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Paradoxes in the Revolution of the Rule of Law

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Perhaps it is in the nature of "velvet revolutions" that their rough undersides are revealed in public forums, such as courts of law, where debates rage about the normative content of changed political systems. In Eastern and Central Europe, courts are now defining the powers of new regimes committed to the rule of law. One of the most difficult issues faced by these courts is how to maintain a commitment to the rule of law while serving the principles of substantive justice. In an attempt to reconcile these competing interests, courts have, in effect, continued "revolutions" within the framework of the law.

We can best understand this "paradox of the revolution of the rule of law," as it has been called,[1] by looking to examples. In this paper, I explore the dilemmas recently confronted by post-Communist transitional governments in Eastern and Central Europe in considering the prosecution of those who perpetrated crimes with the approval of previous regimes. Their dilemma is a familiar one; it arose in the Nuremberg trials following World War II and, before that, in the trials of kings in eighteenth-century transitions.

Two court cases highlight the dilemma. The first is the Hungarian Constitutional Court's consideration of the Zetenyi Law,[2] which would have allowed prosecutions for treason and murder related to the brutal suppression of the 1956 coup attempt.[3] The second is a "border guards" case, heard by the Berlin Trial Court, which involved the prosecution of several guards for shootings at the Berlin Wall.[4] Both cases involve weighty symbols of freedom and repression: 1956 is thought of as the founding year of Hungary's revolution, while the Berlin Wall and its collapse were the central symbols of

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1. Judgment of Mar. 5, 1992, 1992/11 ABH. 77, pt. V(5) (Hung.) (unofficial translation on file with author).

2. Law on the Right to Prosecute Serious Criminal Offenses Committed Between Dec. 21, 1944 and May 2, 1990 That Had Not Been Prosecuted for Political Reasons, Nov. 4, 1991 [hereinafter Zetenyi Law].

3. Judgment of Mar. 5, 1992, 1992/11 ABH. pt. I(1). For another discussion of the Zetenyi Law case, see Forum, *Dilemmas of Justice*, E. EUR. CONST. REV., Summer 1992, at 17.

4. Judgment of Jan. 1, 1992, LG [Trial Court] (Berlin), (523) 2 Js 48/90 (9/91), *reprinted in* 47 JURISTEN ZEITUNG 691 (1992) [hereinafter Border Guards Case]. For a discussion of other "border guards" cases, see Jörg Arnold & Martin Kühl, *Forum: Probleme der Strafbarkeit von "Mauerschützen,"* 32 JURISTISCHE SCHULUNG 991 (1992).

Soviet domination and its demise. Both cases also illustrate the problems involved in attempting to effect substantial change in a society through and within the law. Any resolution of the paradox is not merely a matter of jurisprudential interest, but one that could have political implications wherever transitions similar to those in Eastern and Central Europe take place.

I. RULE OF LAW IN HUNGARY AND UNIFIED GERMANY

In 1991, Hungary's Parliament passed the Zetenyi Law,[5] which authorized the lifting of statutes of limitations for treason, premeditated murder, and aggravated assault. The law, in effect, allowed prosecutions for crimes committed in suppressing the 1956 revolution, among other grave crimes of the past. In a landmark opinion, the Hungarian Constitutional Court held the law unconstitutional. The Court reasoned that, under the newly amended Hungarian Constitution, the rule-of-law principle of prospectivity in lawmaking overrode any *ex post* attempt to extend the statute of limitations, even if the worst offenses would thereby go unpunished.[6]

The opinion begins with a statement of the Court's perception of its dilemma: "The Constitutional Court is the repository of the paradox of the 'revolution of the rule of law.'"[7] Rule of law, the Constitutional Court asserted, means "predictability and foreseeability."[8] Furthermore,

> certainty of the law demands of the state, and primarily the legislature, that the whole of the law . . . be clear, unambiguous, its impact predictable and its consequences foreseeable by those whom the laws address. From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation, especially ex post facto legislation . . . directly follows. . . . Only by following formalized legal procedures can there be valid law, only by adherence to procedural norms can the administration of justice operate constitutionally.[9]

According to the Court, the basic principle of the rule of law is "certainty of the law."[10] This basic principle is juxtaposed against the principle of substantive justice implied in the law. For the court, however, "[t]he certainty of the law based on formal and objective principles is more important than necessarily partial and subjective justice."[11] The choices seemed irreconcilable.

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5. Zetenyi Law, *supra* note 2.

6. Judgment of Mar. 5, 1991, 1992/11 ABH. pt. V(1).

7. *Id.* pt. III(4). Rule of law is unfortunately nowhere defined in the Constitution, although one related term is included: *jogallam*, which is translated as the promise of a "rule of law" or "constitutional" state. This term has no exact equivalent in English but has also been translated as *Rechtsstaat*. *Id.* pt. I(2) n.1. In the *Zetenyi* case the court declared that the content of the Constitution's *Rechtsstaat* mandate is to be determined by the judiciary. *Id.* pt. III(2).

8. *Id.* pt. IV(1).

9. *Id.*

10. *Id.*

11. *Id.* pt. III(5).

In a newly unified Germany, the trial of the border guards for shootings at the Berlin Wall offers another illustration of the dilemma. The Border Protections Law of the former German Democratic Republic (GDR) authorized soldiers to shoot in response to "act[s] of unlawful border crossing."[12] Such acts were very broadly defined and included border crossings attempted by two people together or those committed with "particular intensity." The custom at the border was to enforce the law strictly: supervisors emphasized that "a breach of the border should be prevented at all costs."[13]

In determining whether the GDR law provides border guards a defense against the charges, the Berlin Trial Court acknowledged the rule-of-law/justice dilemma:

> In analyzing the question of whether it is permissible to threaten with death a person who does not want to abide by the exit prohibition and — disregarding it — wants to cross the border, and whether, if necessary, it is permissible to kill him, we are confronted with the question of whether everything is just that was formally, or through interpretation, considered to be a law. [14]

The tension between the "formal" and the "just" is at the heart of the problem. Holding the border guards accountable, the court rejected defenses based on the law as written:

> The basic principle that an act can be punished only if punishability was determined by law before the act was committed . . . does not hinder punishment in this case. . . . Justice and humanity were portrayed as ideals also in the then GDR. In general, adequate ideas as to the basis of natural justice were indeed disseminated.[15]

The court relied on precedents of the Federal Constitutional Court elevating the principle of material justice over the principle of the certainty of the law in certain circumstances.[16] Thus, the Hungarian and German courts formulated the dilemma in a similar manner, but came down on opposite sides: the Hungarian court interpreted the rule of law to require certainty, whereas the Berlin court interpreted it to require substantive justice.

The dilemma of successor justice faced by the Hungarian and German courts forms part of a rich dialogue on the nature of law. H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law.[17] Fuller rejected Hart's abstract formulation of the problem, and instead focused on postwar Germany. The "true nature of the dilemma confronted by Germany

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12. Border Guards Case, *supra* note 4, at 692.
13. *Id.*
14. *Id.*
15. *Id.* at 694-95.
16. *Id.* at 693 (citing 3 BVerGE 232 (1953)).
17. *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Reply*].

in seeking to rebuild her shattered legal institutions," he wrote, was "to restore both respect for law and respect for justice. . . . [P]ainful antinomies were encountered in attempting to restore both at once . . . ."[18] In a now well-known hypothetical, *The Problem of the Grudge Informer*, Fuller questioned whether a new government can bring a collaborator to justice if doing so would necessitate tampering with the laws in effect at the time when the acts were committed.[19] Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified selective tampering to preserve the morality of the law.

Contemporary scholarly analyses of the nature of the rule of law such as Ronald Dworkin's perpetuate antinomic conceptions of the rule of law. Dworkin speaks of a "rule book" conception, which emphasizes procedural protections, such as prospectivity of law, and the "rights" conception, which demands recognition of moral and political rights in positive law and does not distinguish between procedural and substantive justice.[20] To the extent that Dworkin's analysis sets forth competing procedural and substantive visions, the dilemma implicitly remains.[21]

The Hungarian and German cases may illuminate scholarly analysis of this important problem, but they leave the debate exactly as it was: a clash of two absolutes. Pushing the analysis further requires a better understanding of the values served by the rule of law. Moving outside the antinomies of law and morality, law and discretion, law and justice, rules and rights, means thinking about how to reconcile a variety of justice values.

The judges in the two cases in question saw the problem as the pursuit of successor justice threatening certainty of the law. Their approach suggests that "procedural justice" has become detached from a more substantive understanding of the rule of law. Yet what is the independent content of the principle of prospectivity? How are we to make sense of a commitment to these principles separated from some other rule-of-law ideal? Were the two always in tension? Or was there a time when the prospectivity principle could not be understood apart from the principle of substantive justice?

The antinomic formulation of the rule-of-law/justice dilemma in cases and scholarly works results from a distorted view of the rule of law that has developed over time. Re-situating the dilemma in a historical and political context yields a different understanding of the rule of law. The concept of the rule of law developed in ancient Greece in response to tyranny. The Greeks contrasted tyranny with "isonomy," an early conception of the rule of law meaning "equal law for the bad and the good."[22] In the Greek view, the rule

18. Fuller, *Reply*, *supra* note 17, at 657.
19. *See* LON L. FULLER, THE MORALITY OF LAW 187 (1964) [hereinafter FULLER, MORALITY].
20. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 11-12 (1985).
21. *Id.* at 12-13.
22. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 162-75 (1960) (tracing origins of rule

of law is best understood by contrasting it with rule by man.[23] How is it that the early view of the rule of law as equal justice, a view that originated in a societal response to tyranny, has given way to the contemporary view of an insolvable dilemma between justice and the rule of law? Where is the link between the rule-of-law principle of equal justice and the rule-of-law principle of prospectivity? The prospectivity principle, I argue, developed in order to help realize the equal-justice ideal. Seen against a backdrop of tyranny, prospectivity is critical to the rule of law.

In a democracy, a prospectivity requirement can be viewed as a way to make operational a principle of equal justice. The Greeks viewed majority lawmaking as a way to promote equal treatment under the law.[24] But the tyranny or unequal-justice problem is not entirely remedied by democratic lawmaking; a majority may still tyrannize a minority. Here, a role for prospectivity arises: prospectivity is not an autonomous rule-of-law ideal, but rather a constraint designed to promote the rule of law understood as equal justice.

II. THE SEARCH FOR NEUTRAL PRINCIPLES AND THE LEAST DANGEROUS BRANCH

Probing the legal rhetoric of the Hungarian and German cases leads to a different explanation for the decisions involved. By framing the rule-of-law/justice dilemmas as *ex post facto* problems in ordinary constitutional times, the opinions avoid addressing the larger question of the authority of a transitional judiciary to decide the extent of legal continuity of a prior regime. What is the role of the judge and of judicial review where the regime itself, and not merely one piece of legislation, is of questionable legitimacy? To what extent are the questions confronted by the Berlin and Hungarian courts appropriate questions for the judiciary? Should they not instead be part of a vital political debate?

Returning first to the Berlin court in the border guards case, to what extent did acceptance or rejection of the guards' defenses imply evaluation of the validity of the past legal regime? According to the Unification Treaty, acts that took place prior to the treaty are subject to the provisions of the GDR's former criminal code.[25] The Berlin court rejected the guards' defenses, even though they were grounded in prior law, and thus apparently ignored the Treaty's command.[26] The court, however, was guided by past decisions concerning the Nazi regime. Relying on a doctrine established in a 1953

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of law).

23. *See* ARISTOTLE, THE ATHENIAN CONSTITUTION 52 (P.J. Rhodes trans., 1984). On "isonomy," see HAYEK, *supra* note 22, at 164-65.

24. ARISTOTLE, THE POLITICS 225-26 (Trevor J. Saunders ed. & T.A. Sinclair trans., rev. ed. 1981).

25. Border Guards Case, *supra* note 4, at 691.

26. *Id.* at 693-95.

decision distinguishing positive law from justice, the court asserted, "The experience of the National Socialist regime in Germany, in particular, has taught that . . . it must be possible *in extreme cases* to value the principle of material justice more highly than the principle of the certainty of the law."[27] This response to World War II injustice constrains judicial decisionmaking in contemporary post-Communist controversies in unified Germany. The court's reference to "extreme cases" appears to equate the crimes of the national socialist period with the actions taken during the Communist period.[28]

The Court's attempt to link its decision to the post-Nazi rule-of-law dilemma, however, cannot obscure the differences between the post-Nazi and present-day cases. In post-Nazi Germany, achieving the rule of law as equal justice, appeared to collide with achieving the rule of law as procedural regularity. In postwar Germany, legal institutions had no legitimacy. Simultaneously restoring society's confidence in law and in justice required some degree of compromise.

The post-Nazi dilemma does not arise in post-Communist Germany. East Germany was incorporated into a fully functioning legal order; in post-Nazi Germany, no such order existed. To the extent that the legal continuity problem arises at all in the border guards cases, it does so on a much smaller scale than in other post-Communist transitions. Thus, for example, in assuming the power to reject defenses based on past law, the Berlin court does not usurp the power of other political branches. Despite the Court's characterization of its dilemma, it did not bear the burden of restoring the rule of law.

Turning to the Hungarian Constitutional Court, the rule-of-law paradox can be better understood as a rhetorical device enabling the court to avoid explicitly addressing the related question of the extent of legal continuity with the prior regime. The court's conclusion that the Zetenyi Law was unconstitutional appears questionable when one considers that the amended Constitution lacked an express provision against *ex post facto* laws. The mandate for the rule of law is derived from one word in the Constitution: *jogallam.*[29] It is from this one word, alternatively interpreted as promising a "rule of law" or "constitutional" state, that the court construed a mandate to prohibit the Parliament's revival of time-barred causes of action. In elevating the *ex post facto* principle above equal justice under the law, the court employed a formalist approach to halt Parliament's efforts to make perpetrators from previous regimes criminally accountable. This approach enables the court to operate in a counterrevolutionary fashion while increasing judicial power. In effect, the statute-of-limitations decision represents a controversial power grab

27. *Id.* at 693 (citing 3 BVerGE 232 (1953)) (author's translation).
28. *Id.*
29. Judgment of Mar. 5, 1992, 1992/11 ABH. pt. I(2).

by the court. It is a brilliant power grab in that it appears to represent a victory for the rule of law.

The question of legal continuity with the prior regime, so deftly skirted by the Hungarian Constitutional Court, lies at the heart of Fuller's hypothetical.[30] Fuller offers some possible solutions: absolute legal continuity, absolute discontinuity, and selective discontinuity. The Hungarian Parliament, in effect, chose the route of selective discontinuity in the statute-of-limitations law.[31] The Constitutional Court, however, ultimately denied Parliament the power to make this choice, striking down the law. In a profound challenge to Parliament's authority, the court limited Parliament's power to interpret the prior legal order and held that full continuity is required by the rule of law: "Certainty of the law demands . . . the protection of rights previously conferred."[32] It characterized Parliament's choice of selective discontinuity as a challenge to the legality of the new legal order:

> With respect to its validity, there is no distinction between "pre-constitution" and "post-constitution" law. The legitimacy of the different [political] systems during the past half century is a matter of indifference . . . . From the viewpoint of the constitutionality of laws it does not comprise a meaningful category.[33]

The court justified its rejection of Parliament's selective discontinuity proposal on the basis of rule-of-law principles. Yet the court's emphasis on certainty of the law masked its own interpretive leaps and exercise of discretion.

Focusing exclusively on the content of the concept of the rule of law ignores the question of which governmental institutions should have the power to define its parameters. Does the power properly lie with the court or with Parliament? In its decision on the Zetenyi Law, the court asserted itself as the exclusive interpreter of the Constitution, and more broadly of the constitutional regime. Following this holding, the full burden of evaluating the past legal order lies on the court. The court's assertion of exclusive interpretive power is highly problematic; in a constitutional democracy, understandings of legality and constitutionality are best promoted not by judicial monopoly over constitutional interpretation, but by a system allowing for simultaneous and parallel interpretation by the political branches and by the people.

Although the court never acknowledged its own interpretive leaps, a general concern about illegality pervaded the opinion. Nagging questions underlie the court's formalism. What is the validity of the entire endeavor? What ensures the legitimacy of a constitutional court engaging in judicial review under an amended constitution in a transitional period? To what extent does a new constitutional system, and, as in Hungary, an entirely new

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30. FULLER, MORALITY, *supra* note 19, at 187.

31. The Parliament's proposal in the Zetenyi Law was to generally respect the past regime's legal order, but to reopen cases wherever criminal laws had been applied in a politically discriminatory way.

32. Judgment of Mar. 5, 1992, 1992/11 ABH. pt. III(4).

33. *Id.* pt. III(3).

constitutional court, imply a moment of illegality, a glitch in the rule of law as the court has defined it? The Hungarian court addressed these concerns by clinging to the fiction that a state under the rule of law cannot be — and was not in the case of Hungary — created by undermining rule of law:

> The politically revolutionary changes adopted by the [October 1989] Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system's regulation of the power to legislate, thereby gaining their binding force.[34]

The court thus dismissed questions about its own legitimacy.

The *Zetenyi* case stands for the proposition that the authority to assess the legality of the prior regime does not lie with Parliament, but instead with the Constitutional Court. Perhaps this makes sense; after all, the Constitutional Court is an entirely new institution. New institutions carry with them the legitimacy of hope. In contrast, Parliament and the political process suffer from accumulated distrust. It is no wonder that there is fear of Parliament, when one considers the nature of its work in prior years: from 1980 to 1985, it met for a total of thirty-two days. In those thirty-two days, twenty-two acts were passed, with twenty-one of these unanimously approved.[35] Distrust of parliaments and politics is not particular to Hungary; it is pervasive in the region. Sadly, the distrust does not seem to be a function of post-changeover elections but seem to be more deeply, perhaps historically and institutionally, ingrained.

Consider the following hypothetical: what if the question of legal continuity had arisen, not in the context of new legislation, but instead in the case of an individual defendant? Would Hungary's Constitutional Court have reached the same decision? Or might the court have articulated a principle allowing the revival of statutes of limitations in cases of grave crimes committed in the course of political persecution? Perhaps it might have based such a decision on a more substantive conception of the rule of law as the promise of equal justice under law, regardless of political affiliation. If the court had come to such a decision, then the *Zetenyi* case would be less about the rule of law than about institutional distrust.[36]

Already, Hungary's Parliament has responded to the court's decision with a law basing prosecutions on a pre-constitutional law that proscribed genocide without setting a statute of limitations. Suppose the case returns to the court. What would be the result? Parliament has trapped the court in its adherence

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34. *Id.* pt. III(3).

35. DONALD T. FOX & ANDREA BONIME-BLANC, HUNGARIAN CONSTITUTIONAL REFORM AND THE RULE OF LAW 30 (1993).

36. Indeed, Justice Sólyom concedes as much: "The existence of the Constitutional Court during the transition thus allowed the transformation of political problems into legal questions that could be addressed with final, binding decisions." László Sólyom, *The Hungarian Constitutional Court and Social Change*, 19 YALE J. INT'L L. 223, 223 (1994).

to the norm of absolute legal continuity. Will the Constitutional Court now invoke a different theory of the rule of law?

The transitional judges of Hungary, Germany, and other countries in the region have had to confront the difficulty of decisionmaking in uncertain times. Lacking a shared understanding of justice, burdened with what they interpret as the intractable paradox of the "formal" versus the "just," the transitional judges can be expected to continue to have contradictory solutions to the *ex post* justice problem — solutions grounded in each state's historical and political circumstances.