the regime.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

The Prague Spring of 1968

Czechoslovakian leader Alexander Dubček assumed power in January 1968. He introduced an array of unprecedented economic and political reforms intending to revitalize the nation. After two decades of oppressive authoritarian rule, the reforms introduced by Dubček granted rights of free speech and expression and showed greater openness to private enterprise and engagement with western Europe²⁵. In response to these reforms, on the third of August 1968, the Bratislava declaration was negotiated and ratified between the Soviet Union, Czechoslovakia, East Germany, Hungary and Poland in which it was agreed that Soviet Union would intervene if there was an attempt to introduce a bourgeois system. Three weeks later, troops from the Soviet Union and members of the Warsaw-pact (a political and military alliance created to counterbalance NATO) occupied Czechoslovakia and suppressed the Prague Spring movement. Around 186 citizens were killed and many more were injured²⁶. Dubček and four other officials from the party were arrested and taken to Moscow where they were forced to approve the military occupation²⁷. All reforms of the Prague Spring were repealed and censorship of speech, press and travel were re-imposed. Though the momentum of Prague Spring failed to sustain, it left the populace disillusioned with communist regime and its ideals thereby acting as the backdrop for the velvet revolution of 1989 which finally ended the communist regime in Czechoslovakia.

²⁵ Anna J Stoneman, 'Socialism With a Human Face: The Leadership and Legacy of the Prague Spring' (2015) 49(1) *The History Teacher* 103 <http://www.jstor.org/stable/24810503> accessed 1 May 2025

²⁶ Ibid.

²⁷ Ibid.

The end of the cold war

Many factors contributed to the end of the cold war. The inefficiency of centrally planned economies led to severe stagnation of the economies in the eastern bloc as these economies suffered with shortages in consumer goods and high poverty rates²⁸. The unwillingness to engage with western economies had affected these countries at a global stage. The reformist leadership of Mikhail Gorbachev was a significant factor which bolstered the movement towards liberalization. Gorbachev introduced the twin policies of Perestroika (restructuring) and Glasnost (openness) aimed at economically and politically liberalizing the soviet regime²⁹. He explicitly abandoned the Brezhnev Doctrine which acted as the justification for military intervention in the satellite states to preserve communist ideology. These set of reforms which was aimed to internally transform the regime paradoxically led to its collapse. It had bolstered pro-democracy forces across the eastern bloc.

In East Germany, mass protests began to breakout throughout 1989 especially in the city of Leipzig. In October 1989 a more moderate government was formed under Egon Krenz³⁰. However, the most significant event that led to the end of the regime in East Germany was the fall of the Berlin wall. It is interesting to note that the fall was a result of a misunderstanding between the communist party members. There was a new regulation discussed regarding easing of borders between the East and West Germany which was meant to be implemented gradually.

²⁸ Raymond L Garthoff, 'Why Did the Cold War Arise, and Why Did It End?' (1992) 16(2) *Diplomatic History* 287 <http://www.jstor.org/stable/24912158> accessed 1 May 2025

²⁹ Ibid.

³⁰ Langerbein, Helmut. "Great Blunders?: The Great Wall of China, the Berlin Wall, and the Proposed United States/Mexico Border Fence." *The History Teacher*, vol. 43, no. 1, 2009, pp. 9–29. *JSTOR*, <http://www.jstor.org/stable/40543351>. Accessed 1 May 2025.

However, a senior East German official, Günter Schabowski, who was not part of the deliberations of the policy held a press conference and mistakenly announced that the regulation would be effective immediately³¹. This led to a large crowd gathering around the wall, with no clear instructions the border guards eventually gave in and opened the gates. The regime soon collapsed and the re-unification with West Germany was complete by the October 1990.

In Czechoslovakia, after the suppression of student demonstrations in Prague, a nationwide protest led by playwright and activist Václav Havel emerged³². Within a matter of 10 days the communist party resigned and Havel was elected president. Due to the predominantly peaceful and non-violent nature of the transition it is termed as the “Velvet” revolution.

In contrast to both East Germany and Czechoslovakia, where public demonstrations played a massive role in the transition from communism, by contrast in Hungary the transition was characterized by dialogue and negotiation between reformist communists and opposition groups. It was decided in the National Round Table Talks held in 1988 between various political groups, that Hungary would hold free elections and redefine itself as a democratic republic³³.

Conclusion

In this chapter I have attempted provide historical context of the creation, functioning and the collapse of the communist regimes in the comparators. It was under these circumstances that

³¹ Ibid.

³² Robert Skloot, ‘Václav Havel: The Once and Future Playwright’ (1993) 15 *Kenyon Review* 223 <http://www.jstor.org/stable/4336855> accessed 13 June 2025

³³ András Bozóki, *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy* (Central European University Press 2002)

constitutional courts in the comparators had to decide on whether crimes committed under the communist regime were subject to punishment post transition. In the next chapter, I will introduce the specific factual circumstances under which the question concerning retroactive punishment of crime was presented before the court.

III. The Constitutional Courts and The Cases Before Them

After the fall of the communist regimes in Central and Eastern Europe, political elites across the region were tasked with the aim of democratization. The question concerning the adjudication of crimes under the previous regime therefore cannot be dissociated from the process of democratization itself. In this chapter, I will first position the constitutional courts of the comparators with regards to their authority and influence in shaping the transitional processes in the respective countries. I will then introduce the specific cases that was adjudicated upon by the courts. The cases I have picked all have in them the common feature that they attempted to address the question of ‘retroactive’ application of criminal laws. This puts courts in a conflicting position to balance various interests. On the one hand they must be backward looking, in that they have to redress the harms committed under the previous regimes, on the other hand they must be forward looking in their attempt to restore trust in the legal system along with ensuring re-conciliation. By analysing how constitutional courts resolve these tensions during politically sensitive periods, we get a rich perspective on the dynamic nature of constitutional adjudication and the implications it has to our understanding of the meaning of ‘rule of law’.

Constitutional Courts and Transitions

In the case of East Germany, the transition to a democratic state took the form of unification with West Germany. This meant that unlike Hungary and Czechoslovakia, the question of creating a new constitutional court did not arise. Article 8 of the unification treaty between former GDR and Federal Republic of Germany (FDR), formally recognized the extension of

the laws of FDR to the whole of united Germany³⁴. As per Art.9 of the unification treaty, the laws of GDR were valid insofar as they are not in conflict with the provisions of the Basic Law. The legal harmonization of laws and the incorporation of GDR into united Germany meant that the Federal Constitutional Court (FCC) had jurisdictions over constitutional matters concerning the GDR. In contrast, new constitutional courts were established in both Hungary and Czechoslovakia as part of institutional building during the transitional period. Since the transition in Czechoslovakia was accompanied by the peaceful split up of the nation to 'Czech Republic' and 'Slovakia'³⁵, the constitutional court established in 1991 was dissolved and new constitutional courts were created in both the newly created nations in 1993. In both Hungary and Czech Republic, constitutional courts were adopted inspired by the models present across continental nations such as Germany, Austria and Spain³⁶.

In Hungary, the constitutional court was adopted through Act XXII (Constitutional Court Act) in 1989. The Hungarian Constitutional Court became one of the most powerful courts across Europe after the institution of this Act³⁷. The broad powers of the court included abstract judicial review whereby laws could be challenged without a concrete case. It entertained individual complaints, thereby making the constitutional court accessible to the general public. As per the constitution, the judges were to be appointed 2/3rds majority of the parliament thereby ensuring a compromise between the ruling party and opposition on the election of justices³⁸. Heavily influenced by German constitutionalism, the court was envisioned as a strong guardian of the new democratic order. It was tasked with ensuring the supremacy of the

³⁴ *Einigungsvertrag* (Unification Treaty) (1990) BGBl II 885.

³⁵ Rupinder K Randhawa, 'Velvet Revolution to Transition: The Czech Republic's Success Story' (2002) 58 *India Quarterly* 165 <http://www.jstor.org/stable/45073417> accessed 10 June 2025

³⁶ Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 18–25

³⁷ András Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary' (1995) 15(2) *Oxford Journal of Legal Studies* 253 <http://www.jstor.org/stable/764657>. Accessed 1 May 2025

³⁸ *supra* note 36

Constitution, protecting fundamental rights, and ensuring separation of powers. The court's powers were formally recognized through Art.32A of the 1949 Constitution (amended in 1989)³⁹. However, much of the powers of the courts have been diluted by the constitution adopted in 2011 under Orban's rule. The court no longer can check the constitutionality of a range of issues such as elections and budget, a bar on checking the constitutionality of amendments was introduced, and the age of retirement was reduced thereby harming judicial independence.

The Constitutional Court of Czech Republic was established under Art.83 of the new Czech Constitution following the peaceful dissolution of Czechoslovakia. The Court was composed of 15 judges appointed by the president with senate approval for a period of 10 non-renewable years⁴⁰. The powers of the courts, similar to the Hungarian court, included abstract judicial review accepting individual constitutional complaints and resolving disputes between state institutions.

The judges of the first constitutional court in Hungary were elected by the National Assembly prior to their first democratic elections. The National Assembly, was still dominated by the communists, however the bench elected reflected the reformist tendencies within the party and the negotiation that occurred between the opposition party and the communists. The judges were former dissidents, legal scholars and moderate ex-communist jurists. The president of the Constitutional court in Hungary was László Sólyom who was formerly a human right lawyer, activist and a university professor⁴¹. In contrast, the constitutional bench in Czech Republic was elected after the first democratic elections. The composition of the Czech Constitutional

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154(6) *University of Pennsylvania Law Review* 1757 <https://doi.org/10.2307/40041352> accessed 1 May 2025

court was mostly filled with legal scholars, former dissidents and anti-communist reformers. Since the nominations to the bench flows from the president, it is also relevant to note that the President of Czech Republic at the time when the constitutional court was created was Václav Havel, a figure who was at the forefront of the democratization movement in former Czechoslovakia⁴². By the time of German unification in 1990, the Federal Constitutional Court (FCC) had already established itself as one of the most respected constitutional courts in the world. Since its founding in 1951, the Court had played a central role in shaping the post WWII political and legal culture of the Federal Republic of Germany, emphasizing the principles of human dignity, the rule of law and democracy⁴³.

Facts and Question before the Court

German Border Guards

Between 1949 and 1961, millions of East Germans fled to West Germany, seeking greater political freedom and economic opportunities. This mass exodus not only weakened the GDR's economy but also undermined its legitimacy as a socialist state. To stop East Germans from fleeing to the West, the GDR government constructed the Berlin Wall in 1961 and heavily fortified the inner German border⁴⁴. Under these circumstances, East German border guards were instructed to prevent escapes — with deadly force if necessary. Between 1961 and 1989,

⁴² Anna J Stoneman, 'Socialism With a Human Face: The Leadership and Legacy of the Prague Spring' (2015) 49(1) *The History Teacher* 103 <http://www.jstor.org/stable/24810503> accessed 1 May 2025

⁴³ Peter E Quint, 'Leading a Constitutional Court: Perspectives from the Federal Republic of Germany' (2006) 154 *University of Pennsylvania Law Review* 1853 <https://doi.org/10.2307/40041353> accessed 13 June 2025

⁴⁴ Helmut Langerbein, 'Great Blunders?: The Great Wall of China, the Berlin Wall, and the Proposed United States/Mexico Border Fence' (2009) 43(1) *The History Teacher* 9 <http://www.jstor.org/stable/40543351> accessed 1 May 2025

hundreds of East Germans lost their lives in their attempt to flee the regime. After re-unification of Germany, more than 60 cases were sent to trial⁴⁵.

Most of the border guard cases before the courts had a similar fact pattern. Guards' notice that a person or a group of persons were attempting to cross the border. The guards would then call or issue warning shots. Upon failing to stop the attempt of the person(s) to cross with a mere warning, the guards would fire automatic weapons often with fatal results. The fatal cases involved in one instance a victim who already had one hand on top of the wall. In another case, the victim was shot as he was swimming across the River Spree. It was also a common practice to place land mines across the border region to deter people from making the attempt to cross the border⁴⁶.

Initially charges of manslaughter were brought only against the border guards who actually pulled the trigger in these cases. Later on, many top ranked military and political figures were charged with "indirect participation in manslaughter"⁴⁷. Policies at the border were controlled by a chain of institutions and powerful political and military figures. Charges were filed against members of the National Defense Council, a constitutional organ in GDR which was tasked to set policies and guidelines for the Defense Ministry. SED party leader, Erich Honecker and Stasi chief, Erich Mielke, who were also members of the Council were charged in the case. Top officials of the defense ministry such as Heinz Kessler, Fritz Streletz and long-time party functionary, Hans Albrecht were also charged. Members of the defense ministry, upon the directives issued by the National Defense Council were responsible for Ministry's Annual Order 101 which regulated border regime⁴⁸. Issuance of directives from the council was

⁴⁵ Peter E Quint, 'Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command' (1999) 61(2) *The Review of Politics* 303 <http://www.jstor.org/stable/1408359> accessed 1 May 2025

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

common practice. Detailed instructions to the troops were provided as to how the borders must be controlled. Though there was no explicit law that specified to ‘shoot and kill’, there were others statutes that arguably provided a legal justification for the shootings. As per Section 27 of the GDR border law of 1982, the use of firearms was justified ‘in order to prevent an imminent or ongoing offence, which qualifies, according to the circumstances, as a crime’⁴⁹. Similar justification for use of firearms was present under section 17(2) of the Act on the Tasks and Powers of the German People’s Police (VoPoG) of 1968. It was contended that since illegally crossing the border was a crime under section 213 of the Criminal Code in GDR, the use of firearms was justified under the GDR border law and VoPoG. Moreover, the guards received systematic instructions from their superiors. Many guards who used lethal force to restrict movement across borders were praised and officially rewarded for their actions⁵⁰.

The common question that arose before courts in these set of cases concerning the prosecution of border guards and the higher officials of the GDR regime, was with respect to the principle of non-retroactivity. As per this principle, a person may not be punished for an act that was not prohibited by applicable law at the time the act was committed. This principle was also enshrined in the German Basic Law by Article 103(2). The jurisdiction of the court was granted via the unification treaty. The courts had to look into both the GDR laws and FDR laws to determine the applicable law since the rules of intertemporal criminal law determine which statute is applicable when the criminal law at the time of the act has been changed before the criminal is sentenced. As per Art.315 of the Introductory Act to the Criminal Code, to adjudicate the crimes committed in GDR, the court would apply that law which is more lenient

⁴⁹ Adrian Künzler, ‘Judicial Legitimacy and the Role of Courts: Explaining the Transitional Context of the German Border Guard Cases’ (2012) 32(2) *Oxford Journal of Legal Studies* 349

<http://www.jstor.org/stable/41682782> accessed 1 May 2025

⁵⁰ *supra* n.45

to the accused⁵¹. This was in line with Section 2(3) of the Criminal Code. Therefore, the constitutional court in this case was in a peculiar position to apply the GDR law to see if there was violation of the principle of non-retroactivity, and then to apply FDR criminal law upon prosecution all while also dealing with the constitutional provisions of both the basic of FDR and the constitution of GDR.

Statute of Limitation Cases in Hungary and Czech Republic

After democratically elected governments and parliaments came into power in Hungary and Czech Republic, attempts were made to recognize and prosecute the crimes committed under the previous regime. On November 4th 1991, the Hungarian National Assembly adopted a law called the Act “On the Prosecution of Serious Crimes Committed Between December 21, 1944 and May 2, 1990 and Not Prosecuted for Political Reasons”⁵². As per this law, the statute of limitations for crime committed during the communist rule and not prosecuted for political reasons were suspended. In simpler terms, it meant that if a criminal statute had set the limitation period for a crime, let us assume for a period of 15 years, it would follow that if an accused had not been charged before that period, he would no longer be liable for prosecution. By the virtue of this statute, the parliament intended to completely suspend the period of limitation for crimes committed under the communist regime *and* not prosecuted for political reasons. In the context of Hungary, given that the most brutal period of communist oppression was around the time of the 1956 revolution many crimes of the regime would have now been open to investigation and prosecution after almost four decades.

⁵¹ supra n.49

⁵² supra n.8

Similar to the case of Hungary, the Czech Parliament passed the “Act on the Illegality of the Communist Regime and on Resistance Against It” on the 9th of July 1993. As per the Act, the limitation period for crimes committed and not prosecuted for political reasons from February 25th, 1948 to December 29th, 1989 was suspended⁵³.

Both the Hungarian and Czech Court had to attend to the question of non-retroactivity. By suspending the limitation period, these laws effectively brought a criminal act that had lost its justiciability back to the status of being justiciable retroactively, there was a perceptible tension between these laws and the principle of non-retroactivity.

Interestingly, German parliament too introduced a similar law on 26th of March 1993 on the suspension of limitation in respect of ‘acts committed under the unjust regime of the Socialist Unity Party’⁵⁴; additionally, Art.315a of the Introductory Act to the Criminal Code as modified the Unification treaty had an analogous provision. However, this was never directly challenged before the constitutional court since the FCC had settled the question of limitation in a 1969 case related to the prosecution of crimes under the Nazi era⁵⁵.

While evaluating the judgements of these two courts in contrast with the German decision it is important to keep in mind that the same legal question arose in different factual circumstances. In Germany, the court was directly concerned with a criminal act, i.e. violence at the German border. However, in Hungary and Czech, the court had to deal indirectly with criminal acts in responding to the suspension of limitations. Despite these differences, the cases chosen have a fair basis for comparison for two reasons. First, the question of retroactivity in the context of

⁵³ *supra* n.10

⁵⁴ Gábor Steiner, ‘The Issue of Limitation in the Context of Transitional Justice’ (2021) 22 *German Law Journal* 1.

⁵⁵ Statute of Limitations Case (Germany, 1969) BVerfGE 28, 1

regime change was the central question addressed by all three courts. Second, in all three decisions the court had to clarify the meaning of ‘rule of law’ from its perspective. Since, the central aim of the thesis is to evaluate how and why constitutional courts adopt a particular position on ‘rule of law’ during transitional periods, all the cases prove to be of immense relevance to meet that end.

IV. Analysis of the Decisions on the Principle of Non-Retroactivity

The preceding chapters have provided a background to the political history of the transition in the comparators, the context in which the constitutional courts were either formed or were operating under and the specific factual circumstances under which the issue of retroactive application of criminal law arose. In this chapter, I will attempt to elucidate the reasoning provided by the courts for their decisions.

In their adjudication of the *Border Guards Case*, the Constitutional Court in Germany upheld the prosecution of the guards and few members of the political and military elite. The Czech court upheld the law suspending the limitation period for crimes unprosecuted under the previous regime whereas the Hungarian constitutional court held such a law to be unconstitutional. The courts approached the issue from multiple interdependent angles. First, they justified their decisions based on a conception of a rule of law that was asserted to be applicable in deciding whether the principle of non-retroactivity was violated in the cases. However, the understanding of the concept of ‘rule of law’ varied across the courts. Second, it was found that the German and Czech court was of the opinion that legitimacy of the previous regime had a bearing on how rule of law ought to be interpreted, in contrast, the Hungarian Court observed that the question of the legitimacy of the old regime was a matter of indifference insofar as adjudicating the constitutionality of the law before it was concerned. The use of international law also saw a similar division among the constitutional courts. While both the German and Czech constitutional courts made reference to provisions of international law, the Hungarian court did not use international law to strengthen their reasoning. All three courts made reference to their own Constitutions to support their conception of the rule of law.

Rule of law & The principle of nulla poena sine lege

One of the justifications offered by the German Constitutional Court on the question of retroactivity was based on the application of the Radbruch formula. As per the Radbruch formula, positive law would be rendered invalid if it was unjust to an “unbearable” degree. In the context of retroactivity, Radbruch was of the opinion that though the principle of retroactivity was important, it was nevertheless one among many principles of justice⁵⁶. When substantive justice is violated intolerably, then the principle of non-retroactivity must yield to. It was upon this principle that the criminal trial of officials in the Nazi regime was undertaken at Nuremberg⁵⁷. Upon this basis, the constitutional court held that Section 27(2) of the Border Guard Act and Section 17 of the Police Act were invalid on account of substantive justice since these laws and the state practice that accompanied it valued borders more than it valued human life. The protection granted by Art. 103(2), which crystallizes the principle of non-retroactivity in the German Basic law was found to have met with a circumstance which was exceptional, therefore invalidating the protection granted under it. Many German scholars have criticized the manner in which the courts applied the Radbruch formula since the court drew parallels between the communist regime and the Nazi regime without sufficiently justifying the same⁵⁸. In fact, the constitutional court cites the judgement of the Federal Court which indulges in a self-contradiction while applying the Radbruch formula. The court states⁵⁹:

“The contradiction between positive law and justice had to be so intolerable that the law, as incorrect law, had to give way to justice. This standard, described in the Radbruch formula,

⁵⁶ Peter Quint , “The Border Guard Trials and the East German Past-Seven Arguments,” The. American Journal of Comparative Law , 541

⁵⁷ Markus Dirk Dubber, ‘Judicial Positivism and Hitler’s Injustice’ (1993) 93 *Columbia Law Review* 1807 <https://doi.org/10.2307/1123061> accessed 1 June 2025

⁵⁸ Ibid.

⁵⁹ *supra* n.8

which was used to assess the most serious Nazi crimes of violence, also applies to the killing of people on the inner-German border, although this cannot be equated with Nazi mass murder.”

As per the court, the communist regime, at once, was equivalent to the Nazi regime and was not. The lack of clarity on the scope of the Radbruch formula and its applicability, makes one wonder if Radbruch himself would have applied his dictate in the *Borders Guards Case*. The confusion regarding the scope of the formula emanates from within the formula itself. Where exactly must one look at to find the “the intolerability” of positive law? While from the positivist stand point, the formula is up for critique for the same reason, I shall argue in the final chapter that the Radbruch formula forces us to confront the double life of law: authority and ethics.

Now, I turn to the decisions of the Czech and Hungarian courts.

The Czech court, while declaring that the law on the suspension of limitation period to be constitutional held that the perpetrators of crime in the previous regime were protected politically and this in turn acted as “legal certainty” for perpetuation of crime and jeopardized the interest of the civilian population. The court while balancing the rule of law interests between offenders and civil society held⁶⁰:

“This ‘legal certainty’ of offenders is, however, a source of legal uncertainty to citizens (and vice versa). In a contest of these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state. Some other solution would mean conferring upon a totalitarian dictatorship a stamp of approval as a law-based state,..”

⁶⁰ supra n.10

The court noted that the non-prosecution of criminal acts would entail an infringement in the continuity of written law. According to the court, rule of law would entail maintenance of a state of trust in the durability of legal rules. However, to justify the constitutionality of law the court does not dive into the details of the exceptions to the principle of non-retroactivity like the German court, instead it made two manoeuvres. First, the court considered the relevant law under challenge not to be a constitutive norm but a declaratory one⁶¹. In other words, the law did not make an attempt to bring about a new state of affairs but merely clarified an existing one. As per the court, the question was not whether the law brought about an impediment to the running of impediment of limitation but rather the question was whether the period of limitation under the previous regime was real or fictional. In other words, the nature of the old regime itself had a significant bearing on the functioning of the limitation period. Second, the court noted that the criminal acts were *de facto* illegal at the time of commission. What the principle of retroactivity provides protection from are the alleged criminal acts themselves not *for how long* the acts may be prosecuted. While primarily referring to Art. 40, para 6 of the Charter of fundamental Rights and Basic Freedoms, the court asserted that what was prohibited was the retroactive definition of crime and the imposition of punishment, both of which were central to a criminal law. The law on limitations of actions, as per the court, were not substantial rights but procedural rights. The language used by the court, further hinted that there was a clear hierarchy between substantial and procedural right⁶²:

“Neither in the Czech Republic, nor in other democratic states does the issue of the procedural requirements for a criminal prosecution in general, and that of the limitation of actions in particular, rank among the principal fundamental rights and basic freedoms which form a part of the constitutional order of the Czech Republic...”

⁶¹ Ibid

⁶² Ibid.

“The argument that the limitation of actions is an institute of substantive criminal law is not crucial to judgment in this matter, not only due to the fact that the issue is an ongoing subject of dispute in criminal law doctrine and that in several other democratic states it is considered, for the most part, as a procedural law institute”.

By reframing the status of the law of limitation, and observing that the period of limitation was never operational under the regime, the Czech court managed to by-pass the hurdle of the non-retroactivity principle.

In contrast to both the German court and the Czech Court, stands the Hungarian Constitutional Court which held the law suspending the statute of limitations for crimes under the regime to be unconstitutional. The guiding precept of rule of law for the Hungarian court was the element of the ‘security of law’⁶³. For the court, the principle of retroactivity was part of the security provided by law, and the security of law based on objective and formal principles were more important than partial and subjective justice. Unambiguity, predictability and foreseeability are demands placed on the state by the rule of law. While the German court understood *crimen sine lege* to be one of the principles of justice that could be subservient to the demands of substantive justice, the Hungarian court held the principle of retroactivity in high regards and explicitly concluded that ‘historical situations, justice, etc. are of no consideration in this matter’⁶⁴. While making reference to the provisions of the newly amended constitution (Section 54-57), it noted that the constitution does not allow the restriction or suspension of the constitutional principles of criminal law even in times of emergency or state of danger. The court considered itself to have its own historical task⁶⁵:

⁶³ supra n.9

⁶⁴ Ibid.

⁶⁵ Ibid.

“The Constitutional Court is the custodian of the paradox of the “rule of law revolution”: in the peaceful regime change that began with the rule of law Constitution and is being implemented, the Constitutional Court must, within its own jurisdiction, ensure the consistency of legislation with the Constitution.”

While the Czech Court understood that the criminal act to be latent due to the illegitimate running of the limitation period, the Hungarian court understood that once the limitation period is passed it must be understood as though the crime never occurred⁶⁶:

“Once the statute of limitations has expired, the state's criminal claim ceases and the perpetrator acquires the right to impunity.”

“From the perspective of culpability, an offense whose statute of limitation had run its course must be treated—given that the State’s claim for punishment had vanished—as never having been punishable.”

From these lines, the distinct between the Hungarian and Czech approach to understanding the interaction between the statute of limitation, rule of law and retroactivity becomes evident. For the Czech court, the statute of limitation was never running due to the fact that prosecutions did not occur for political reasons. The Hungarian courts set aside this reasoning by stating that not only is it unfeasible to distinguish between which prosecutions failed to occur for political reasons and which were a result of state failure but also that introducing such a criterion would place an unfair burden on the accused to prove his innocence. The contrast between the Czech and Hungarian court also provides us the distinct directions that could be adopted by new constitutional courts during transition. On one hand, the court could assert rule of law and defend retributive goals of the parliament in bringing the old regime to justice and thereby signify a new era of democracy and human right and on the other hand, the court could signal

⁶⁶ Ibid.

that the independent constitutional court will uphold democracy and human rights by preventing the parliament from breaching the strict dictates of the rule of law.

Legitimacy of the old regime

In upholding their verdicts, the German and Czech courts quite explicitly denounced the totalitarian nature of the previous regime, and considered the illegitimacy of the regime to have a bearing on the legal question of retroactivity. Between these two courts, it was found that the reasoning of the Czech Court was far more contingent on their beliefs about the legitimacy of the previous regime.

The Czech court found that effort and intention of the state to prosecute crimes is an indispensable part of the law of limitation. To talk of the running of limitation period without the willingness of the state to prosecute is meaningless. As per the court, the condition of mass, State-protected illegal activities was not the consequence of negligence or error, but the purposeful and collective behaviour of the state authorities as a whole⁶⁷. In this way the Czech court drew a strong link between the authoritarian nature of the state and invalidity of the period of limitation. The German court found the entire border regime to be manifestly unjust and found the political motives behind the border regime to be inhuman. The historical imprint of the Nazi era could be observed in their attempted comparison of the communist regime to the Nazi party. The court referred to the speeches of leaders and minutes of meetings, especially those involving the General secretary of the SED, Erich Honecker⁶⁸. While referring to the findings of the regional court, it observed that the attempted crossings at the border was a

⁶⁷ supra n.10

⁶⁸ supra n.8

political embarrassment for the party and the directions to the border guards went beyond what was permitted by the written law, and included orders to “unconditionally protect borders” and “...border violators were to be arrested or exterminated”⁶⁹. Cumulatively, all of this played a role in the courts conclusion that there was intolerable injustice done at the border.

The Hungarian Court was the most reluctant to denounce the behaviour of the communist regime. In fact, it acknowledged the continuity in the rule of law from the previous regime. It stated that there was no distinction between ‘pre-constitution’ and ‘post-constitution’ laws in so far as its validity is concerned⁷⁰. The legitimacy of different political systems was a matter of “indifference” from the view point of constitutionality of laws⁷¹. Since, the court framed rule of law as ‘security of the law’, it concluded that established legal relationships cannot be disturbed. However, there seems to be little justification for a statement of that proposition this especially given that the court paradoxically also believes that by the enactment of the constitution, there was indeed a new system of rule of law.

Analysis of Statutory texts & Constitutional texts

The courts not only relied on principles of rule of law but found justification also based on positive law to support their verdicts. Among the three courts, it was found that the German Court made the most use of positive law and the Hungarian court made the least use of it. This seems counterintuitive since the primary justification of the German Court was based on substantive justice and natural law, while the ruling of the Hungarian court explicitly places the predictability and certainty of formal law above subjective substantial justice.

Apart from the application of Radbruch principle, the German Court(s) used the constitution and laws of the GDR itself to determine the question of retroactivity— there was no violation

⁶⁹ supra note 45

⁷⁰ supra n.9

⁷¹ Ibid.

of the principle of non-retroactivity since the acts were criminal at the time when they were committed. The court noted that section 112 and 113 of the GDR criminal code prohibits intentional killing of people. The laws that permitted the use of firearms, the court noted were misused. The use of firearms was permitted under exceptional circumstances, when serious crime was being committed. The crossing off borders though was criminalized, was not a ‘serious crime’ as per Section 213(3) of the GDR criminal law as the penalty for an act to be considered a serious crime was *more than 2* years of imprisonment whereas the penalty for crossing the border was *upto 2* years of imprisonment⁷². The Supreme Court of Germany also considered Art.30(2) of the GDR constitution which protected an individual’s personality, freedom and life. Given that right to life could be limited only under extreme circumstances, the use of firearms was disproportionate. Some scholars have criticized this interpretation of the GDR laws by the court. The critiques argue that the court employed the interpretation that was most suitable for its own needs. For instance, the court chose to ignore the ambiguity in the GDR constitution that emphasized “socialist legality”⁷³. The court’s interpretation of the laws of the previous regime did not take into consideration the interpretation employed by the courts in the previous legal system. These objections raise serious concerns about this line of argumentation adopted by the court.

The Czech Court made the most reference to the Charter of Fundamental Rights and Freedoms⁷⁴, which was considered to be the foundational document in post independent Czechoslovakia. After split of the nation, this document was incorporated by both the Czech Republic and Slovakia. Article 3 of the Czech constitution⁷⁵ considers the Charter to be part of

⁷² supra n.46

⁷³ supra n.45

⁷⁴ Charter of Fundamental Rights and Freedoms (Czech Republic) No. 2/1993 Coll., as part of the constitutional order

⁷⁵ Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.)

the ‘constitutional order’ of the Czech Republic. The principle of non-retroactivity is protected by Art.40, para 6 of the chapter. However, the court found that the principle did not extend to the law of limitation, but only protected the substantial aspects such as the definition of the ‘criminal act’ and the ‘imposition of punishment’⁷⁶. The court additionally referred to Art.9, para 3 of the Czech Constitution according to which legal norms must not to be interpreted in a way that would eliminate or jeopardize the foundations of a democratic state. Allowing an interpretation of rule of law that would speak in approval of the totalitarian state was itself anti-thetical to a law-based state.

To justify its conception of the security of law, the Hungarian court made use of Section 2 of the Constitution⁷⁷ which codified the principle. The court also referred to Section 57(4) of the Constitution which codifies the non-retroactivity principle. The qualification of “political reasons”, which distinguished the applicability of the limitation period or its suspension was found to be an *ex post facto* classification which determined a legal fact retroactively and hence violating Sec.57(4) of the Constitution. What was indeed interesting in the Hungarian judgement is the reference to the judgements of its own court, which despite being in its infancy had already passed major judgements such as the one on the abolition of the death penalty and restriction of property rights. The newly formed Czech court had no such precedents of its own but made the sole reference to a 1969 judgement of the German constitutional court on the retroactivity of limitation statute⁷⁸.

The use of international law

⁷⁶ *supra* n.10

⁷⁷ Act XX of 1949 on the Constitution of the Republic of Hungary (as amended in 1989), Magyar Közlöny 1989/71.

⁷⁸ *supra* n. 54

In a pattern similar to that in the case of the use of constitutional and legal provisions, it was found that Germany made the most use of the international legal instruments while Hungary made the least use of it.

The German court made reference to Art.12(2) and Art.6(1) of the International Covenant of Civil and Political Rights (ICCPR), 1966 to assert that inherent right to life and the freedom to leave any country including one's own was now crystallised in international law. The exception provided to the freedom to exit a country was laid down in Art.12(3). The court highlighted that the measures adopted by the regime to restrict this right guaranteed by ICCPR was not in compliance with the provisions of ICCPR. The controversy surrounding the application of international law stems from the fact that though GDR had ratified to ICCPR it had not converted into the domestic legal system; foregoing this fact the court found GDR to be bound by international law. Another point of contention with respect to international law was concerned with the 'act of state doctrine'. Some of the accused claimed sovereign immunity under the doctrine according to which validity of an official act of a foreign government cannot be brought into question. The court ruled that the 'act of state doctrine' was an Anglo-American legal concept that is not recognized outside that sphere and hence does not form a part of the 'general rule of international law' as specified in Art.25 of the basic law⁷⁹.

The Czech and Hungarian courts in comparison make little to no reference to international legal instruments. The Czech court makes a passing reference to Art.15 of the ICCPR whose terms it finds similar to that of Art.40, para 6 of the Charter of Fundamental Rights and Basic Freedom. The Hungarian court only makes a vague reference to human rights but does not discuss any international legal instrument.

⁷⁹ supra note 8.

V. Factors Influencing the Decisions

Legal reasoning alone seldom provides for a full justification for why constitutional courts decide in a particular way. The political nature of the cases discussed demands more attention paid to non-legal factors that influenced the decisions. This chapter aims to shine light on some of these factors that would help provide a deeper insight as to why the constitutional courts in their particular circumstances adopted a position on ‘rule of law’. The various positions the court took on the retroactive application of law and subsequently on the ‘rule of law’ were dealt with in the previous chapter. It was found in the German case that the court analogized the communist rule with the Nazi regime and positioned law as being in service of justice⁸⁰. The Czech court found that aiding criminal activities was anti-thetical to the rule of law; if legal certainty of offenders were in conflict with the legal certainty of the public, the latter must be preferred⁸¹. For the Hungarian court, the security that the law provides with regards to certainty and foreseeability was indispensable⁸². These varied approaches to ‘rule of law’ goes on to show the instrumental nature of law and the purposeful construction of legality. In the context of the cases analysed, I find four particularly important factors that affected the construction of legality: (i) the nature of the political transition to democracy (ii) the historical experience of dealing with injustice, (iii) the influence of president of the constitutional court, and (iv) the attempt to convey the symbolic meaning of law.

⁸⁰ *supra* n.8

⁸¹ *supra* n. 10

⁸² *supra* n. 9

Transition process and Emotions

In his work on democratization in the late twentieth century, Samuel P. Huntington categorizes transition process into four categories⁸³:

1. Transformations: In this category, change is initiated by elites within the authoritarian regime. This often occurs as an attempt by the regime to redefine itself in response to internal pressure and gradual liberalization
2. Transplacement: When the transition is a result of negotiations between the old regime and the emerging opposition, it is said to be a transplacement.
3. Replacement: This transition process occurs when the change is a result of mobilization or revolutionary overthrow. The masses are said to be the causers of transition in this case.
4. Intervention: As the name suggests, this transition process involves the imposition of democracy from outside power.

Using these categorizations, Huntington concluded that East Germany was a case of replacement, while Czechoslovakia and Hungary were cases of transplacement and transformation respectively.

The historical facts as explained in the first chapter partially attest to this categorization.

⁸³ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991), Ch.3

Across 1989, protests erupted in various cities of East Germany, predominantly in Leipzig. By October of that year, the long-standing leader of the regime, Erich Honecker was forced to resign⁸⁴. The massive public pressure leading to the large-scale crossings across the Berlin Wall marked the end of the regime. The involvement of public and the absence of political negotiations with the opposition parties like in Hungary and Czech justifies East Germany's classification as a replacement transition.

In Hungary, reformist communists such as Miklós Németh and Imre Pozsgay pushed for gradual democratization⁸⁵. The leadership decided to open the borders with Austria aiding East Germans to escape into West Germany, and opted to distance from Marxist-Leninist ideology as can be inferred by the change in the party's name. All of this indicates to a trend towards democratization even before the round table talks of 1989. Scholars such as András Bozóki, have resisted the categorization of the Hungarian transition as purely elite driven and have highlighted the role of opposition parties and the public leading up to the negotiations⁸⁶. However, the predominant role of elites in bringing about the transition makes it a fit case to be classified as transformation, perhaps with some overlap with transplacement.

In the case of Czechoslovakia, violent suppression of student protests in November 1989 sparks mass protests led by groups such as Civic Forum⁸⁷. The main figure at the forefront of galvanizing crowds for demonstrations, Václav Havel, later went on to become the President. The communist party was forced into negotiations with the opposition forces. The role played

⁸⁴ supra n.30

⁸⁵ supra n. 18

⁸⁶ supra n.33

⁸⁷ supra n.35

by popular protest along with strong opposition forces makes the Czech case a hybrid of transplacement and replacement.

An interesting pattern can be observed here. The constitutional court decisions that were more punitive of the previous regime occurred in jurisdictions where masses played a significant role during the transition. I also find it relevant that the authoritarian peaks for the more punitive jurisdictions such as in the Czech case were much closer to the end of the regime as can be inferred from the repression after the ‘Prague Spring’ in 1968. In comparison, the authoritarianism in Hungary peaked during the suppression of the 1956 revolution after which the regime adopted a semi-liberal approach including market and cultural reforms open to the west, possibly to avoid uprising from the masses. The Hungarian constitutional court’s resistance to explicitly condemn the communist regime might have to do with the regime’s reputation as the ‘merriest barrack in the socialist camp’⁸⁸.

The implication of the above observation can also be read as follows: the institutional decision to opt for more punitive or less punitive measures is partly influenced by the emotional state of the public at the time of deciding the matter. In his paper on ‘Emotions And Transitional Justice’⁸⁹, Jon Elster notes that during transitional justice base motives such as anger, revenge and indignation are transmuted into nobler ones such as demand for justice. Since base motives are strongest immediately after the harm is done and tend to dilute over time, the demand for a retributive approach also weakens as the gap between the wrongdoing and its adjudication grows. In Hungary, where the worst abuses had happened decades earlier the public outrage for retributive justice had faded. Whereas in the case of Czech Republic and East Germany, the sense of injustice was still fresh in public imagination.

⁸⁸ István Csurka “Új magyar önépítés” (New Hungarian Self-Construction), in: János Rainer M. A monori tanácskozás jegyzőkönyve (Minutes of the Monor Meeting), June 14-16, 1985. Budapest: 1956-os Intézet, 2005

⁸⁹ Jon Elster, ‘Emotions and Transitional Justice’ (2003) 86(1/2) *Soundings: An Interdisciplinary Journal* 17 <http://www.jstor.org/stable/41179084> accessed 13 June 2025.

Historical Experience- The Influence of Nazi Era and Nuremberg Trials

Erich Honecker, the prominent leader of GDR and one of the accused before the court in the *Border Guards* case decried the attempts of his prosecution by terming it as a ‘political trial’ and a form of ‘victor’s justice’⁹⁰. This apprehension perhaps had some backing as can be inferred from the statement of the Chief Prosecutor for the crimes in the GDR, Christoph Schaegfen, who affirmed that “*we want to do everything we can to ensure that a situation like the one after 1945 does not occur again, which was known to ensure that no member of the judiciary was held criminally responsible for an unjust judgment*”⁹¹. In his statement before the court, Honecker urged the court to be sensitive to the history that has led up to the trials. He positioned himself and his co-accused as the victims of a cruel twist of historical fate. For him, the roots of the tragedies at the Berlin Wall lay in the world-historical conflict that began with Hitler’s rise in 1933 and culminated in the formation of two opposing German states and the hysteria of the cold war⁹². One would assume that such a vague political comment would not resonate with the court. Though Honecker himself was let off on health grounds, during the trial of other officers in the same case, the historical determinism he voiced out made its influence visible. While sentencing Kessler, Streletz, and Albrecht to milder sentences than what was demanded by the prosecution, the trial judge noted that defendants were themselves “prisoners of German postwar history and prisoners of their own political convictions”⁹³. The judge reasoned, in the absence of the Cold War, none of the individuals would presumably have committed the crimes for which they had been convicted.

The duality of German judiciary during the whole *Border Guards* saga is intriguing. While convicting the accused, they highlighted the evil of the East German regime. However, at the

⁹⁰ A James McAdams, ‘The Honecker Trial: The East German Past and the German Future’ (1996) 58(1) *The Review of Politics* 53 <http://www.jstor.org/stable/1408492> accessed 12 June 2025.

⁹¹ *supra* n.54, p.165

⁹² *supra* n.90, p.67

⁹³ *supra* n. 90, p.72

time of deciding the quantum of sentence, the German courts were found to be sympathetic to the perpetrators, treating them as victims of history. The contradictory and yet co-existing reasoning can also be observed through the tension between substantive justice and adherence to legal positivism. In upholding the convictions of the high ranked officials, the Constitutional court provides two kinds of reasoning. The first, relying on Radbruch's formula and analogizing the communist regime to the Nazi regime, the court concluded that punishment was warranted for the crimes committed in an unjust state (*Unrechtsstaat*)⁹⁴. The second line of argumentation, relied on laws under the GDR to establish that the acts being prosecuted were also punishable under the GDR and therefore there was no violation of the principle of retroactivity. If the second line of argumentation is preferred, then there must be a concession that GDR was indeed a law-based regime (*Rechtsstaat*), a position which is in direct contradiction with the declaration of the first line of argument that the GDR was unjust and illegitimate (*Unrechtsstaat*). To understand how both these reasoning emerged it is pertinent to look at what happened at the trial courts. In first border guard trial, which began on 2nd September 1991, the defendants used an argument that was already made famous at Nuremberg. They admitted to using their weapons against those sought to flee GDR but justified their actions by contending that they were simply carrying out their duties as soldiers and acting well within the laws of their country. While refusing this submission, the trial court⁹⁵ did not rely on erroneous interpretation of law but focused on what kind of state GDR had been. It is at this point the Radbruch principle was first invoked to state that laws of the regime enjoyed no legitimation. Though the judge observed that the Nazi regime was a much bigger evil he stated , "*Nonetheless , the court has no misgivings about following this legal approach in this case, for the protection of human life enjoys general validity and cannot be dependent*

⁹⁴ supra n.90, p.75

⁹⁵ Interestingly, the presiding judge, Theodor Seidel, was a member of an organization that aided East Germans to leave GDR. supra n.90, p.61

upon a specific number of killings.” This statement makes the invocation of Radbruch’s principle all the more controversial. Radbruch himself clarifies that not all unjust law is flawed law but only those that conflict with justice to an ‘intolerable degree’. What the threshold of intolerable degree is unclear. One can conclude that the difference between the Nazi regime and the communist regime was sufficient enough to push the communist regime below the threshold of intolerability or to hold that despite significant differences with the Nazi regime, the communist regime breached the threshold. The uncertainty involved in the application of the principle meant that positive law had to be relied upon.

The positivist view emerged in the second trial which began on 18th December 1991. The trial court which was presided by a different judge, adopted a different route to convict the border guards⁹⁶. The court painstakingly demonstrated that the actions of the guards were impermissible as per GDR laws. Even though use of force was permitted at the borders, it had to be used proportionally since the GDR Border Law specified “to preserve human life if possible” (Section 27.5)⁹⁷. Interestingly, despite finding the defendants guilty the judge suspended their sentence. Like the first trial court, the court refused to accept the excuse of “superior” orders, however, the court held that the soldiers were not motivated by ‘selfishness or criminal energy’ but were in ‘circumstances in which they had no influence’⁹⁸. Another instance where one set of reasoning is used decide conviction and the exact opposite to decide sentencing. The mildness of the sentencing in these trials led one of the East German dissidents, Bärbel Bohley, to conclude that the demand was for justice and instead they got *Rechtsstaat*.

Both these approaches of the trial courts seem to have been merged at the higher courts, both at the stage of appeal and finally by the constitutional court. This explains the existence of

⁹⁶ There were more than 60 border guard trials involving different victims.

⁹⁷ Manfred J Gabriel, ‘Coming to Terms with the East German Border Guards Cases’ (2000) 38 *Columbia Journal of Transnational Law* 377, p.390

⁹⁸ *supra* n.90, p.64

alternating logics of substantive justice and positive law in the constitutional court's judgement. This positivistic turn by the court had also come under critique by scholars for selectively deciding on the legality of GDR laws. Commenting on the decision, Peter Quint writes⁹⁹:

“For all their earnestness and complexity, opinions of this sort seem to be lacking in candor. The court created an ideal law of the GDR, through the use of techniques and principles resembling those current in the Federal Republic, solely for the purpose of saying that this hypothetical construct was “really” the law of the GDR and therefore its application today is not retroactive...”

Here we find a clear instance of how legality is indeed a construction to pursue moral/political ends. The historical experience with the Nazi regime, the legal approach adopted in the Nuremberg trials and the moral/political ends that were aimed to be fulfilled post WWII all made its significance felt after the collapse of the communist regime.

President of the Constitutional Court-László Sólyom and The Invisible Constitution

While the tension between substantive justice and positive law was handled by a delicate balancing act by the German judiciary, the Hungarian constitutional court was insistent upon the fact that reference to substantive justice and history cannot make hamper the value of legal certainty. The tenor of the judgement was significantly influenced by the president of the constitutional court- László Sólyom.

⁹⁹ Peter E Quint, *The Imperfect Union: Constitutional Structures of German Unification* (Princeton University Press 1997), p.203

As described earlier, the transition in Hungary involved negotiations in the National Roundtable among the elites, a process catalysed by the ideological cracks within the communist party. Sólyom was one of the members of the democratic opposition involved in the negotiation¹⁰⁰. One of the substantial results of the negotiations was the significant amendments to the Constitution of 1949. It is relevant to note that this constitution came into effect through the vote of a parliament that was still under significant communist influence. It was also this parliament which elected the first justices of the constitutional court including Sólyom. Considering this series of events, the reluctance of the Hungarian court to condemn the previous regime finds its justification. Unlike the East German or Czech case, where the regime collapsed swiftly and the tides dramatically turned against the members of the communist party, the Hungarian case was more similar to the events in Poland where elite negotiation ensured that the communists shielded themselves from punitive actions¹⁰¹. The nature of transition along with the choice of the president influenced the decision. However, this alone does not justify the positivist approach to understanding the rule of law. A much more significant factor was Sólyom's desire for the court to create its own jurisprudence that would solidify the newly adopted constitution which he termed as 'revolution under the rule of law'¹⁰². In his concurring opinion on the constitutionality of death penalty, one of the earliest cases decided by the newly established constitutional court, he stated that the constitutional court must make efforts to explain the 'theoretical bases of the constitution and the rights included'¹⁰³. This 'invisible constitution' he believed was a reliable standard of constitutionality beyond the written constitution which was susceptible to amendments. It was evident from his early decisions in the death penalty case and the holding against the

¹⁰⁰ supra n.41, p.1774

¹⁰¹ Richard F Staar, 'Transition in Poland' (1990) 89(551) *Current History* 401
<http://www.jstor.org/stable/45316438> accessed 13 June 2025.

¹⁰² supra n.41, p.1776

¹⁰³ Supra n.41, p.1777

reprivatization programme which gave back property only to agricultural co-operatives, that he adamantly believed that the court must embrace its role as the guardian of the constitution. To fulfil this task, he did not only stop with judgements but often spoke to the press about the decisions which were issued. Much pertinent to this thesis, is his statements on the statute of limitation case. While announcing the judgement he states¹⁰⁴:

“There is no reason for joy. The whole matter was about a conflict of values. No matter how many serious crimes were committed, the ethical glory of punishing a villain is not worth the legal guarantees of our constitutional state”.

While the discourse around the German and Czech case was to view the conflict as one between morality and law, the Hungarian court transforms the discussion into a conflict between two moral principles. He states in an interview defending the judgement, that while moral justice demands the punishment of the criminal, moral justice also demands punishment be accorded through law¹⁰⁵. While the Czech court reasoned that substantive justice must prevailed because law cannot be an aid to injustice, the Hungarian court saw the rule of law as an end in itself. This position of the Hungarian court can be understood as a manifestation of Sólyom’s anxiety about how a culture of legal uncertainty would prevail through constant amendments of written constitution¹⁰⁶, which was his indeed his primary motivation to encourage the courts to define the constitution and its rights. His emphasis on the certainty of law from this prism seems to be an attempt to send a message to the legislature and the public at large of the importance of ‘legal certainty’ in a rule-based society.

¹⁰⁴ Ken Kasriel, ‘Court Rules Justice Law Unconstitutional’ *Inter Press Service* (5 March 1992).

¹⁰⁵ ‘President of the Constitutional Court Defends Zetenyi/Takács Ruling’ (Hungarian Radio broadcast, 8 March 1992), translated in *BBC Summary of World Broadcasts*, 10 March 1992.

¹⁰⁶ For all his like dislike of amendments, he demanded an amendment to increase the tenure of judges up to 12 years without renewal. The request was ignored. See, *supra* note 41, p.1785

Co-incidentally the year he finished his term at the Court (1998), was also the same year Viktor Orbán was elected as the prime minister for the first time¹⁰⁷. It was ultimately under Orbán's reign in 2011, a new constitution was adopted which under Article U¹⁰⁸, explicitly abolished the limitation period for crimes committed under the regime. An aspiration which can also be found in the preamble. Some commentators speculate that Orbán's transgression of judicial independence was a response to the activism of the first of the court under Sólyom.

The Symbolism of Rule of law

After the suspension of the limitation period by the Czech constitutional court, the Office for Documentation and Investigation of Crimes of Communism (UDV) reviewed over 3,000 cases from 1995 until 2008¹⁰⁹. However, only 100 charges were pursued and only around 30 convictions were secured. Out of these 30 convictions, only 8 led to prison terms, the rest received suspended sentences. The pattern followed by the German judiciary, which combined strong condemnation with meek punishments were also followed in Czech Republic. Like Erich Honecker, many senior officials like former Interior Minister under the communist regime in Czech, Vratislav Vajnar were let off on health grounds¹¹⁰. The trial court in Germany reasoned that conducting the trial of Honecker would be opposed to the guarantee of human dignity afforded by the German basic law¹¹¹. What explains this balancing of the court between conviction and sentencing? What explains the Hungarian court's insistence that the certainty of law must be preserved regardless of the harshness of the crime?

¹⁰⁷ supra note 41, p.1786

¹⁰⁸ Fundamental Law of Hungary (25 April 2011), Art U.

¹⁰⁹ Nadya Nedelsky, 'Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia' (2004) 33 *Theory and Society* 1, 65 <http://www.jstor.org/stable/4144891> accessed 13 June 2025.

¹¹⁰ Supra n.90, p.68

¹¹¹ Ibid.

In my view, all the constitutional courts who found themselves in comparable circumstances of political transformation made an attempt to make the symbolic value of the ‘rule of law’ be felt among the population. The employment of a particular meaning of ‘rule of law’ in the judgement was an attempt to affirm particular values and speak to the future of newly established democracies or as in the case of Germany to the future of a unified people¹¹². Despite having common goals, the difference in outcome and approach of the courts can be explained by the plurality of symbolic messages courts can pass. For the German and Czech courts, a new beginning would necessarily involve a repudiation of the past. Without condemning the crimes of the communist regime, it would not be possible to convey the message that democracy is indeed the antidote to authoritarianism. The survivors of the victims of crimes under the previous regime would not be satisfied if the court failed to acknowledge the severity of injustice borne under communist regime. The symbolic deployment of ‘rule of law’ was different in the case of Hungary. The message conveyed by the Hungarian court reminded the public that democratic rule was distinct from authoritarian rule on account of its utmost respect for the law itself. The practice of authoritarian regimes to deploy law for ulterior motives was not to be tolerated in a democratic state. Moral convictions or the need to satiate the feelings of revenge cannot be a justification to depart from the rigour of law. We thus see how different conceptions of morality and law can have symbolic utility in periods of political transitions.

Perhaps Rachel Kleinfeld is right in her observation that the multiple ends of ‘rule of law’ is far more important than a single unified institutional conception¹¹³. The analysis of the decisions of the constitutional courts in politically volatile periods provides empirical backing to the observation that in the midst of our search for legal objectivity and theoretical clarity we

¹¹² Supra n.97, p.412

¹¹³ Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners* (Carnegie Endowment for International Peace, Carnegie Paper No 55, January 2005)

must not lose sight of the plural and often conflicting goals that legal and political systems aim to achieve.

VI. Findings and Summary

This thesis has added to the literature on transitional justice by focusing on the logics of transitional adjudication after the collapse of various communist regimes in Europe. It was found that constitutional courts are involved in employing an understanding of ‘rule of law’ to achieve specific ends informed by history, morality and political demands of the time. The constitutional court in Germany settled the question of retroactive application of law by using both natural law and positive law to uphold the conviction of those responsible for the tragic shootings at Berlin Wall. However, the courts chose to impose lenient sentences to those convicted. While upholding the law that removed limitation periods for crimes unprosecuted during the communist era, the Czech court concluded that the principle of retroactivity is unharmed by such a legislation. They asserted that a state that functions under the ‘rule of law’ cannot allow law to be an aid to oppression and criminality. Furthermore, they observed that the law on limitation is merely procedural and are not part of fundamental rights. But similar to the German case, it was found then when matters were eventually tried before courts it led to lenient sentencing. The Hungarian court treated laws on limitation as though they were inviolable and considered that allowing for prosecution of crimes of the previous regime in a modern democracy would violate the security provided by the rule of law.

There were various factors that were found to be relevant while analysing the decisions. First, the nature of transition shed light on why a particular constitutional court opts for a retributive account and others do not. The higher the involvement of the masses during the transition the more likely was there to be a punitive approach adopted by the courts against the previous regime. Second, recent historical experience of dealing with transition from an authoritarian regime also affects the judicial approach to the case. As was evident from the German case, the

political/judicial approach adopted to come to terms with the Nazi past was influential while dealing with the authoritarianism of the communists. Third, as was visible with the Hungarian case, how the president of the constitutional court conceives the authority of judiciary holds significant explanatory power while assessing the judgement. Lastly, the finding that constitutional courts attempt to convey the symbolic value of ‘rule of law’ after a political transition is itself a contributing factor to understand the motives behind a particular judicial approach. Since a multitude of symbolism can be invoked, we find there to be a multitude of ‘rule of law’ with no one clear definition— some courts construct the meaning of ‘rule of law’ to condemn perpetrators of crimes of the previous regime thereby separating moral law from mere legalism and other courts imbue meaning into the concept of law to display that a democratic society grants the security of law to everyone and thereby distinguishing a democratic regime from an authoritarian one.

In its final analysis, the thesis highlights the challenges of transitional adjudication. Adjudication in the period of political transformation involves reckoning with the past and creating stable foundations for a new beginning¹¹⁴. When legal systems find themselves disturbed during transition, the intuitions we have of justice based on pure legal justifications find themselves threatened. For strict adherents of legal positivism, judges applying anything but law appear to be insurgents in robes. But the challenges of transitional adjudication most clearly elucidate the naivety in believing that decision making restricts itself to determining whether the facts fit the law. It appears to be the case, that more often than we would like to believe, it is the law that is made to fit the facts.

¹¹⁴ Otto Kirchheimer, *Political Justice: The Use of Legal Procedures for Political Ends* (photo reprint 1980, originally published 1961) 336.

VII. Radbruch's Principle and Legal Philosophy

The complicity of the legal system in enabling the injustice of the Nazi regime caused a transformation in legal philosophy in Germany. Nothing encapsulates this movement in legal philosophy better than Gustav Radbruch's change in position on legal positivism. Prior to WWII, he held that any statute regardless of its content is better than no statute at all since it at least has the benefit of legal certainty. Much of the argument hung on value relativism. Since there cannot be uniformity among judges on what justice entails, he believed that the legal certainty which was provided by duly enacted law must be preferred. The horrors of the Nazi regime caused a change in perspective. He declared in his famous article *Statutory Lawlessness and Supra-Statutory Law*¹¹⁵ in 1946, that when statutory law reaches an 'intolerable degree' of injustice, then such flawed law must yield to justice. He viewed the conflict between legal certainty and justice as a conflict of justice with itself— between apparent and real justice. He believed this conflict to be expressed in the Gospel between the commands to 'obey them that have the rule over you, and submit yourselves' and to 'obey God rather than men'¹¹⁶. In my view, these contradictory commands of the Gospel reveal questions pertinent to legal philosophy since it highlights a contentious relationship between human and transcendental sovereignty. While a thorough attempt to unravel this question is beyond the scope of this thesis, I will briefly comment on the implication of Radbruch's principle on the nature of law.

¹¹⁵ Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26(1) *Oxford Journal of Legal Studies* 1 <http://www.jstor.org/stable/3600538> accessed 12 June 2025

¹¹⁶ Ibid. p.7

The Hart-Fueller debate on Radbruch's principle

It is generally agreed that Radbruch's principle is a direction for how judges must decide certain contentious cases—the demands of justice are such that intolerably unjust statutes must not be applied. What is contentious about Radbruch's principle is whether or not it is an attempt to clarify what the nature of law itself is¹¹⁷. There are two possible ways one could understand the relationship between unjust 'laws' and legal validity.

In the first approach, one could argue that unjust laws must not be applied by judges despite these laws having legal validity. This approach is preferred by Hart. Hart prefers a separation of law and morality¹¹⁸ and criticizes Radbruch's principle of merging them. As per Hart, even if judges decline the application of unjust laws, they must do so with "candour" and "plain speech"¹¹⁹. In other words, they must be transparent and honest that they are indeed choosing not to apply valid law since morality demands so. From this perspective, the judges in the *Border Guards* case must not have attempted to show how the laws of GDR were invalid but instead be honest about applying criminal legislation retroactively. In extreme cases, what morality demands is the refusal to apply valid law due to its injustice. However, Hart believed, that one must not confuse the *application of law* with the *validity of law*.

Alternatively, one could read Radbruch's principle as stating that unjust laws are not laws at all and therefore, they need not be applied. This reading is preferred by Fueller. In Fueller's view, it is the heights of 'moral confusion' when courts refuse to apply something it admits to be law¹²⁰. If the norm in question does not conform to the requirement of the "inner morality"

¹¹⁷ Brian Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 American Journal of Jurisprudence 45, https://scholarship.law.umn.edu/faculty_articles/450 accessed 12 June 2025

¹¹⁸ HLA Hart, 'Positivism and the Separation of Law and Morality' (1958) 71 *Harvard Law Review* 593, 615–21

¹¹⁹ Supra note 117, p.48

¹²⁰ Lon L Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 648–57, p. 655

of law¹²¹, then it is not law at all. GDR enactments that were shrouded in a lack of clarity, secrecy and attempt to trap citizens do not have the legitimacy of law. Therefore, border guards cannot protect their actions under the guise of law since they were no law at all.

Both positions have their own set of challenges. Hart's position admits that in extreme cases there is judicial discretion to deny law based on morality. However, the lack of guidance to judges as to when moral consideration overrides the force of valid remains an unresolved issue. On most occasions, judges are caught up in the middle of legal language to an extent where acting against the language of law without questioning its validity would lead to contradictions. Consider for instance a Nazi era law that stated that any Jew who fled Germany automatically lost citizenship¹²². This law indirectly prevents a decedent of Jew who fled Germany to claim inheritance. In such a case, the court cannot admit the law to be valid and at the same time excuse itself to apply it. The court must make a *legal* determination of whether Jews who fled from Germany died as Germans or not to settle the moral ramification of the judgement.

Fuller's importation of morality into law, though might be helpful in deciding unjust laws is not sufficient to eliminate the use of supra-statutory norms in extreme cases. While GDR laws permitting use of force at the borders might have been unlawful, there still seems to be a lack of justification for punishment. Considering the GDR laws for defining the crime of homicide and invalidating a law that creates an exception for homicide appears to lack consistency. He admittedly reverts back to moral consideration in such cases. What then is the best way to read Radbruch's principle in light of the Hart-Fueller debate on the nature of law?

John Finnis and the double life of law

¹²¹ Ibid., p. 650

¹²² supra n.97, p.400

It is pertinent to note that Radbruch's embrace of natural law was reluctant. A careful reading of the principle suggests that he had one foot firmly rooted in legal positivism. The principle does not denounce all unjust laws to lose its force, but only those that have crossed the threshold of being 'intolerable'. To clarify whether an 'intolerable' norm would qualify as law or not, it would be helpful to turn to Finnis. As per Finnis, law leads a double life¹²³. Unjust laws are laws to the extent that they have a history of authoritative action. However, they are not laws "in the fullest sense"¹²⁴ since they do not provide sufficient justifications for judges and citizens to obey them. Since the coercion of the state is only a means to achieve other ends that are necessary for human co-ordination and flourishing, coercion alone cannot be a justification for obedience to law. Therefore, to accept the validity of law is to accept its double life. This observation of Finnis, that law is both a social fact and a normative institution helps clarify the debate on the separation between law and morality.

From this lens, it appears that one of the tasks of the judge is to balance this double life of the law. Radbruch's insistence that the judge not apply law that is intolerably unjust is a direction for the judges to recognize when the balance has tipped on the side of ethics. This is distinct from Hart since it allows judges to modify a law in light of certain ethical ends to apply laws in their full authority. This way human sovereignty (vested in people but represented by executive/legislature) is harmonized by transcendental sovereignty (through the recognition of ethical principles).

One might criticize Radbruch and ask how can we be certain that a judge would invalidate norms at the threshold of 'intolerable' justice and not any other. This I believe to be an unresolvable problem only when the question is posed in its abstract. Given specific facts, many might agree on what constitutes injustice. Radbruch makes no demand for us to identify

¹²³ John Finnis, 'On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review* 1597, 1602–06

¹²⁴ John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 351–66

what constitutes justice, which is a far greater challenge than identifying what constitutes extreme injustice. In any case, society outsources the task to judges precisely because complete consensus on such matters is not possible. Consider for a moment the definition of health. While there appears to be huge divergence in scientific view on what constitutes ‘good health’, there are still good reasons to visit the doctor. In the midst of uncertainty, we defer to their judgement on health. This conclusion does not suggest that the public blindly trust judges. There are corrupt judges just like how there are corrupt doctors. Once there is acceptance of the ethical dimensions of law and recognition of the plural objectives for which we deploy the instrument of law, political communities are called upon to ensure that judges who decide matters of life and death are of utmost integrity.

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