

PROSECUTING HISTORY

*POLITICAL JUSTICE
IN POST-COMMUNIST EASTERN EUROPE*

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To Torben and Stefan

Remarking upon injustice is like having an eye gouged out, looking away is losing both eyes.

Russian proverb

We can readily find both states and scholars who *accept the differentiation of State Responsibility and yet reject the concept of Crimes of State.*

Joseph H. H. Weiler, "On Prophets and Judges"

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ABSTRACT

Fifty years after the Nuremberg trials, Europe is challenged once again with a question: Who is responsible for state-sponsored violations of human rights? This time, those put on trial or ostracised from power are elements of the Communist structures of control. Some observers have criticised these measures of political justice, comparing them to a 'witch hunt,' and accusing the courts and legislature of often engendering an unjustifiable collective guilt. In contrast, others have claimed that not enough is being done; that the people of Eastern Europe "have asked for justice, and got the rule of law."

In this thesis, the author proposes an assessment of the process of political justice taking place in post-Communist Eastern Europe. The approach taken is from the perspective of the role played in this process by the concept of collective responsibility of political organisations for violations of human rights. While concentrating on the way collective responsibility appears in the criminal law measures taken in Hungary, and in the administrative procedures of screening used in the Czech Republic, the thesis also aims to offer a comprehensive picture of the general debate on accountability for past human rights violations which takes place in post-Communist Eastern Europe.

The thesis underlines the complexity of the political reality in which the expectations for accountability for state-sponsored violations of human rights are answered. It also emphasises the importance for this answer to acknowledge the nature of the Communist regime, and of its representative structure known under the name of *Nomenklatura*. Based on these elements, the author argues for the necessity of combining individual and collective responsibility for human rights violations. A reconstructed concept of collective agency and collective responsibility appears to be the solution to the inconsistencies otherwise manifested in a process of political justice. Such concepts, the author argues, should allow for the acknowledgement - through commissions of truth, as well as through prosecution and screening - of the role played by the Communist structure of power in the violations of human rights which took place under its regime.

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Chapter One

COLLECTIVE RESPONSIBILITY AS A DIMENSION OF POLITICAL JUSTICE

Abstract

The introductory chapter focuses on defining the concept of political justice, and on establishing its connections with the concept of collective responsibility. After the analysis of the definition of the concept of political justice and terminological clarifications, the different approaches taken to political justice in Eastern Europe are presented. This analysis reveals the systematic violations of human rights as central to the debate on political justice. This fact brings the accountability of the power structures of the communist regime into discussion, establishing undeniable connections with the concept of collective responsibility. The acknowledgement of human rights as the legitimate objective of a process of political justice brings under analysis the right to revolution as the right implying a retroactive assessment of a repressive regime. The analysis of this right reinforces collective governmental accountability among the dimensions proposed in a process of political justice. This dimension remains to be identified in the Eastern European case studies analysed in Chapter Two and Chapter Three.

1.1 The “Alternative” Fuller Never Wrote About

In 1969 Fuller added to his previously published book *The Morality of Law* an appendix entitled “The Problem of the Grudge Informer.”¹ In the appendix, which, as it happens, was published almost half way between the fall of the Nazi regime and the fall of Communism in the Soviet bloc, Fuller wrote about an imaginary society confronted with the difficulties of transition from a repressive regime. Through his essay, Fuller tried to

¹Lon L. Fuller, *The Morality of Law*, rev. ed. 1964 (New Haven and London: Yale University Press, 1969), pp. 245-253.

revive the debate surrounding the issue of political justice. His original approach appears to be inspired by practical legal experience and expectations for justice which arose after the Second World War. At the same time, Fuller built a visionary bridge to the future by calling the main political actors of his imaginary society “the Purple Shirts.”

Fuller’s story goes as follows: The Purple Shirts arrived in power during a deep economic and political crisis. Their victory at the polls was preceded by an election campaign that was marked by reckless promises, ingenious falsifications and systematic physical intimidation of opponents. Once in power, apparently nothing changed in the constitutional and legal framework of the country: there were no steps taken to repeal the ancient Constitution or any of its provisions; the Civil, Criminal and Procedural Codes remained the same; no official or civil servant was dismissed and no judge was removed from the bench. Meanwhile, elections continued to be held regularly. As a matter of deliberate policy, the Purple Shirts once in power preserved an element of flexibility in their operations. At times they were acting through “the party in the streets,” whilst at other times they were implementing their policies through the state apparatus which they controlled entirely.

Although apparently not much had changed, the country started to sink “under a reign of terror.”² Judges who followed the law rather than the Party’s directives were beaten and even murdered. The meaning of the Criminal Code was perverted and used to imprison political opponents, or even to sentence them to death. Secret statutes known only to the

²Fuller, p. 247.

Party hierarchy were passed. Slowly but surely, using invented motives, the Purple Shirt Party disbanded all opposing political parties. In this legal context saturated with political discretion, informers who tried to resolve personal grudges found a fertile ground. The activities usually reported by informers were apparently minor: expressing personal views critical to the government, listening to foreign radio broadcasts, failing to report the loss of identification papers within five days, etc. The punishment for these acts, if proven true, could be the death penalty, as all these acts were seen as endangering the security of the state. Given the harshness of these consequences, the overthrow of the Purple Shirts regime brought with it a strong public demand for the grudge informers to be punished.

The main actor of Fuller's story is neither the Purple Shirt Party who established the repressive rule, nor the "grudge informer" who took advantage of the discretionary and totalitarian nature of the regime. The "hero" (and the victim, one could say) of the story is the reader, who is asked to take the place of an imaginary Minister of Justice, in an imaginary democratic post-Purple Shirt regime, and who is asked to choose between five alternative solutions to these demands for justice concerning the grudge informers. In Fuller's story, the five solutions are offered not by those thirsty for revenge, or by politicians seeking political capital, but by five imaginary Deputies concerned, presumably, with the preservation of legality and democratic government.

The problem of the grudge informers that the reader as Minister of Justice has to solve is a limited one, compared to the legacy of legal problems a repressive regime leaves

behind. Generalisations, however, are easily made by the reader. We are advised by the first of Fuller's Deputies that one cannot judge acts from the past if in the past those very acts were considered lawful: "The difference between ourselves and the Purple Shirts is not that theirs was an unlawful government - a contradiction in terms - but lies rather in the field of ideology."³ The second Deputy offers the same solution of impossibility of legal action against the grudge informers, although this time the solution is based on a totally different argument. We are told that the Purple Shirt Party established a lawless power, and that one cannot conclude that a system of law existed in a repressive regime. Thus, to judge an act committed in such a period as being unlawful would be a nonsense: "What they did do was neither lawful nor contrary to law, for they lived, not under a regime of law, but under one of anarchy and terror."⁴ The third Deputy suggests that in order to answer the expectations of justice, through the courts there should be "discrimination" between the different domains of the Purple Shirt rule. Only those acts where "the Purple Shirt philosophy intruded itself and perverted the administration of justice from its normal aims and uses"⁵ should be prosecuted. The fourth Deputy finds the third Deputy's pick-and-choose attitude objectionable. He proposes to enact a "designer law" which would cover only carefully selected acts.⁶ As an experienced lawyer, the fifth Deputy feels dismayed by this suggestion for an *ex post facto* criminal statute. Caring about the consistency of the legal discourse, he suggests that the law

³Fuller, p. 248.

⁴Fuller, p. 250.

⁵Fuller, p. 251.

⁶Fuller, p. 252.

should abstain from answering the expectations for political justice. According to the fifth Deputy, there is good evidence that, before long, the population would solve the problem of grudge informers outside the law. Therefore, since using any of the previous solutions would violate some or all fundamental legal principles, he proposes to let the people take the law into their own hands.⁷

It would be quite normal to hesitate when choosing between the five alternatives. In the end, when one opts for one or another alternative, one always remains with a feeling of compromise, with the feeling of having sacrificed either substantive justice or the rule of law. Fuller himself hesitates to openly test his ideas on the formal morality of law against the hard case of political justice. In fact, Fuller only exemplifies the dilemmas that arise from certain expectations for justice, he does not solve them; he leaves the reader to make the choice between the five alternatives.⁸

The dilemma of the grudge informers can easily be transferred to the vast injustice inherited in 1989 from the repressive Communist regimes in Eastern Europe. Nevertheless, when one is confronted with the paradigm of the grudge informers, the

⁷Fuller, p. 253.

⁸In the introduction to his book, Fuller does recommend chapter two as being instrumental to solving the dilemma of the Minister of Justice. Fuller, 1969, p. vii and pp. 33-94. Fuller's "procedural natural law" does not seem though to meet the challenge of a totalitarian regime, and many critics emphasise the fact that a regime could follow Fuller's procedural requirements and still enact "wicked laws." See Michael D. A. Freeman, Lloyd's Introduction to Jurisprudence, 6th ed. (London : Sweet & Maxwell, 1994), p. 723 ff. Speaking about the legacy of Purple Shirtism in Eastern Europe, Los states that none of the solutions offered by Fuller's deputies - now echoed in post-Communist parliaments - seem adequate. Maria Los, "In the Shadow of Totalitarian Law: Law-Making in Post-Communist Poland," in Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), p. 276.

question of which of the five solutions to choose from Fuller's account is not necessarily the first question that should be asked. The question that should be asked first is whether there are only five alternatives for justice. Concerning these alternatives, there are "rumours" - confirmed somehow by the recent post-Communist Eastern European experience with similar problems - that there might have been a sixth Deputy advising the Minister of Justice of the post-Purple Shirt regime. For unknown reasons, the opinion of this sixth Deputy does not appear in Fuller's account. Thus, one can only imagine what the sixth Deputy's advice to a post-Purple Shirt regime might be.

Were a sixth Deputy to exist, he would not contradict directly any of the other Deputies in their opinions about the way of dealing with the grudge informers. He would even praise the five Deputies' tendency to base each of their solutions within an evaluation of the nature of the Purple Shirt regime. However, the sixth Deputy would find that these evaluations lack legal depth. Indeed, he would argue that an answer to particular issues of justice derived from the fall of a repressive regime, such as the Purple Shirt regime, could not be found without addressing, within the law, the nature of these demands for justice. The nature of a process of justice such as the one generating the problem of the grudge informers is always the same, he would say: it basically proposes a "backward-looking" assessment of the ousted political regime. Therefore, addressing the aspects of an "institutional" responsibility of a repressive totalitarian regime would become central to any such process of political justice. In other words, the sixth Deputy would argue that in order for the legal discourse to be able to answer the problem of the grudge informer appropriately, it would have first to address the Purple Shirt regime itself.

Is there a way to address a past regime as a whole, as the sixth Deputy would advise? Who would be responsible for *the regime*? Could we conceive, in law, a collective political responsibility which would match up to the crimes of the regime? And, could this be done without endangering the fragile democracy? These are all questions which indeed, should be answered before being able to decide about the grudge informers. In fact, only by answering these questions can we establish the basis for a more just solution to the problem of the grudge informers.

This thesis is seeking to provide for this basis for justice in the context of the post-Communist Eastern Europe. Following this objective, the thesis will analyse the main dimensions of the processes of political justice initiated in the Eastern European countries, focusing on the role played by the concept of collective responsibility.

The inquiry into the relationship between political justice and the concept of collective responsibility will be pursued as follows. In this introductory chapter the concept of political justice, its main objective, and its potential social agents, are defined. The second and third chapter will be dedicated to the analysis of the two main approaches to political justice in Eastern Europe: the criminal law approach, and the non-criminal or administrative procedures respectively. The analysis of these two fundamentally different legal approaches to political justice is meant to underline the difficulties and inconsistencies encountered in the process of political justice in the absence of a coherent position towards the concept of collective responsibility. In Chapter Four the source of these difficulties and inconsistencies, and their potential solution, will be identified. This

will be done through an analysis of the concept of collective responsibility as it is conceived by the legal doctrine and jurisprudence, as well as by the sociology of organisations. In Chapter Five, the concept of collective agency will be applied to the realities of Eastern European Communist societies. Those governmental or political organisations which can prove the credentials of agenthood will be identified from the multitude of collective social entities. These agencies will be proposed as able to participate in the “division of responsibility” for the human rights violations which occurred under the totalitarian Communist regime. The sixth and final chapter will spell out the implications brought about by the acknowledgment of a collective agent for the process of political justice.

1.2 The Definition and Terminology of Political Justice

1.2.1 The Definition of Political Justice

Political justice is one of the most controversial concepts within the legal discourse. One could even disagree that such a concept belongs to the legal domain at all, given the way in which basic legal principles are questioned and even ignored in such a process.⁹ It would be more appropriate perhaps to view it as an aspect close to the constitutional discourse, where ontologically law and politics meet and tolerate each other more often.

⁹J. Colwill, “From Nuremberg to Bosnia: War Crimes Trials in the Modern Era,” Social Justice 22, no.3 (Fall 1995): 111-128. G. Werle, “‘We asked for Justice and Got the Rule of Law:’ German Courts and the Totalitarian Past,” South African Journal on Human Rights 11, no. 1 (1995): 70-83.

This tolerance, however, does not make political justice a less controversial issue.¹⁰

The evident entanglement of law and politics is generally the reason why the concept of political justice is a controversial concept, and why it comes associated with rather negative connotations and definitions. Initially the term political justice suggested the search for an ideal order in which all members of society communicate and interact with the body politic to assure its highest perfection.¹¹ However, what one generally understands now by the term political justice is the way political interests contaminate the legal means employed to achieve legitimate social expectations. This understanding makes political justice become an almost pejorative term. Otto Kirchheimer analysed the concept of political justice mainly from this perspective. In his view the process of political justice appears as “the most dubious segment of the administration of justice.”¹² This segment, constituted by the use of devices of justice, bolsters or creates new power positions. Therefore, the aim of this segment appears to be purely political; politics merely manipulating the devices of justice.¹³ According to Kirchheimer, “circumstantial

¹⁰Public international law is sometimes subject to the same controversy. David Hutchinson, “Positivism and International Law,” in Positivism Today, ed. Stephen Guest (Aldershot: Dartmouth, 1996), pp. 46-64. Also, Charalambos Apostolidis, Doctrines Juridiques et Droit International (Paris: Eyrolles, 1991), pp. 114-122 and 444 ff.

¹¹Otfried Höffe, Political Justice: Foundations for a Critical Philosophy of Law and the State (Cambridge, UK; Cambridge, MA: Polity Press, 1995), pp. 27-33. Peter J Steinberger, The Concept of Political Judgment (Chicago: University of Chicago Press, 1993), p. 3 ff. J.A. Caporaso, Theories of Political Economy (New York: Cambridge University Press, 1992), p. 197. R. Richie and S. Hill, “Proportional Representation,” Social Policy, vol. 26, no. 4 (Summer 1996): 25-37. Milton Fisk, The State and Justice (Cambridge: Cambridge University Press, 1989), p. 65 ff.

¹²Otto Kirchheimer, Political Justice (Westport, Connecticut: Greenwood Press Publishers, 1980), p. vii.

¹³*Ibid.*

and contradictory, the linkage of politics and justice is characterized by both promise and blasphemy.”¹⁴

The contradiction inherent in political justice derives mainly from a kind of short-circuit between the activity of the law and the acts to which the law is, or tries to be, applied.¹⁵

The coincidence in time which should usually exist between the activity of a legal norm and the acts to which the law applies can - due to political pressures - be altered to different degrees. Usually this alteration arises out of a radical change in the political regime along with a radically different view about justice, than the preceding regime. This non-coincidence, however, could take place without such a radical change, when - again because of political reasons - the legal discourse is reactivated in areas in which it used to be kept dormant.¹⁶

However, it would be a mistake to consider that the term “political justice” applies only to those situations in which there is this type of short-circuit in the application of the laws. Evidently, the scope of political justice encompasses purely retroactive laws, re-

¹⁴Ibid.

¹⁵Joseph Raz, “On the Functions of Law,” in Oxford Essays in Jurisprudence, Second Series, ed. A.W.B. Simpson (Oxford: Clarendon Press, 1978), p. 281 f.

¹⁶An extra-judicial “de-activation” of legal norms occurs when specific laws are left to fall totally in *desuetude*, or are not applied to certain categories of persons, or in certain circumstances which are defined politically. On the fundamental problem of the tacit assumption of an essential continuity of the law and legal culture between the Communist and the post-Communist reality see Maria Los, “In the Shadow of Totalitarian Law,” pp. 286-292.

interpretations of old laws,¹⁷ as well as extreme analogical legal thinking.¹⁸ Nevertheless, the concept of political justice often applies to situations in which there is no real conflict of activity between the acts and the legal norms, the conflict being *purely* political, derived from a change of commitment to the application of the law.¹⁹ Thus, the term of political justice applies also to situations to which the short-circuit in the application of the law is itself a pure political creation.

The change of commitment to the enforcement of the law is also associated with a change of government, or with another equivalent radical change within the political system, such as the changes of policy determined by international pressure applied to an undemocratic government. A recent example of a political justice conflict where the conflict originates completely outside the law but tends to affect the way in which the law is applied, is the Rwandan genocide trials.²⁰ In cases like this not all of Fuller's alternatives are available. The debate, however, develops around the same parameters of justice, deterrence and need for reconciliation as in Fuller's paradigmatic story. In fact, this debate might only mimic the legal argumentation, while remaining purely political. The result is a debate *about* law, or more precisely about the commitment to law, which

¹⁷On the "so-called methods of interpretation" see Hans Kelsen, Introduction to the Problems of Legal Theory (Oxford: Clarendon Press, 1996), pp. 77-89.

¹⁸Gerald C. MacCallum, Jr., "Legislative Intent," in Legislative Intent and Other Essays on Law, Politics and Morality, eds. Marcus G. Singer and Rex Martin (Wisconsin: The University of Wisconsin Press, 1993), pp. 3-35.

¹⁹Los, Maria, "In the Shadow of Totalitarian Law," p. 296 ff.

²⁰African Rights (Organisation), "Rwanda: Who is Killing, Who is Dying, What is To Be Done?" Discussion paper, African Rights (London: African Rights, May 1994).

takes place outside the legal discourse. In situations in which the crimes (and guilt) are so obvious that not even the perpetrators can deny them, the process of justice is branded as “political” in order to highlight the strength, importance and maybe even legitimacy of other political objectives (other than formal legal justice). Non-legal matters for instance, come up often in such a debate on justice. Among the relevant aspects there is the need for reconciliation and prevention of future waves of atrocities.²¹

It is important to acknowledge that the concept of political justice is applied in a more complex and contradictory way than it was perceived by Kirchheimer.²² The concept of political justice envelopes both situations in which there is a legal potential for inhibiting the political predisposition to penalise, and situations in which the legal potential for penalising is itself hindered by strong political demands. Both these types of conflict relate to the search for political legitimacy, although not all the instances of political justice can be reduced to the expression of a crisis of legitimacy.²³ Nevertheless, in both

²¹There is also the fear that, procedurally, the process of political justice will not reach up to the highest standards of due process required by the criminal law. Ethan Klingsberg, “The Triumph of the Therapeutic: The Quest to Cure Eastern Europe Through Secret Police Files,” in Truth and Justice: The Delicate Balance, Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 11-12.

²²Reflecting somewhat the Kirchheimerian perspective, Bankowski and Mungham write that “the traditional way of getting over [the acknowledgement of political trials in the legal order] and giving the term ‘political trial’ a specific meaning has been to see it as a prosecution launched with a political (in a narrow sense) purpose.” Bankowski and Mungham, however, offer a wider meaning to the term “political trial” (which is one of the legal measures that can be identified in a process of political justice), inquiring into “what happens when defendants take their politics into the courtroom.” Zenon Bankowski and Geoff Mungham, “Political Trials in Contemporary Wales: Cases, Causes and Methods,” in Essays in Law and Society, ed. Zenon Bankowski and Geoff Mungham (London, Boston, Henley: Routledge and Kegan Paul, 1980), p. 53.

²³Aryeh Neier, “What Should be Done about the Guilty?” The New York Review of Books 37, no. 1 (1 February 1990): 34-35.

circumstances the process of justice is always politically charged, though not always in an “illegitimate” way.²⁴ This unavoidable contamination between law and politics explains Kirchheimer’s perspective on the issue of political justice.

More importantly, regardless of its concrete manifestation, the process of political justice always suggests a normative *evaluation* of the “political foe.”²⁵ This evaluation takes place even in those circumstances in which the legal discourse, far from being forced upon, is actually deflected from being applied to certain acts which could be linked to a certain political actor. A process of political justice does not, for example, materialise only in the form of screening procedures, and other similar measures; it can just as well materialise in an amnesty law. Even if individually applied, such a law intimates an act which gives up legitimate legal claims over a collective political actor, or a political regime. An amnesty concerning the crimes of a political regime is still an implicit declaration about the nature of the acts of that regime. Had the amnesty law not been enacted, these acts would normally be under the scope of the criminal law. Hence, the presence of a political dimension of the legal action in a variety of forms, should lead any real Minister of Justice - just like Fuller’s imaginary one - to be cautious.

²⁴Guillermo O’Donnell and Phillippe C. Schmitter, Transition from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies (Baltimore, London: Johns Hopkins University Press, 1986), pp. 28-36.

²⁵Kirchheimer, Political Justice, p. 7 ff. This “evaluation” could be seen as what Bankowski and Mungham, referring to political trials, call “a transmutation of political activity into legal processes.” This transmutation would be done, according to Bankowski and Mungham, “not only by translating these activities into legal language but also, through this, by making the defendants symbolically act out their activities in a legal way in the trial.” Bankowski and Mungham, p. 53.

Another important aspect, which should be retained for the purpose of a definition of political justice, is the fact that the process of justice initiated by the fall of a repressive regime can be best defined as blending into a legal equation the goal of political legitimacy with the aims of moral justice. This understanding of the definition of political justice does not imply, or preclude, the possibility of this equation being, entirely or partly, a fraudulent one. In other words, moral ideals can be used as tools of political manipulation.²⁶ It is just as likely, however, that the aim of political legitimacy intimately coincides with that of moral justice. The possibility of manipulating the equation arises out of the difficulty in finding a yardstick which could be instrumental in comparing and assessing the performance of governments or other political actors.²⁷ However, the main conceptual point that makes Kirchheimer's definition of political justice restrictive and unilateral resides precisely in overrating the difficulty of finding a standard normative measure for political conduct.

The unilateral nature of Kirchheimer's definition of political justice is compatible with a certain combination of modern moral relativism and the formal conception of the rule of law.²⁸ This combination makes it impossible to acknowledge in the legal discourse

²⁶Leslie Holmes, "The Democratic State or State Democracy? Problems of Post-Communist Transition," European University Institute, Jean Monnet Chair Paper RSC No. 97/48. "Hungarian Screening Committee Chairman Refuses to Resign," Daily Digest, 18 January 1995. "Screening Law in Poland." Daily Digest, 2 February 1996.

²⁷For general aspects on these issues see Peter Morton, An Institutional Theory of Law: Keeping Law in Its Place (New York: Oxford University Press, 1997), pp.163 & 194 ff.

²⁸David Lyons, Ethics and the Rule of Law (Cambridge: Cambridge University Press, 1984), pp. 11-35.

whether a regime which killed millions of its own citizens is a criminal regime or not. Thus, Kirchheimer's rather procedural analysis of the concept of political justice appears lopsided. On the one hand, the imbalance of his definition originates from the fact that it takes into account only that part of the concept which reflects the pressure applied by the political discourse on the legal process, with the aim of hyper-activating the latter. On the other hand, Kirchheimer's approach neglects to a very large extent those situations in which moral and legal expectations coincide in their legitimacy, but are denied realisation through (pertinent, or less pertinent) political interventions.²⁹

In order to compensate for this neglect manifested in Kirchheimer's approach, the definition of political justice should not go further than a mere acknowledgement of the presence of competing discourses of justice.³⁰ In this sense, political justice appears as that part of the realisation of social (not necessarily legal) justice, in which the political, moral and legal discourses become acutely equal and thus, competing. This definition is more enhancing in its simplicity and therefore, with a greater potential for adaptability to a variety of complex situations which, in practice, are defined as processes of political justice but could not fit into the narrow mould of Kirchheimer's definition.

²⁹In the conclusions to his book on political justice, Kirchheimer acknowledges, although only *en passant*, this type of competing expectations. Kirchheimer neglects, however, to elaborate over this very important and controversial side of the concept of political justice. Kirchheimer, Political Justice, p. 423.

³⁰Authors such as Joseph Raz and Peter Craig have acknowledged the existence of competing values requiring the protection of the law in their analysis of the concept of the rule of law. Joseph Raz, "The Rule of Law and Its Virtue," The Law Quarterly Review 93 (April 1977): 206-207. Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law," Diritto Pubblico, (Saggi, 1995), pp. 35-55.

1.2.2 The Terminology of Justice

The “coexistence” in the conflict of political justice of two, often competing, normative discourses (the moral and the legal one) combined with the inherent tendency of a third discourse, the political one, to colonise the other two discourses involved, means that, aside from a prejudiced attitude towards pursuing justice in such a context, there is a certain reluctance in using the term of political justice itself. Various authors have attempted to replace it with other, more neutral or more specific terms.³¹ A short review of this terminology used alongside or instead of the term political justice is not only helpful in understanding some of the authors who analysed the process of justice in revolutionary contexts, but it can also reveal some of the characteristics of this particular process of justice. Among the terms used more or less synonymously with the one of political justice one could mention “backward-looking” or “retrospective justice,” “retroactive” or “*ex post facto* justice,” “retributive justice,” “post-authoritarian justice,” “transitional justice” and “historical justice.”

Terms such as “backward looking” and “retrospective justice” appear as tautological, since a process of criminal justice is always, to a certain extent, backward-looking. Therefore, these terms do not include anything of the specificity of the phenomena being

³¹Luc Huyse, “Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past,” *Law & Social Inquiry* 20, no. 1 (Winter 1995), reproduced in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, *General Considerations*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 339.

analysed. As to the terms of “retroactive” or “*ex post facto* justice,” they are too limiting; as we have seen, not all cases of political justice imply a challenge to the ban on retroactivity. In this sense, the post-Communist Eastern Europe presents a whole spectrum of legal measures, with different degrees of conflict regarding the ban on legal retroactivity, or, in some cases, in no conflict with this ban at all. As to the terms “post-authoritarian” and “post-totalitarian justice,” these appear restrictive, covering only part of the processes of justice in which politics and law come into conflict. These last two expressions, however, do emphasize valid dimensions of the process of justice taking place in post-Communist Eastern Europe.

With all the negative connotations underlined by Kirchheimer's definition, the term political justice seems also preferable to the one of “historical” or “post-transitional justice.” This is the case because the term of political justice suggests, more than the others, a chronic entanglement of the legal and political discourses, and because it expresses more than the other terms, the perplexity of law in front of a past to which are attached very complex and peremptory social expectations. The term political justice also has a wider applicability, including situations in which the lapse of time to which the term applies does not necessarily have any significance, as the term “historical” would suggest. Nevertheless, in the specific case of the post-Communist Eastern Europe, the expression of “historical justice” does evoke an important dimension of the process of justice. As to the term of “post-transitional justice,” it seems inappropriate exactly because the process of justice is part of the process of political transition, and not *post*-transition.

All these terminological nuances may well be appropriate in a process of great complexity involving different social discourses. They also make evident that in a highly politicised context “justice” cannot stay on its own, but it needs a denominator, a “justification.” However, aside from all these differences, it should also be noted that the distinction between the different terms is often only at the linguistic level. Among the analysts of the Eastern European transitions to democracy, the terms of “historical” or “post- transitional justice,” as well as the other terms, are often used with the same Kirchheimerian connotations. Considering, for instance, “the problem of ‘historical justice,’” a Polish analyst remarks that the term is a vague expression used as a convenient label for the different attempts that have been made in Poland to use legislation and the law to satisfy the demand for moral justice made by the “victims of real socialism,” and to provide Poland’s new political class “a moral mandate to rule.”³²

This abundance of terminology reflects in a way the complexity of the process of justice in the context of competing discourses. In particular, it reflects the way in which societies have often questioned both moral relativism and the rule of law, in the search for substantive justice.³³ In this sense, post-Communist Eastern Europe made no exception. Even the countries most committed to the values of democracy and legality have, in their process of transition, considered measures of political justice. The consideration given

³² Andrzej S. Walicki, “Transitional Justice and the Political Struggles of Post-Communist Poland,” in Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams (Notre Dame & London: University of Notre Dame Press, 1997), pp.185-237.

³³ Lyons, Ethics and the Rule of Law, pp. 11-35. Will Kymlicka, Justice in Political Philosophy, An Elgar Reference Collection (England: Aldershot, 1992).

to the expectations and demands for political justice in Eastern Europe went far beyond the issue of the grudge informer, and beyond the limits of the criminal law. These steps were taken in spite of the almost inevitably politicised definition usually given to the concept of political justice.

The nature of the Eastern European Communist regimes undeniably determined the need to consider the legitimacy of the expectations for substantive justice, overriding the perspective according to which the process of political justice appears only as means of acquiring political legitimacy.³⁴ In this sense, the broad definition of political justice formulated earlier is able to grasp the complexity of the process of justice in post-Communist Eastern Europe. This definition stresses more the coexistence of different competing social discourses than the direction in which the balance is tipped in this competition. This enlarged and “neutralised” definition of political justice corresponds more closely to the need to consider this process of justice in all its complexity. This complexity will be made evident in the following section where the legal and non-legal parameters of the Eastern European debate on political justice will be outlined.

1.3 Approaches to Political Justice in Eastern Europe

As in Fuller’s story, the criminal law is one of the chief paths taken by the process of political justice in Eastern Europe. All the post-Communist governments in Eastern

³⁴Neier, p. 34. O’Donnell and Schmitter, *Transition from Authoritarian Rule*, pp. 31-33.

Europe have been confronted with the question of whether to prosecute the leaders of the Communist regime, or their subordinates, for the abuses they have committed.³⁵ Prosecution, however, is not the only way in which post-Communist Eastern Europe has tried to deal with the Communist past. In circumstances where the application of criminal law is impossible, the introduction of administrative or non-criminal measures have also been envisaged by the post-Communist governments.³⁶

As described above, the problem with Kirchheimer's vision of political justice as merely a device for creating new power positions is that it might ignore and discourage anyone from reacting to cases of systematic violations of rights and liberties perpetrated by governments. Without excluding completely the possibility of political manipulation in the discourse of justice, the irrefutable reality of the crimes of the Communist regimes, makes the debate on political justice more complex and more difficult to dismiss as irrelevant for the legal discourse. This often irrefutable reality of the political crime is rather an incentive for rethinking the way in which the checks and balances of the law are applied to the potentially legitimate (legal and non-legal) expectations for justice.

Although sometimes coming from outside the formal legal domain, these expectations for justice address directly the legal discourse for an answer, and can be hard to ignore

³⁵James A. McAdams, "The Honecker Trial: The East German Past and the German Future," The Review of Politics 58, no.1 (Winter 1996): 53 ff.

³⁶Jamal Benomar, "Confronting the Past: Justice After Transition," Journal of Democracy 4, no. 1 (January 1993): 3-14. Luc Huyse, "A Devil's Choice: Dilemmas of Backward-Looking Justice," European Journal of Crime, Criminal Law and Criminal Justice 2, no.2, (1994): 132. Also, Huyse, "Justice after Transition," p. 105 ff.

or dismiss. Consequently, it is important to analyse in this section the way in which different arguments for and against political justice actually relate to the legal discourse. We shall then identify the answers given within the legal discourse to the questions of political justice, the consistency of these answers, and their implications for the dimension of collective political responsibility.

1.3.1 The Case for Prosecutions

The debate on both criminal and non-criminal measures of political justice involves legal as well as moral, political and even economic arguments.³⁷ One argument brought in favour of prosecution refers to the fact that using the criminal law is essential for achieving a minimal degree of justice and deterrence. It is argued that the minimal justice brought by the prosecution of abuses and violations represents a symbolic reparation for the victims of the Communist regimes. This reparation, it is argued, is owed as a moral obligation by the post-Communist governments to the victims of Communism.³⁸ According to the supporters of criminal prosecutions, the country in which such measures

³⁷Los classifies all these arguments as dystopic arguments, which deny that any benefit could be brought by measures of political justice, and affirmative arguments, which support in various degrees such measures. Maria Los, "Lustration and Truth Claims: Unfinished Revolutions in Central Europe," Law and Social Inquiry 20, no. 1 (Winter 1995). Also Mary Albon, "Project on Justice in Times of Transition," The Charter Seventy Seven Foundation, New York, Report of the Project Inaugural Meeting (Salzburg, 7-10 March 1992), pp. 9-11.

³⁸Huyse, "A Devil's Choice," pp. 138-139.

are ignored will end up being haunted by its past.³⁹

A second important argument invoked in favour of prosecutions against the Communist regime is that a fragile democracy would be strengthened by them.⁴⁰ The potential of the exponents of the Communist regime for sabotaging the new democratic governments is an idea which appears often as a justification and incentive towards dealing swiftly and firmly with the crimes as well as with the old political loyalties of the past regime. It is also argued that to neglect the real crimes might prove an incentive towards less temperate legal measures of purging and screening indiscriminately all the persons who had anything to do with the Communist regime.

The contribution brought by the criminal prosecutions towards the strengthening of the fragile democracies relates very much to the legitimating functions which these prosecutions would fulfill.⁴¹ The post-Communist governments came to power by strongly denouncing the crimes and abuses of the Communist regime. Therefore, these

³⁹A good example in this respect is the recent trials which took place in France related to the Vichy regime, more than half a decade after the Vichy regime ended. See Arno Klarsfeld, Papon: un verdict français (Paris: Ramsay, 1998), p. 17. Eric Conan and Henry Rousso, Vichy, un passé qui ne passe pas (Paris: Fayard, 1994), p. 5 ff.

⁴⁰Mary Albon, "Truth and Justice: The Delicate Balance. Rapporteur's Report," in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 34-66.

⁴¹Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, (University of Oklahoma Press, 1991), pp. 46-58. Huyes, "A Devil's Choice," p. 131. Also Kirchheimer, Political Justice, pp. 4-6. In this respect, Tocqueville wrote very suggestively: "C'est une chose surprenante que la puissance d'opinion accordée en général par les hommes, à l'intervention des tribunaux. Cette puissance est si grande, qu'elle s'attache encore à la forme judiciaire quand la substance n'existe plus, elle donne un corps à l'ombre." Alexis de Tocqueville, De la démocratie en Amérique (Paris : Gallimard, 1951), p. 8.

governments' legitimacy and political capital could be very much diminished if, once in power, this denunciation was not concretised in appropriate legal measures. Also, as it was proven in some of the Eastern European countries, a lack of sufficient political enthusiasm towards dealing with the criminal past of the Communist regime can make the population cynical and distrust the new political class.⁴² It is argued that this cynicism and distrust could be very counter productive for a government which would need all the support it could get for the difficult process of reconstructing the society economically and socially. Apart from these short-term benefits of political justice through criminal prosecutions, it is also considered that prosecution could advance an even long-term democratic consolidation by professing equality in front of the criminal law. Prosecution is also called upon as the most potent deterrent measure against future crimes and abuses perpetrated by governments.⁴³

1.3.2 The Case Against Prosecutions

The arguments put forward against prosecution do not appear less compelling. Since the arguments in favour of the process do not remain on mere legal grounds - professing

⁴²“Even the most brilliant economic policy will fail, under conditions of electoral democracy, if it does not gain support of the public.” Stephen Holmes, “The Challenge of Post-Communist State Building: The Politics of Economics in the Czech Republic,” *Eastern European Constitutional Review* 4, no. 2 (Fall 1995): 53. On the transformation of the “red” political class into a “pink” political class, and the “harmful post-totalitarian side-effects” see Adam Podgorecki, “Polish Communist and Post-Communist *Nomenklaturas*,” in *Totalitarian and Post-Totalitarian Law*, eds. Adam Podgorecki and Vittorio Olgiate (Dartmouth: Oñati I.I.S.L., 1996), pp. 324-326, 328-329 and 332-333.

⁴³Luc Huyes, “Justice after Transition,” p. 341.

more than legality and equality in front of the criminal law - the opponents of the criminal law approach to political justice argue that prosecution does not necessarily mean benefits for democracy.⁴⁴ The complexity of the Communist legacy makes the application of criminal law a less straightforward matter than sometimes believed. In the pursuit of the crimes of the Communist regime, the new democracies might themselves have to bend the very legal principles they try to protect. This can weaken, it is said, the legitimacy of the new regime and hence the chances of democracy. Suspending the statute of limitation for the Communist crimes is considered to be an example of a weakened legality, and hence a weakened democracy. Through retroactive alterations of this statute, basic principles of legal justice, e.g. the universality and prospectivity of legal norms, might be sacrificed for the pursuit of a higher sense of justice. Ironically though, these measures would be undertaken against a political regime accused precisely of not having respected the principles of legality.

A similar de-legitimising effect, it is argued, can be brought by certain legal attempts towards a “soft criminalisation” of the acts of collaboration with the Communist Secret Police, or by screening laws banning Communist officials from certain public or private office, or from both. From a similar perspective of hidden criminalisation it is considered the tendency to re-interpret the criminal law in such a way that acts of a purely political nature receive connotations which place them under the jurisdiction of the criminal law.

⁴⁴,”Dilemmas of Justice: How Can Democratic Governments Deal With the Injustices of their Predecessors Without Sacrificing the Rule of Law? A Forum on the Recent Hungarian Constitutional Court Decision Upholding Statutes of Limitation,” *East European Constitutional Review* 1, no. 2 (Summer 1992): 17-21.

It is argued that there is a considerable danger that the impartiality of the judiciary might be damaged by political pressure being put on the latter to make the norms fit the alleged crimes, or simply by a natural inclination of the judiciary towards activism.⁴⁵

An even more direct danger to the fragile Eastern European democracies is, according to some authors, the possibility of destabilising backlashes between the post-Communist governments and the still active forces of the Communist regime.⁴⁶ Threatened by criminal prosecutions and purges, these forces could coagulate as in the presence of a catalyst, and destabilise the political scene in order to deviate the attention from themselves. In a hostile political and legal environment, they could also generate subcultures and networks which, in turn, can become hostile to democracy. Finally, it is argued that the criminal prosecutions could prevent a much needed reconciliation to take place between the forces of the past and the rest of the population. This reconciliation would be needed to enable the society to look forward and to move on.

⁴⁵Kenneth M. Holland, ed., Judicial Activism in Comparative Perspective (London: Macmillan, 1991), p. vii. Wróblewski speaks about a “judicial evaluative attitude” as the “psychological disposition of the judge to take into account specified sets of values and their preference - a disposition to a particular kind of evaluation.” Jerzy Wróblewski, The Judicial Application of Law, Law and Philosophy Library Series, vol. 15, eds. Zenon Bankowski and Neil MacCormick (Dordrecht, London: Kluwer Academic, 1992), p. 322.

⁴⁶On creating semiloyal or even disloyal opposition by alienating the former political bureaucracy through measures of political justice see Juan J. Linz, The Breakdown of Democratic Regimes: Crisis, Breakdown, & Reequilibration (Baltimore, London: Johns Hopkins University Press, 1978), pp. 34-35.

1.3.3 Screening and Cleansing

The non-criminal path to political justice, including administrative procedures of screening and banning from office, shares many of the pros and cons of criminal prosecution of the Communist crimes. The administrative “penalties,” such as screening from public office and even screening from certain important positions in the private sector of those who actively served or took advantage of the Communist regime, represent a constant issue in some of the post-Communist governments even now. The extent to which such a process has been implemented varies from country to country.⁴⁷ The Czech Republic undertook one of the most extensive screening processes, while Germany followed a more limited path of protecting public office and important public services, such as education, from the influence of persons attached to the former regime. Bulgaria limited its purges to important economic positions like banking, while Lithuania curtailed the right to vote and be elected in the first general elections of its entire Russian minority. In Poland a screening process has failed to materialise in spite of several rounds of talks and proposals being passed through the legislative body, whilst in Romania the issue of screening has arisen belatedly on the political agenda. This delay was mainly due to the “confiscation” of the democratic movement in the first seven years by the “second-guard” of the old Communist regime. As to Russia, the entire Communist party was banned, although only temporarily.

⁴⁷Luc Huyse, “Justice after Transition,” pp. 105-134.

Aside from arguments shared with the debate on criminal prosecution of the Communist crimes - arguments in favour, as much as against political justice - the screening processes have been supported or opposed by some specific arguments as well. In favour of screening it was often claimed, for instance, that keeping the old Communist guard away from important government positions would be the only way to restore public confidence in governmental agencies. Incorporating such compromised persons in the new government structures would offer these persons the opportunity to sabotage the democratic reconstruction of the post-Communist societies. It would also generate dysfunctional structures because of the inevitable difficulties derived from working with personnel indoctrinated with the mentality and ideology of an undemocratic repressive regime.⁴⁸

These type of arguments in favour of administrative measures taken against the exponents of the Communist regime are considered by some as going against the very democratic principles the new regime is supposed to support. The right to run for office, the right to vote, the freedom of association, it is said, are fundamental principles of democracy, and they should not be too easily forfeited for, ultimately, mere political rationale. The expedient procedures through which these processes are generally introduced could also create even more injustice than they would repair. The old Communist governments would in fact be accused of the same type of discretionary sanctions as the ones undertaken by the new democratic regimes against undesirable influences of the Communist regimes. In this sense, it is claimed that the screening procedures disregard

⁴⁸Podgorecki, "Polish *Nomenklatura*," p. 327.

the protection the rule of law contains against collective responsibility and discrimination on the basis of political affiliation.

1.3.4 Procedural Concerns

The use of procedural impediments plays an important part in the critique of the screening processes. The due process requirements, for instance, usually present when following the criminal law path to political justice, are unlikely to be met by screening processes. The extent of the purges makes it very difficult, if not impossible, for the post-Communist societies to provide the necessary independent judiciary. This fact usually leads to the creation of special non-judiciary commissions charged with managing the screening process. Moreover, the right to defence is often altered and the burden of proof tends usually to lie with the defendant.

All these procedural shortcuts make the administrative purges easily open to abuse for purely political or even personal motives. Furthermore, public opinion may also become inclined to approve such measures for reasons other than those of justice, and the political class may answer such inclinations from mere populist motivations. This appeared to be the case in Poland, for instance, where the screening of the Communist officials seemed to be prompted to a large extent by extra-legal motives. Economic frustrations related to the process of privatisation and redistribution of wealth, which transformed the

Communist partocracy into a crypto-Communist *kleptocracy*,⁴⁹ made the population favour the screening processes as a way of keeping the old guard of the Communist regime out of the economically influential positions.⁵⁰ The case of Bulgaria might appear to be similar.⁵¹

Related to economic issues there are also utilitarian arguments. These arguments are invoked against prosecution, and more especially against screening processes. The need for post-Communist countries to have specialists and managers forms the basis of these arguments. According to some opinions, these specialists cannot be found outside the circles of power of the old regime; giving up these invaluable specialists would mean an important sacrifice of experienced persons. Such a sacrifice could prove difficult to undertake in the struggling post-central planing economies.⁵²

Even when all the criticism of political justice has been overcome, both criminal and administrative approaches to political justice have to produce a balanced answer to many other practical details. These details could decisively influence the perception of the process of justice as a whole, although they appear minor compared to the fundamental questions such as “to prosecute or not to prosecute,” “to screen or not to screen.” There

⁴⁹Domenico Mario Nuti, “Post-kommunistiske mutationer,” Samfundøkonomen 8 (1996): 17.

⁵⁰“Poland: Constitution Watch,” East European Constitutional Review 2, no. 3 (Summer 1993): 12-14.

⁵¹“Bulgaria: Constitution Watch,” East European Constitutional Review 2, no. 1 (Winter 1993): 2-3. “Bulgaria: Constitution Watch,” East European Constitutional Review 4, no. 2 (Spring 1995): 5-7.

⁵²Victor Yasmann, “Legislation on Screening and State Security in Russia,” RFE/RL Research Report 2, no. 32 (1993): 13.

are a series of “quantitative” aspects, for instance, which have to be addressed, including: the extent of prosecution or the administrative screening; the type of acts to be scrutinised (only the gross violations of human rights or also the widespread corruption and economic mismanagement); how high in the hierarchy should the strict responsibility be imposed upon officials for violations perpetrated by their subordinates, and how far down the “superior order defence” should be found to be inapplicable, etc. Depending upon the way these “quantitative questions” are answered, the whole process of dealing with the Communist past can be perceived as just, balanced and in agreement with the fundamental dimensions of the rule of law, or it can be seen as a mere political manipulation of the moral and legal discourses for an easier ride over the difficulties of the post-totalitarian transition.⁵³

Other procedural issues also come to question the processes of political justice. The judicial or non-judicial character of the agencies in charge of the process of political justice can have a direct impact upon the perception of the process. The same stays true with respect to the procedures used for establishing the authoritative truth about certain landmark events during the Communist repression. An important question also, which inevitably appears whenever details such as the “the problem of the grudge informer” are attempted to be solved, is whether it is necessary to demonstrate that the violations and abuses committed by individual persons have been “systematic” violations, “designed at the top” as a matter of policy, rather than mere random, unrelated events.

⁵³Creating scapegoats, it is said, distracts from the eventual policy failures. Andras Sajo, “On Old and New Battles: Obstacles to the Rule of Law in Eastern Europe,” *Journal of Law and Society* 22, no.1 (Mar 1995): 97-104.

Though it might appear as additional to the fundamental questions of whether to undertake active measures of political justice, the question of the responsibility of the Communist governments is neither a question of detail, nor a “quantitative” question. In a way, all the other fundamental issues acquire substance only when considering - favourably or not - the question of the role of the repressive government in the perpetration of certain crimes and abuses. As it appeared from Fuller’s open-ended story, the answer (or the perception of the answer) given to almost any aspect of a process of political justice depends on the answer given to the question of the role of the regime.

From this dependence one should not understand that prosecution of individual criminal acts committed during a repressive regime should necessarily be designed as part of a political justice process. In the next chapter however, it will be shown in detail how this prosecution *is* part of the political justice process independently of its outcome, by the mere fact that it is projected upon its background. Therefore, a certain tuning of the different types of responsibility involved - collective and individual, legal and political - is required. Obviously, this tuning does not take place exclusively within the legal discourse. Within the legal discourse the coordination of different aspects of responsibility is meant to avoid discrepancies in the legal process of the realisation of justice in revolutionary contexts. In the specific case of the Eastern European revolutionary changes, these discrepancies originate in the complexity of the totalitarian legacy - marked by an entanglement of individual and collective responsibilities - and in the reluctance and unreadiness of the legal discourse to deal with this legacy.

From the review of all the arguments for and against a political justice process one could only guess the real complexity of the legal challenge in the Eastern European countries. As a general idea it could be noted that both criminal law and administrative approaches always implicate not only the legal and political discourse but also the moral one, with all its demanding authority, as well as the economic one, with all its utilitarian weight.⁵⁴ Although in essence similar to other processes of political justice undertaken in societies in transition to democracy, the discourse of political justice in post-Communist Eastern Europe has acquired an increased complexity.⁵⁵ This complexity is mainly due to the totalitarian nature of the Communist regimes in Eastern Europe,⁵⁶ to the extended period over which societies have been exposed to it and, not least, due to its internationalisation (or Sovietisation) and “ghettoisation” taking place both at the same time.

The complexity of the Eastern European process of post-Communist justice is sometimes manifested in two types of contradictory situations. On the one hand there are situations in which compelling legal evidence leads to the prosecution of certain crimes of the previous regime, but the prosecution fails to act upon this evidence because the political context hinders the legal process.⁵⁷ On the other hand, there are also situations in which

⁵⁴Neier, p. 33. Jon Elster, “On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution,” East European Constitutional Review 1, no. 2 (1992): 23-26.

⁵⁵David Olson, “Organizational Dilemmas of Post-Communist Assemblies: Parliament by Design,” East European Constitutional Review, 4, no. 2 (1995), pp. 59-60.

⁵⁶Adam Podgorecki and Vittorio Olgiati, eds., Totalitarian and Post-Totalitarian Law (Dartmouth: Oñati I.I.S.L., 1996), p. ix.

⁵⁷Carlos S. Nino, “When Just Punishment is Impossible,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 67-74.

the political incentives to punish and deter exist, but - for purely formal legal rationale - the legal discourse finds it difficult to offer a viable solution, e.g. a solution which would be both legally consistent and ultimately politically constructive towards social reconciliation and democratic consolidation of the new regime.⁵⁸

From this complexity it should be noted that, in the post-Communist context, the decision not to prosecute and not to screen appears as much of a political justice decision as the opposite decision, to prosecute and screen, would be. In this highly politicised context, the arguments both in favour and against criminal prosecution or administrative screening will always go beyond mere legal motivations. The acknowledgement of this dead-end situation⁵⁹ leads towards the path of balancing the advantages and disadvantages of a political justice process, trying to reach a workable compromise which would enhance and not impoverish democracy, legality and justice.

Reconciling ethical imperatives and political constraints, however, is not an easy enterprise; the arguments in the debate over the political justice process are often quite contradictory. The much needed reconciliation for instance, considered a prerequisite of democratic consolidation of the post-totalitarian societies, is seen by some as conditioned

⁵⁸„Dilemmas of Justice: How Can Democratic Governments Deal With the Injustices of their Predecessors Without Sacrificing the Rule of Law? A Forum on the Recent Hungarian Constitutional Court Decision Upholding Statutes of Limitation,” East European Constitutional Review 1, no. 2 (Spring 1992): 26-34.

⁵⁹O'Donnell and Schmitter, Transition from Authoritarian Rule, pp. 28-36. Also Jose Zallaquett, “Why Deal with the Past,” contribution in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer (Cape Town: IDASA, 1994), pp. 8-15. Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman: University of Oklahoma Press, 1991), pp. 211-232.

by the successor elites refraining from prosecuting and screening the officials of the Communist regime. At the same time, others consider the impunity of the same officials as an obstacle to any hope for reconciliation.⁶⁰ Similar controversies, with pertinent arguments on both sides, surround almost all the other possible points of negotiation in a process of political justice, making the justification of the process rather complex and difficult.

1.4 The Object of Political Justice

The above-mentioned controversies in the debate on justice in the post-Communist Eastern Europe brings us back to Kirchheimer's analysis of the concept of political justice. One of his arguments against political justice was the impossibility for the legal discourse to offer, or to accommodate, a yardstick which could be instrumental in evaluating a regime. This yardstick would be expected to solve what according to him is the main dilemma of political justice: who decides what is acceptable and what is unacceptable, e.g. punishable, political conduct?⁶¹ Developing a consensus over how to measure the record of the Communist regime and of those who operated in its name becomes therefore one of the important issues in a process of political justice.

⁶⁰Tina Rosenberg, "Reconciliation and Amnesty," contribution in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer, (Cape Town: IDASA, 1994), p. 66.

⁶¹Kirchheimer, Political Justice, p. 34 ff.

Defining “inadmissible political conduct” is, evidently, controversial and highly ideologized. Nevertheless, it appears that there is one aspect which can help with this definition, and over which the majority of scholars, lawyers and politicians converge. This convergence is supported by the general evolution of public international law. In the past decades, the general consensus has been coagulating around the idea of the duty of a new government to address past human rights violations.⁶² From a constitutional perspective, it is possible to identify a continuity in the obligations of the state with respect to the protection of human rights. In the case of a radical or revolutionary change of regime such as was the case in Eastern Europe, this aspect of continuity functions despite the unconstitutional paths some, although not all Eastern European countries,⁶³ had to follow in changing the government.⁶⁴ One can speak therefore about the responsibility of a post-Communist government to promote justice and reparation for the past acts of a Communist government to which it claims no political or constitutional continuity.⁶⁵ The same obligation exists, of course, in the case of a government, such as was the case in Hungary for example, which is attached to the replaced regime by the legal belt of constitutional succession.

⁶²Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” Yale Law Journal 100, no. 8 (June 1991): 2539-2615.

⁶³Timothy Garton Ash, We the People: The Revolution of ‘89 Witnessed in Warsaw, Budapest, Berlin and Prague (Cambridge: Granta Books, 1990).

⁶⁴Robert K. Goldman, “International Law and Amnesty Laws,” Human Rights Internet Reporter 12, no. 2 (Winter 1988): 9-11.

⁶⁵Hans Kelsen, The General Theory of Law and State (Cambridge, Mass.: Harvard University Press, 1945), p. 36.

This constitutional state of affairs is supported by provisions in public international law. The duty imposed on a government to punish human rights violations refers to those acts which international law defines as criminal.⁶⁶ Of course, the human rights doctrine does not offer a clear cut solution for dealing with revolutionary changes. Governments are left with a certain degree of discretion in balancing the expectations of justice for past human rights violations and the need to achieve other legitimate goals, such as the strengthening of the new democratic system through social reconciliation.⁶⁷ This discretion in choosing between different legitimate goals is important since the forces unleashed by the human rights prosecutions might represent a real or a potential threat for a fragile democratic political arrangement.⁶⁸ Therefore, international law could not put an imperative demand on the new governments to punish the violations of human rights.⁶⁹ However, the need to put the duty to punish and repair past human rights violations uppermost is undoubtedly recognised, and the reasons for not addressing the human rights violations

⁶⁶Orentlicher specifies that the international law requires states to punish serious violations of physical integrity. Orentlicher, "Settling Accounts," p. 2543.

⁶⁷As it was shown when analysing the arguments for and against political justice, some argue that it is not possible to strengthen a fragile democracy by leaving human rights violations unpunished. Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?" Human Rights Quarterly 12, no. 1 (1990): 1-16.

⁶⁸"As an affirmative obligation on the part of states to redress wrongs inflicted by human rights violations, accountability has legal, ethical, and political dimensions. It is fair to say that no single one of these aspects should be allowed to overshadow the other two. Therefore, just as it makes no sense to exaggerate the political obstacles, it is equally wrong to postulate an obligation to punish the perpetrators of past offenses without regard to the potential consequences for the future enjoyment of rights by all others. The lack of adequate regard for this need to address all aspects of the problem has sometimes made the victims of abuse sound shrill to their critics, making it that much easier to dismiss their demands. Yet, these demands for accountability have firm legal, ethical, and even political foundation." Juan E. Méndez, "In Defence of Transitional Justice," in Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams, (Notre Dame & London: University of Notre Dame Press, 1997), p. 4.

⁶⁹José Zallaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," State Crimes: Punishment or Pardon (Aspen Institute, 1989), p. 26.

have to be evident and compelling.⁷⁰

Although human rights expectations cannot be translated imperatively into a duty to prosecute and deter, it can be argued that the development of the doctrine of the government's responsibility to punish human rights violations which occurred under a previous regime provides a much needed normative foundation for a process of justice addressing the crimes of the old regime. This foundation offers a big step forward from the Kirchheimerian position on political justice. The yardstick searched for measuring the "political deviation"⁷¹ could find its guiding elements in phrases which have been formalised in public international law practice, such as "serious violations of physical integrity,"⁷² or "gross abuses of human rights."⁷³ Following these elements which are already acknowledged in public international law it would reduce considerably the "historical risk" a government would run, according to Kirchheimer, while engaging in an over-politicised process of political justice.⁷⁴ Accordingly, in order to avoid the over-

⁷⁰The very plausible threat of a military dictatorship for instance should have more weight than the threat of sabotage from a bureaucratic political elite. Juan E. Méndez, "Acknowledgement, Truth, and Justice: Argentina," in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer (Cape Town: IDASA, 1994), p. 40.

⁷¹Kirchheimer, Political Justice, p. 197 and 304 ff.

⁷²Orentlicher, "Settling Accounts," pp. 2539-2545.

⁷³The formula "gross abuses of human rights," as it is used by the Human Rights Watch, applies to: genocide, arbitrary, summary or extrajudicial executions; forced or involuntary disappearances; torture or other gross physical abuses; prolonged arbitrary deprivation of liberty. Human Rights Watch, "Special Issue: Accountability for Past Human Rights Abuses," Human Rights Watch, no. 4 (New York, December 1989): 1-2.

⁷⁴"Future generations, judging with more precise knowledge of the motivations, expectations, risks, and dangers of all the participants, may not be very charitable when assessing the motivations of those ordering political prosecutions." Kirchheimer, Political Justice, p. 199.

politicisation of the process of justice, a post-Communist government has to limit the process of political justice to basically two objectives only: deterrence from future violations of human rights, and reparation of the violations already occurred.⁷⁵

If a government remains responsible for promoting justice and providing reparation for actions belonging to a previous regime with which it does not claim continuity, then this responsibility should exist even more imperatively for actions taking place *under* the mandate of that same government. In other words, if the post-Communist governments are under the duty to punish the violations of human rights which occurred under the Communist regime, this duty should be just as valid for the violations occurred under the post-Communist regime itself. This type of duty, however, should be valid for any government, including the Communist governments themselves. Thus, the Communist governments are themselves responsible, in the same way as the post-Communist governments, for those violations of human rights which occurred under their leadership.⁷⁶

This aspect of the Communist governments' responsibility for the protection of the

⁷⁵Zallaquett, "Confronting Human Rights Violations," p.5.

⁷⁶In this respect, in December 1989, the Human Rights Watch issued a statement on the duty of the governments to punish gross abuses of human rights. "Human Rights Watch holds that those who commit gross abuses of human rights should be held accountable for their crimes. It is a responsibility of governments to seek accountability regardless of whether the perpetrators of such abuses are officials of the government itself and its armed forces, or officials of a predecessor government, or members of anti-government forces, or others. We oppose laws and practices that purport to immunize those who have committed gross abuses from the exposure of their crimes, from civil suits for damages for those crimes, or from criminal investigation, prosecution and punishment." Human Rights Watch, "Special Issue," p. 1.

citizens' rights, not only as alleged perpetrators of systematic human rights violations, but also as entities placed under the constitutional duty to defend and promote those rights, creates a new dimension concerning the legitimate foundation of a process of justice addressing the crimes which occurred under a previous regime. In this dimension, a new government addresses not only the individual violations of human rights, but also the old regime itself, for not having fulfilled its duty to protect human rights. Therefore, in fulfilling his duty to protect human rights,⁷⁷ the post-Communist governments are kept responsible not only for punishing individual perpetrators, but also for legally evaluating the past regime under which those crimes remained unpunished. Hence, the qualified way of designing the object of a process of political justice, based on human rights violations, includes necessarily an unavoidable dimension of governmental responsibility with respect to the past regime.

1.5 The Right to Revolution

The core position of human rights violations as the object of a process of political justice, can be linked to a theoretically forgotten dimension of social justice: the right to revolution. Concentrating on the violations of human rights, as the object and the justification of the process of post-totalitarian justice, anchors such a process more stably

⁷⁷ About an absolute duty to prosecute human rights violations see Orentlicher and Nino debate. Carlos S. Nino, "The Duty to Punish Abuses of Human Rights Put Into Context: The Case of Argentina," Yale Law Journal 100, no. 8 (June 1991): 2619-2640. Diane F. Orentlicher, "A Reply to Professor Nino," Yale Law Journal 100, no. 8 (June 1991): 2641-2643.

within the realm of legality. At the same time, this choice of the object of a process of political justice tolerates a positive discrimination towards those aspects of the competing discourses which are in favour of justice through an assessment of the past regime. Logically, this choice is detrimental with respect to other potentially valid arguments put forward *against* measures of political justice.

Ironically, it is the development of the very concept of legality which, alongside the protection offered implicitly to basic human rights, has also curtailed the path (and one could even say the right) to political justice based on what we have just identified as the duty of any government to protect and promote human rights.⁷⁸ This curtailment is not due to the usual restrictions entailed by the formal principle of the rule of law, but through an implicit weakening of the natural right to an “ultimate protection” against the state. Such a protection was, and still is necessary in those realms where the positive law might be structurally unable to offer a real shield against discretion and abuse.

The rule of law offered, in its emergence as a fundamental principle of the modern state, a list of tools and principles for the protection of the individual against abuse. At the same time, this development brought in practice an end to an important meta-legal right of the individual: the right to resistance and to revolution. This right was based on the notion that when the state puts itself in “a state of war with the People,” the People “have the

⁷⁸Herman Klenner, “On the Right to Revolution: A German Dilemma,” in Enlightenment, Rights and Revolution, eds. Neil McCormick and Zenon Bankowski (Aberdeen : Aberdeen University Press, 1989), pp. 287-296.

right to resume their original Liberty.”⁷⁹ This restoration allowed, of course, for institutional changes in society, but it also implied an inevitable normative retroactive assessment of the way the political power was exercised. This implication represents in fact one of the important ways in which societies could “provide for their own Safety and Security.”⁸⁰

Given the very wide mandate society gives its government, changing mechanically the nature of the political institutions and making these function under the formal prescriptions of the rule of law, is not always sufficient to provide safety and security. Society needs the practical means to send a clearer message: that there is retribution where the political mandate and the state institutions are diverted from their agreed-upon functions.⁸¹ Of course, it is not possible to transform this unwritten mandate, or the originating “social contract” into the yardstick we need for measuring political conduct and for assessing the extent to which the Government is “in breach of contract.” Nevertheless, as it was shown earlier, the human rights discourse offers a solid core to this mandate which cannot be dismissed: no society can give its government a mandate which would allow the disposal of society’s most fundamental rights, such as the right

⁷⁹ John Locke, Two Treatises of Government, 2nd ed., vol. 2, ed. Peter Laslett (London : Cambridge U.P., 1967), 168-69. Also, Robert C. Grady, “Obligation, Consent, and Locke’s Right to Revolution: ‘Who Is to Judge?’” Canadian Journal of Political Science ix, no. 2 (June 1976): 277-292.

⁸⁰ John Locke, “Two Treatises of Government,” p. 227.

⁸¹ Jaime Malamud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?” Human Rights Quarterly 12, no. 1 (1990): 1-16. Ruti Teitel, “How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?” The Council on Foreign Relations Latin America Project Paper (New York, 17 May 1990): 146 ff. Also, Orentlicher, “Settling Accounts,” p. 2543.



to life, to freedom of movement and freedom of opinion, the right to privacy, the right not to be unjustly imprisoned.⁸² All these rights have been systematically violated by the Communist regimes without necessarily violating at the same time the formal principles of the rule of law.

If the right to resistance and revolution is so important for the protection of significant dimensions of citizens' relationship with their government one could ask why this right has been neglected by the law. Ironically, the reason for the dilution of this important right to revolution was the emergence, within the law, of the discourse of constitutional rights. The "ultimate right," the right to revolution, has not been included in the realm of rights protected by the rule of law partly because of "technical difficulties" in dealing with the "unintended indeterminacy"⁸³ such a right would bring into a positive legal system, and partly because of an unjustified confidence in the potential of the rule of law to protect the lives and liberty of the citizens against the state.⁸⁴ The maturing of this exclusive discourse of rights within the discourse of legality, which itself was founded upon the rule of law, implied that the right to revolution lost its ideological arguments

⁸² Amnesty International, "Oral Statement by Amnesty International before the United Nations Commission on Human Rights, Sub-Committee on Prevention of Discrimination and Protection of Minorities," Amnesty International, International Secretariat (August 1991), pp. 1-4. Orentlicher, "Settling Accounts," p. 2543.

⁸³ On the intended and unintended indeterminacy in law, see Kelsen, Problems of Legal Theory, pp. 78-80.

⁸⁴ In a paper preceding his book on political justice, Kirchheimer himself acknowledged the "degradation" of the right of resistance into a catalogue of constitutional rights of freedom. Otto Kirchheimer, "Legality and Legitimacy," reprinted in Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann, transl. by L. Tanner and K. Tribe (London: Allen and Unwin, 1987), p. 132.

and strength. This was very much due to the belief that the formal principle of legality is capable *by itself* to ensure justice regardless of the nature of, and the way in which, the political power is exercised.

Given the fact that the discourse of Constitutional rights is based on the formal rationality of law, it appears that the right to revolution against governmental oppression has been replaced by the rights and liberties protected by the rule of law. However, not all the functions of the right to revolution, nor its substantive sources⁸⁵ have been passed on into the new Constitutional rights. The constitutional rights offer sufficient protection only for citizens living under a “responsible and responsive government.”⁸⁶ The right to revolution though is an indispensable right to minimal justice for people living under “irresponsible” and “unresponsive” governments. “Responsible and responsive” versus “irresponsible and unresponsive” is the distinction between two fundamental types of the exercise of power which the rule of law in its formal spelling fails to address.⁸⁷ This is the distinction upon which many of the claims for justice, in Eastern Europe and elsewhere, are based.

Excluded from “legality,” the protection offered to the right to revolution by its usual natural law sources was also weakened. Accordingly, the concept acquired a notoriously

⁸⁵Kirchheimer places the “popular consciousness” among the substantive sources of the right to revolution. Kirchheimer, “Legality and Legitimacy,” p.143.

⁸⁶Roger Cotterrell, “The Rule of Law in Transition: Revisiting Franz Neumann’s Sociology of Legality,” Social and Legal Studies 5, no. 4 (1996): 451-470.

⁸⁷Montesquieu distinguished between “moderate” and “immoderate” government. See, Judith N. Shklar, Montesquieu (Oxford: Oxford University Press, 1987), p. 85. Also, Judith N. Shklar, “Political Theory and the Rule of Law,” in The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan, (Toronto: Carswell, 1987), pp.1-16.

controversial character in the legal discourse. Faced with the institutionalised protection offered to the legal rights by the positive law, the importance of a right to resistance and revolution faded. In this way, the weakening of citizens' protection - from the extreme point of view of a revolutionary context - occurred not through an active process of undermining of this right, but through a passive one; it occurred through completely being left out of the realm of the formal rule of law. In fact, what was left out was the right to re-assess a government, and eventually withdraw the delegated power of government. Implicitly, all the logical consequences of political justice that this re-assessment would entail have become more difficult to argue for from the formal legal position.⁸⁸

Among the clear implications a right to revolution would have for an oppressive regime is the governmental responsibility for the gross violations of human rights. Undeniably therefore, the right to revolution, just as the right to resistance, concerns directly the political power. The distinction between resistance and revolution emerges in relation to the political structures, reflecting the degree and quality of the impact upon the structures addressed and contested. The right to resistance is chronologically, as well as philosophically, linked to the right to revolution, the latter being, however, of a more direct concern for the process of political justice. From this point of view, the right to revolution expresses the more dynamic dimension, implying the taking over of the institutions of power, and a radical, often violent, change of constitutional structures. As

⁸⁸Locke, "Two Treaties of Government," p. 222.

to the right to resistance, it covers mostly (passive or active, non-violent or violent⁸⁹) acts of civil disobedience aimed at forcing the government agencies to implement changes in line with the civil demands.⁹⁰ The right to resistance aims to obtain a change which does not necessarily affect the structures of the government but which affects its policies, while the right to revolution is inevitably linked to radical institutional changes.⁹¹ The two can sometimes overlap, and the result is a... "velvet revolution."

Regardless of the style and depth of the changes, both resistance and revolution entail variable degrees of civil disobedience.⁹² Often, the radicalisation of the acts of civil disobedience depends upon the responses the structures of power have to social signals

⁸⁹Joseph Raz, The Authority of Law (Oxford: Clarendon Press, 1979), pp. 266-275.

⁹⁰Rawls defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." John Rawls, A Theory of Justice (Oxford: Oxford University Press, 1971), pp. 364-365. Also, Hugo Adam Bedau, "On Civil Disobedience," Journal of Philosophy 58 (1961): 653-661. For "disobedience as a plea for reconsideration" see Peter Singer, Democracy and Disobedience (Oxford: Oxford University Press, 1973), pp. 84-92. Hugo Adam Bedau (ed.) Civil Disobedience in Focus (London, New York: Routledge, 1990), p. 4 ff.

⁹¹"Revolution is the most extreme political option of a dissenting group, a course taken generally when more moderate and legal attempts to achieve recognition or reform have failed..." Microsoft Encarta 97 Encyclopaedia, s.v. "Revolution." For the radicalness of the changes brought by a revolutionary movement see J. M. Finnis, "Revolutions and Continuity of Law," in Oxford Essays in Jurisprudence, ed. A. W. B. Simpson (Oxford: Clarendon Press, 1973), pp. 44-76. Also in Kelsen, General Theory of Law and State (Cambridge MA: Harvard University Press, 1945), pp. 368-369. and also Hans Kelsen, The Pure Theory of Law, trans. from the 2nd (rev. and enl.) German ed. by Max Knight (Berkeley: University of California Press, 1970). "'Revolution,' where rival claims to govern are made from within the group, is only one case, and though this will always involve a breach of some of the laws of the existing system, it may entail only the legally unauthorized substitution of a new set of individuals as officials, and not a new constitution or legal system..." H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), pp. 114-115.

⁹²Ronald Dworkin, Taking Rights Seriously, 7th ed. (London : Duckworth , 1994), pp. 206-222. Henry David Thoreau, Civil disobedience (London] : Peace Pledge Union, 1940).

of discontent.⁹³ The fact that one government would be relatively open and “respectful” when faced with citizens exercising their right to resistance, while another government might be repressive and motivate revolution, does not change the philosophical and legal dilemma hidden within the dichotomy between the right of states to legislate and to citizens’ obedience on the one hand, and the civil rights of the citizens - which might sometimes collide with the duty to obey - on the other hand.⁹⁴ Only one set of actions can be legitimised, either the absolute claim put forward by the law of the state to respect its demands for conduct, or the actions inspired from the right to civil disobedience, and ultimately to revolution, in those cases in which the civil rights are threatened by the state.⁹⁵ The act of legitimising either one is placed outside the legal discourse since, indirectly, it questions the very potential of formal legal rationality to convey legitimacy.⁹⁶

A breakthrough out of this dilemma could be represented by a differentiated approach to the rule of law. A process of differentiation of this fundamental legal principle might be able to offer the constitutional rights the same formal protection, and at the same time, to acknowledge the right to revolution based upon the violation of the citizens’ basic rights. Within the revolutionary context, this differentiation of the principles of the rule

⁹³Here again, Montesquieu’s distinction between moderate and immoderate governments seems relevant.

⁹⁴Klenner, pp. 288-290.

⁹⁵Ibid.

⁹⁶See Max Weber, “The Types of Legitimate Domination,” in Economy and Society: An Outline of Interpretive Sociology, vol. 3, eds. Gunther Roth and Claus Wittich (New York: Bedminster Press, 1968), pp. 212 ff.

of law would have the role to “tame,” more than to exclude, those morally legitimate social expectations for justice. Klenner’s analysis of the 19th century German philosophers conveys such an idea. In a pure Alexandrian way, he cuts the Gordian knot of the dilemma of duty and rights by arguing for a normative *bias* towards the revolution.

The choice between the right to revolution and the duty to obey, argues Klenner, represents a decision to be taken “in intellectual terms.” This indicates a rational normative choice which cannot be made without proving a certain degree of bias.⁹⁷ Klenner argues that without this bias there is no escape from the theoretical paradox of rights and duties.⁹⁸ The lack of bias towards the right to revolution transformed this right into a forgotten, but needed, path to *post facto* evaluation of an *unequal* power relationship between the state and its citizens. A fully fledged right to revolution should necessarily include a duty of the government agencies to recognise and acknowledge the social *signals*, emerging from the unbalanced power relationship, as valid statements of legitimate expectations. In this sense, one could bring in the legally daring idea that the expectations for justice brought by a revolution are never truly retroactive.

⁹⁷Klenner, p. 289 ff.

⁹⁸The zero position towards this paradox is found in J. Fries’s expression “The people have no right to insurrection, and the ruler has no right against it.” J. Fries, Philosophische Rechtslehre, quoted in Klenner, p. 292.

1.6 Preliminary Conclusions

So far, it appears that focusing on the duty to protect fundamental human rights introduces into the discussion two of the most controversial issues entailed in the process of political justice in Eastern Europe. Firstly, the issue of collective responsibility revealed both in the duty of the post-Communist governments to address the totalitarian regimes as a whole, and in the implied duty of the Communist governments themselves to protect and promote human rights. The second important issue, through the emphasis on human rights as the main object of political justice, is the right to revolution, and hence the right to a retroactive assessment of the totalitarian regime and of its human rights record.

A process of political justice is largely presupposed by a revolutionary process. Associated to a revolution as inherently backward-looking process, the mechanism of political justice has also an inevitable retroactive dimension. The right to revolution is ultimately a right to a “controlled” retroactivity. This right will not be integrated under the rule of law, but rather circumscribed by it. The circumscription appears as essential for any process of justice in periods of transition, or in times of radical questioning of the political ruling class.

Therefore, creating a path for the process of political justice requires the creation of a path for the reintegration of this distinct right, meant for times of social hardship, into

the discourse of recognised rights. This right implies, in its extreme application, an *ex post facto* assessment of the acts of government. Its source will go beyond legal statutes and, according to Kirchheimer, marked by an “absence of substantive boundaries,” its strength will lie only “in its embodiment in popular consciousness.”⁹⁹ The way in which the right to resistance and revolution can re-enter the constitutional discourse is only through a “particularised” rule of law.¹⁰⁰ The rule of law in itself will not be able to offer direct protection against certain types of systemic abuse calling for revolution.¹⁰¹ However, it could allow for mechanisms of protection to evolve under specific limitations, within the concept of political justice, with the purpose of containing this very process of justice within the wider limits of the legal discourse.

As we have seen in the beginning of this chapter, Kirchheimer in his account does not provide for a process of benign political justice emerging from a revolution. The fact that this type of political justice is prompted by violations of universally recognised basic rights determines the need for the legal discourse to acknowledge undeniably legitimate expectations even when they concern a previous regime. In answering the duty to address the violations of human rights, a new government will inevitably have to address the past

⁹⁹Kirchheimer, *Political Justice*, p. 132.

¹⁰⁰Cass R. Sunstein, “Problems with Rules,” *California Law Review* 83, no. 4 (1995): 1023-1024.

¹⁰¹“The possibility of abusing norms undoubtedly exists in the [parliamentary legislative] type of state; to try to exclude this possibility for any form of state, however, would really have to be called a ‘normativistic illusion.’ The same is true - as also stated by Carl Schmitt - for a certain degree of normative indefiniteness, but it was exactly the typical normative structure of historical realization of this state system which aimed at reducing, if possible, this degree of indefiniteness.” Otto Kirchheimer and N. Leites, “Remarks on Carl Schmitt’s *Legalität und Legitimität*,” in *Social Democracy and the Rule of Law*, transl. L. Tanner and K. Tribe (London: Allen & Unwin, 1987), p. 168.

political regime as a whole. In the context of a revolution, the duty to protect human rights acquires in this way not only an undeniable retroactive character, but also a collective dimension of responsibility, which the legal discourse has to deal with. In the next two chapters, in which the procedural paradigms of political justice will be presented, we shall see to what extent and how the debate on political justice has acknowledged both a dimension of collective responsibility attached to the past regime, and the inherent *ex post facto* character of this responsibility.

Chapter Two

ON PROSECUTING: POLITICAL JUSTICE THROUGH CRIMINAL LAW MEASURES

Abstract

After establishing in Chapter One collective responsibility as one of the important dimensions of a process of political justice in Eastern Europe, Chapter Two and Chapter Three present the two main legal approaches to this process: the approach through criminal law and the approach through administrative measures. Political justice through criminal law is illustrated in this chapter through an analysis of the Hungarian debate on the amendments to the statute of limitations. This debate reveals both the challenge put to the principle of the rule of law in a process of political justice, and the limitations of this principle in acknowledging a concept of collective responsibility and, implicitly in answering the social expectations for justice. As a different perspective within the criminal law approach to collective governmental accountability certain aspects of the German border guards trials are also presented. Both these criminal law cases illustrate the pervasiveness of the idea of collective (political) responsibility, and the need for a coherent concept of collective agency and collective responsibility.

2.1 Introducing Case Studies to Political Justice

The “presence” of Fuller’s sixth Deputy - advising that the perspective of a collective political responsibility be acknowledged in post-Communist Eastern Europe - is to be established by inquiring as to what extent the concept of collective responsibility is present in the debate on political justice after a revolution. As far as possible, this inquiry will consider directly the debate on collective responsibility of the Communist governments in Eastern Europe. However, an important part of this analysis will consist of an identification of the possible consequences different other elements of the issue of

political justice in Eastern Europe have for the debate on collective responsibility. For this purpose we will look mainly at two case studies from the post-Communist Eastern Europe - Hungary and Czech Republic.

Each of the main cases of political justice included in this thesis cover specific areas of the debate on political justice. The present chapter concentrates on the criminal law approach taken by Hungary. In analysing this approach we shall look closely into the legislative process and the debate around it. This debate brought about the Hungarian law which resulted in the suspension of the statute of limitations for certain categories of crimes committed under the Hungarian Communist regime. Choosing Hungary as one of the case studies was determined by the amplitude the debate on the statute of limitations and more generally the debate on political justice took in Hungary. This analysis will be supplemented with details from the German criminal law approach to political justice. In this case, procedural and substantive aspects were combined, giving a totally different “texture” to the process of justice as a whole, and incorporating more openly the concept of collective responsibility.

In the next chapter, an analysis of the predominantly non-criminal approach taken in the Czech Republic will be undertaken. This analysis will consider the administrative and legislative measures of screening and purging undertaken in the Czech Republic. This case study was chosen, from among all the Eastern European cases of political screening, due to the far-reaching consequences these measures had at the legislative level. The two case studies also seem representative because they each concentrate basically on one of

the fundamental approaches to political justice. Although the debate on administrative decommunisation was also present in Hungary, the adopted criminal law approach to the issue of post-Communist justice was for a very long time the only one which went beyond the stage of mere debate. Even later, when screening and purging were considered, they did not reach the same legislative climax as in the Czech approach.¹ On the other hand, the Czech process of decommunisation as a whole appeared legally so much bolder in that it “annexed” any criminal law initiatives in the search for post-totalitarian justice.

2.2 The Criminal Law Approach to Political Justice in Hungary:

Historical Background

As argued in Chapter One, assessing the human rights violations perpetrated under a past regime should represent the main goal of a process of political justice. Given this objective, it appears normal for a post-Communist government to examine the possibility of reaffirming justice for the violations of human rights through the mechanisms provided by the criminal law. Also, this legal path often appears as the most imperative, although not the only one capable of providing punishment, reparation and deterrence relative to human rights abuses.

¹Gábor Halmai and Kim Lane Scheppele, “Living Well is the Best Revenge: The Hungarian Approach to Judging the Past,” in Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams (Notre Dame & London: University of Notre Dame Press, 1997), pp. 171-178.

In spite of its immediacy, the criminal law approach also comes with inherent complex mechanisms and limitations derived from the basic principles of the rule of law, which make the applicability of the criminal law less obvious, less all-embracing, and more cumbersome in a process of political justice. Besides these limitations always present in a debate on political justice, the difficulties in applying the criminal law have proven even greater in post-Communist countries such as Hungary, due to the specificity of the Communist regime.

In all Eastern European countries, the initial Communist repression was followed by a long period of milder, if not peaceful, dominance. In this context, at an institutional level at least, the distinction between right and wrong was sometimes blurred to the extent that the two became almost confused.² The relatively long duration of the Communist regimes in Eastern Europe is, of course, not without importance in this respect. The Communist governments took their time to build legal systems which, with some effort, just as in Fuller's Purple Shirt regime, could mimic well the formal dimensions of the rule of law.³ At a more concrete level, the same dimension of time determined also situations in which, given the statute of limitations rules, serious crimes and human rights violations occurring under the Communist regime, could not be pursued by the criminal courts in spite of the radical changes in political context, and in spite of a re-instated commitment to the consistent application of criminal law.

²Janos Kis, "Meditation On Time Before Firing Squad Trials," (TD, 1994), p. 18 ff.

³Adam Podgorecki, "Totalitarian Law: Basic Concepts and Issues," in Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), pp. 3-37, esp. pp. 19-21.

Hungary's Communist history for instance, began violently. Occupied by the Soviet troops in the end of the World War II, Hungary was soon "invaded" from within by the Hungarian Socialist Workers' Party (MSzMP). Benefiting from the Soviet support, this party quickly and violently took control of the whole country. By 1947 extensive purges of the judiciary, civil service and military, as well as the violent suppression of the church, were undertaken. The Communist rule was enforced at all levels by the State Security Department (AVO) which, copying the Stalinist methods, used force and terror without any restraint.⁴

However, in 1953, after Stalin's death, Imre Nagy who became the new Hungarian prime minister, tried to institute a "New Course" for the country, following a liberal reform programme which included a reduction in the use of repressive methods by the Security Department, the reduction in power of this latter department, the liberation of the political prisoners, and the abolition of the concentration camps. Moscow and the internal Communist hard-liners disapproved of this movement.⁵ As a consequence, in 1955 Nagy was ousted from office and from the Party leadership. The prospect of a return to a repressive regime was not well received by the Hungarian population, and, in October 1956, when the police fired into a peaceful student demonstration, the population turned the peaceful march into a revolution. Although the army joined the revolutionaries and

⁴For details and data on the victims of this stage of the Communist regime in Hungary, see Stéphane Courtois, et al., Le livre noir du communisme: crimes, terreur et répression (Paris: Editions Robert Laffont, 1997), pp. 429-496.

⁵Andrew Felkay, Hungary and the USSR, 1956-1988: Kadar's Political Leadership (New York; London: Greenwood, 1989), p17.

Nagy was reinstated, the more rigid line of the Hungarian Communist leadership called upon the Soviet tanks which invaded Hungary and, on the 4th of November 1956, reinstated the rigid Communist control. Janos Kadar became the new head of state. The first decision taken by the new president once in power was to unleash a violent purge of the Party machine of Nagy's followers. Repression was reinstated, and many of the revolutionaries were executed.⁶

In spite of this brutal reaction to the population's peaceful calls for more openness and real democratisation of the party-state, repression began to ease during the 1960s.⁷ The Kadar regime began to apply less state interference and to allow a relatively greater freedom of expression. These concessions, of course, did not come for free; they were made under the tacit condition that the citizens were not to contest openly the authority of Communist rule. A "New Economic Mechanism" implemented by Kadar began also to bring about some results in the welfare of the population. However, the vivid memory of the 1956 repression, was kept fresher by the sight of the Soviet soldiers patrolling the country.

Given the Kadar reforms, Hungary became one of the most economically advanced Communist countries. Yet, the complacency in the regime, put forward by some authors

⁶Gyorgy Litvan, The Hungarian Revolution of 1956: Reform, Revolution, Repression, 1953-1963 (Harlow: Longman, 1996), p. 93 ff.

⁷Felkay, p. 22.

as a reason to halt any attempt of addressing the injustices of the Communist regime,⁸ seems to have been only a submission in front of the threat of sheer force.⁹ In fact, the Hungarians seem never to have forgotten the original repression of the mid 1940s, and the repression of the 1950s even less. A proof that this element remained in the collective memory of the Hungarian population is the fact that, in the attempt to bring to justice the Communist past, the 1956 repression and the political decisions related to it were among the first to be addressed. The need for a solid legal basis, and the desire to distance itself from the illegalities and abuses which happened all too often during the Communist regime, prompted the Hungarian legislature to address the issue of justice for the past mainly through the “active” criminal law. This actually meant trying to bring to court those acts which constituted a criminal offence under the new legal regime, as well as under the Communist one.

⁸Kis, “The Firing Squad Trials,” p. 28 ff.

⁹Weber classified the legitimacy according to its source in “charismatic” legitimacy, based on the personal features of the leader, “traditional” legitimacy, based on the master’s authority, and “legal-rational” legitimacy, based on the crucial feature of impersonality of the legal norms. None of these faces of legitimacy can truly cover the legitimacy claims of a totalitarian repressive regime. Weber, pp. 212-233. Podgorecki proposes a new type of legitimacy called the “dead-end legitimacy,” characterising a totalitarian system. This type of legitimacy occurs when the population tolerates the power it does not respect, following for instance attempts to change the regime which ended in disaster, or when it is generally recognized that the superior power which had imposed the hated rules is more than a match for the forces of the subjugated society. Podgorecki, “Totalitarian Law,” p. 21. Although trying to bring totalitarianism under a systematic view over the concept of legitimacy, the “dead-end legitimacy” seem to go against the common sense meaning of the word “legitimate”: “lawful,” “regular,” “reasonable,” “that can be justified.” Oxford English Dictionary, s.v. “legitimate,” London: Oxford University Press, 1963.

2.2.1 Amending the Statute of Limitations: Context and Content of the Zétényi-Takacs Law

On the 4th of November 1991, the Hungarian Parliament voted a law which was due to become a landmark for the Hungarian process of post-Communist political justice. This law called for the suspension of the statute of limitations prescribed by law for cases of treason, premeditated murder and aggravated assault leading to death, that had been committed between the 21st of December 1944 and the 2nd of May 1990 (the date of the first free post-Communist elections in Hungary).¹⁰ The new law applied to cases in which prosecution had not previously been possible *due to political reasons* (e.g. during the Communist regime).¹¹ The law was introduced by Zsolt Zétényi and Péter Takacs - two deputies of the governing party at the time¹² who gave their name to the law - and it was supported by a large majority in parliament.¹³ In its formulation, the Zétényi-Takacs law addressed the Communist regime's crimes in two ways. Firstly, the law allowed the

¹⁰The Zétényi-Takacs law, Art. 1. para (1): "On May 2, 1990 the statute of limitation recommences for the prosecutability of criminal offences committed between December 21, 1944 and May 2, 1990 which, constituting offences by the Law in effect at their commission, are defined by the 1978 Law IV as treason (144 para. (2)), voluntary manslaughter (166 para. (1) and (2)), and infliction of bodily harm resulting in death (170 para. (5)), provided that the State's foregoing of its claim to punish was based on political reasons. Art. 1. para (2) The punishment prescribed under Paragraph (1) can be mitigated without any restrictions." (Unofficial translation).

¹¹Judith Pataki, "Dealing with Hungarian Communists' Crimes," RFE/RL Research Report 1, no. 28 (1992): 21-24.

¹²The Hungarian Democratic Forum (HDF).

¹³The votes were casted as following: 197 votes in favour, 50 votes against and 74 abstentions. The Independent, 11 November 1991, p. 14.

prosecution of the mentioned serious offences for which the statute of limitations term had expired. Secondly, the prescribed period in the statute of limitations was renewed for crimes for which the limitation period had not yet fully expired.

Two aspects of the Zétényi-Takacs law appear as very important for this criminal law approach to political justice. The first aspect refers to the fact that the categories of actions to be prosecuted were defined very precisely in the Zétényi-Takacs proposal. Moreover, this precision was achieved by using legal definitions of crimes from the Hungarian Communist criminal code. The second aspect derives from the continuity of the post-Communist legislation with the Communist legal norms, and it consists of the fact that the law was clearly based on existing criminal norms, and it carried with it the necessity to conform to a whole range of cumulative procedural conditions dominant in the criminal law.¹⁴ This meant that the Zétényi-Takacs law had - at least with respect to the substantive grounds of the case - the potential of safeguarding the principle of the security of law and the right to a fair warning of the persons concerned by the new law. Later on, when analysing the controversial issues accompanying the administrative way of dealing with the past (Chapter Three), we might consider these two aspects of the criminal law approach as virtues of a process of political justice in comparison with the shortcomings of the administrative approach.

Notwithstanding these procedural “facilities” offered by the criminal law, or maybe more

¹⁴Ruti Teitel, “How can democratic governments deal with the injustices of their predecessors without sacrificing the rule of law? A forum on the recent Hungarian Constitutional Court decision upholding statutes of limitations,” East European Constitutional Review 1, no. 2 (Summer 1992): 18-19.

correctly because of them, the criminal prosecution of the ex-Communist leaders appeared to be a very difficult enterprise, legally as well as politically. An exclusively criminal law approach towards political justice has necessarily not only positive protective implications, but also negative ones. For instance, it was generally agreed that the Hungarian society could not build a state based on the rule of law if the concept of justice was being corrupted by the fact that the perpetrators of serious crimes remained unpunished. Nevertheless, suspending the statute of limitations retroactively *per se* introduced an element of legal uncertainty. Some argued that this uncertainty has an equally negative effect on the system of justice as the fact of leaving some crimes unpunished. While the law in discussion would attempt to provide justice where this was made impossible by the past regime, the means used to do so could eventually be detrimental to the very concept of justice that the law tried to restore. For a fragile democracy, it was said, the Zétényi-Takacs law was creating an unwelcome precedent.¹⁵

Different political factions and different voices in the Hungarian civil society were inclined towards different scenarios in assembling the moral, legal and political discourses involved in justifying or denying this law. Those rejecting the law characterised it as “backward-looking,” in order to underline its strongest contested parameter: its alleged non-conformity to the principle of non-retroactivity of the criminal

¹⁵Pataki, “Hungarian Communists’ Crimes,” p. 24. Michael Rosenfeld, “Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?” A forum on the recent Hungarian Constitutional Court decision upholding statutes of limitations, East European Constitutional Review 1, no. 2 (Summer 1992): 17-18.

law.¹⁶ Based on this critique, a legal dystopia,¹⁷ emphasising the negative scenarios, was opposed to the search for justice claimed by the Zétényi-Takacs law. It was argued that the new democracy's commitment to the fundamental principles of the rule of law includes an absolute prohibition of *ex post facto* laws.¹⁸ Moreover, introducing a retroactive regulation in an area intricately associated with the field of substantive criminal law was said to destabilise the entire legal system. This negative projection of the law was further entrenched by moral arguments. These arguments were not necessarily looking for support in legal arguments. After more than forty years since some of the crimes have occurred, it was argued, the prosecution will have no other scope than revenge.¹⁹ This search for revenge, the critics were warning, was doomed to bring to society a climate of suspicion. This suspicion, it was claimed, would in the end be very damaging for the social and economic reconstruction of the country.²⁰

The supporters of the Zétényi-Takacs law also used moral as well as legal arguments to

¹⁶Halmi and Scheppele, "Living Well," p. 157.

¹⁷Supra, Chapter One, note 37.

¹⁸Krisztina Morvai, "Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court," East European Constitutional Review 2, no.4 / 3, no.1 (Fall 1993/Winter 1994): 32.

¹⁹This argument, together with the claim made sometimes that after such a long period of time would be very difficult, if not impossible, to gather evidence for the prosecution of those crimes, is contradicted by the fact that several countries do not have a statute of limitations for serious crimes. Schulhofer made an analysis of the American legislation in this sense. Stephen J. Schulhofer, "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?" A forum on the recent Hungarian Constitutional Court decision upholding statutes of limitations. East European Constitutional Review 1, no. 2 (Summer 1992): 18-19.

²⁰Jean-Marie Domenach, "Laisser les morts enterrer les morts," Le Monde, 20 February 1990, p. 2.

consider the positive protective implications of basing this measure on the criminal law. The affirmative moral argument for the adoption of the law was that not prosecuting those serious crimes placed under its jurisdiction would mean to do injustice a second time to the victims of the Communist regime.²¹ It was also pointed out, that the accusation of revenge or witch-hunt made by some of the critics, was not only unfair - given the sad reality of the Communist crimes - but also logically unsustainable.²² As long as the number of persons to whom the law refers would involve only about one hundred (most of the persons falling under its jurisdiction being dead, or very old), the trials which might have been conditioned by the suspension of the statute of limitations, would have acquired a symbolic nature, rather than one of revenge. The Zétényi-Takacs law, it was said, was aiming to unmask rather than to punish.²³ Along the same lines, it was argued that the law was providing for the possibility of lighter sentences than the ones prescribed by the criminal code. According to the Zétényi-Takacs law, the courts had even the possibility to pass symbolic sentences, whilst suspending punishment.²⁴

²¹Huyse, "Justice after Transition," pp. 105-106.

²²"Hungary: Constitution Watch," East European Constitutional Review 1, no. 3 (Fall 1992): 6. Pataki, 1992, p. 22.

²³Edith Oltay, "Hungary Attempts to Deal With Its Past," RFE/RL Research 2, no. 18 (30 April 1993): 8-9. Pataki, p. 23. With a deterrent potential of knowledge agree even authors who, for procedural reasons, do not support the suspension of the statute of limitations in Hungary. Roger Errera, "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?" A forum on the recent Hungarian Constitutional Court decision upholding statutes of limitations, East European Constitutional Review 1, no. 2 (Summer 1992): 19.

²⁴Zétényi referred to an "indirect amnesty." Pataki, p. 23. It appears that the courts could reach decisions which are both sentence and pardon in the same time. The courts have also been vested, in this respect, with the usually presidential prerogative of forgiveness or pardon.

As to the legal argument in favour of the Zétényi-Takacs law, it started from the idea of a necessary separation of powers in the state, promoting a demand for the separation of actors in the legal arena.²⁵ In this sense, it was argued that the legal institution of the statute of limitations presumes that the offenders and those in charge of law enforcement do not belong to the same interest group, e.g. the Government.²⁶ From this assumption of institutional conflict flows the conclusion that the statute of limitations is inapplicable to those cases in which Communist officials committed crimes and then, abusing their positions, blocked the machinery of criminal justice.²⁷ In order to support this argument, information was provided from the Hungarian Secret Police files, making publicly available a series of top secret orders from the Communist Hungarian chief prosecutor. These orders revealed that any arrest or prosecution of a Communist official was conditioned by the approval of the Communist Party hierarchy.²⁸ This approval was not

²⁵Edith Oltay, "Hungary's Attempt to Deal With Its Past," RFE/RL Research Report 2, no. 18 (1993): 9-10.

²⁶This reasoning is not unusual. From the American legal tradition, which was very much present in the Eastern European debate on political justice (through the participation in the legal reform of many American legal scholars), and in particular in the discussions on the statute of limitations in Hungary and screening in the Czech and Slovak Republics, Schulhofer gives the example of the states of New York, Pennsylvania and Illinois where the statute of limitations for charges involving misconduct by a public official is tolled for the period that the official remains in office. Schulhofer, p. 18.

²⁷The Hungarian Constitutional Court referred to these arguments in its decision on the Zétényi-Takacs law. "Hungary: Constitutional Court Decision on the Statute of Limitations. No. 2086/A/1991/14 (March 5, 1992)," in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 3, Laws, Rulings, and Reports, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 639-640, hereafter "Hungary: Constitutional Court Decision No. 2086."

²⁸Pataki, pp. 22-23. This kind of instructions were not unusual in the Communist Eastern Europe. In fact it is one of the basic features identified by Podgorecki in the totalitarian legal systems. "[If] a Communist Party member (either Soviet or Polish) committed a crime, he or she could not be brought to court, even if his or her guilt was evident, without clearance from the relevant party organs, which might expel the subject from their ranks to enable the police to bring charges. But, according to secret instructions issued to state prosecutors and the police, no criminal charges could be brought against a person who remained a party member." Podgorecki, "Totalitarian Law," p. 13.

prescribed by any constitutional provision, and therefore, was a constitutional abuse.

Given these revelations, the supporters of the Zétényi-Takacs law claimed that in fact, the statute of limitations was not extended or abolished, but merely applied differently in exceptional circumstances.²⁹ These exceptional circumstances had their origin in the Hungarian Communist regime itself. Since the political context created by the perpetrators themselves did not allow prosecution, it was argued that, in effect, the statute of limitations laid dormant, and the clock attached to it could not start ticking until the 2nd of May 1990.

Along with the moral and legal arguments used in the Hungarian debate on the retroactive suspension of the statute of limitations, there is an important political argument as well. This argument leads back to the negotiations which took place in Hungary before the revolutionary changes. Specific to the Hungarian democratic changes was the fact that in July 1989 negotiations had been initiated between the non-governmental democratic forces and the more progressive wing of the Communist Party.³⁰ It was, and is still maintained, that the peaceful character of the revolutionary change in Hungary was due to a large extent to the participation in those negotiations of the Communist “progressists,” and to their “collaboration” and positive consideration of the democratic

²⁹Pataki, p. 23. To these “exceptional circumstance” the Constitutional Court will refer extensively in its decision over the Zétényi-Takacs law. See “Hungary: Constitutional Court Decision on the Statute of Limitations. No. 2086/A/1991/14,” pp. 629-640.

³⁰Garton Ash, pp. 49-56.

changes.³¹ Starting from this point, it was argued that the law on the statute of limitations would break the tacit or implicit promises made to the “reform Communists” by the political opposition during the round-table discussions in Summer 1989. The opponents to this claim conceded little place for this type of political concession. The supporters of the law argued that social justice could not be traded and, more especially, that it could not be traded by a self-appointed authority, a non-elected body, as was the case with the opposition present at the Summer 1989 negotiations. Besides, it was argued that the law in question was certainly not intended to punish the “reform Communists.”³²

In the end, after a fierce debate, the Zétényi-Takacs law actually received a very favourable vote. However, the arguments for and against the law did not only mark the parliamentary debate but they spread to the other levels of the constitutional law making process. Although successfully passed through the Parliament, the Zétényi-Takacs law required for validity the signature of the President. Given the controversial character of the law, President Árpád Göncz³³ declined to sign it automatically and asked for the opinion of the Constitutional Court.³⁴

³¹Halmai and Scheppele, p. 157.

³²Yves-Michel Riols, “Les actions du régime Communiste pourront être jugées,” *Le Monde*, 20 February 1993, p. 16.

³³President Árpád Göncz himself had been a victim of the 1956 repression, being sentenced to life imprisonment for the part he played in the 1956 uprising. Garton Ash, p. 54.

³⁴According to the Hungarian constitutional rules, the law should be signed by the President. The President however, has two possibilities when faced with a law approved by the Parliament. The first one would be simply to sign the law, in which case it will become applicable. The second possibility is that in case of doubts concerning the constitutionality of the law, the President may ask before signing, the opinion of the Constitutional Court. In case the Court answers affirmatively to the question of constitutionality of the law the President may refuse his signature and the law becomes valid. In

The President's concerns were mainly with respect to the likelihood that the law "would violate the principles of a rule-of-law state."³⁵ More precisely, he was concerned with the fact that the law might have been violating Articles 57(4) and 2(1) of the Hungarian Constitution.³⁶ Article 57(4) stated that "no one shall be declared guilty and sentenced for an act which was not a criminal offense under Hungarian law at the time when it was committed," and the article 2(1) proclaimed Hungary a "constitutional rule-of-law state." In his petition to the Constitutional Court, the President also made reference to the "historically developed" legal doctrine of *nullum crimen sine lege* which was internationally promoted as one of the basic protectors of human rights, as well as to "the basic constitutional principle that every citizen can have faith in the trustworthiness of the law and the state."³⁷

Another significant aspect raised by President Göncz was the fact that the Zétényi-Takacs law was making an "arbitrary and unreasonable distinction"³⁸ among the perpetrators of the same criminal offence on the basis of the state's reason for prosecution of such

case of a negative answer from the Constitutional Court the law will be either dropped or sent back to the Parliament for changes. Matthew Shugart, "Of Presidents and Parliaments: The Post-Communist Democracies Offer a Diversity of Legislative-Executive Configurations," East European Constitutional Review 2, no. 1 (Winter 1993): p. 32.

³⁵Petition quoted in the Decision of the Hungarian Constitutional Court, 11/1992 (III.5)AB h, translated and published in Journal of Constitutional Law in Eastern and Central Europe 1, no. 1 (1994): 131-132. Halmai and Scheppele, p. 160. Kritz, Neil J. (ed.), Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 3, Laws, Rulings, and Reports (Washington D.C.: United States Institute of Peace Press, 1995), pp. 629-640.

³⁶The Constitution of the Republic of Hungary, Article 2(1), and Article 57(4), (unofficial translation).

³⁷Decision of the Hungarian Constitutional Court, 11/1992 (III.5)AB h, p. 132.

³⁸*Ibid.*

offences. The argument, however, is important for more than what the President meant to say. It is important not only because one cannot bluntly distinguish between the degree of criminality of different reasons for committing a crime, but also because, given the nature of the regime, crimes apparently without any direct political weight have enjoyed the same active or tacit protection as the ones with a clear political motivation. For example, it is a matter of common knowledge that in Eastern Europe in the early years of the Communist rule, although not only in those years, many violent crimes were committed in connection with private property. These crimes remained unpunished not because they were not protected by the criminal law, or because the perpetrators themselves belonged to the political hierarchy, but because, at the time, it was politically incorrect to defend private property and the lives “attached” to it.³⁹

2.2.2 The Constitutional Court Decision on the Zétényi-Takacs Law

Following President Göncz’ request, on the 5th of March 1992 the Hungarian Constitutional Court gave its decision on the controversial Zétényi-Takacs law and rejected it as unconstitutional. The law received a very negative qualification from the Court because of its alleged retroactive dimension. The decision of unconstitutionality was based upon the fact that, in the Constitutional Court’s opinion, the proposed amendment of the statute of limitations did not comply “with the constitutional criminal

³⁹Robert Conquest, The Harvest of Sorrow: Soviet Collectivisation and the Terror-Famine (London: Hutchinson, 1986), p. 3 ff.

law's requisite of legitimacy."⁴⁰ In spite of the precision and non-retroactive manner in which the crimes in the Zétényi-Takacs law were defined, the law in its entirety was also qualified by the Constitutional Court as "ambiguous," "vague," and "difficult to apply."⁴¹

The Constitutional Court gave special attention to those provisions of the Zétényi-Takacs law referring to the crime of treason. The Constitutional Court considered that the definition of treason was generally subject to a too broad interpretation to be useful in such a sensitive situation as the one concerning the prosecution of persons from the Communist hierarchy; what constitutes "political reasons" and the criteria to be applied in establishing the latter could not be determined without creating many ambiguities. In the Court's view, treason is treated differently in different political systems, and therefore, it acquires different meanings.⁴² Accordingly, the danger would be that, in dealing with the crimes of treason, the courts would apply value judgements inspired by the post-Communist regime to acts committed under the Communist rule and ideology.

This difficulty in charging any former official with treason was demonstrated in the case of the Communist Party leader, Janos Kadar.⁴³ Kadar was accused of high treason on two counts: firstly, that Kadar betrayed Nagy's government in 1956, and secondly, that Kadar called upon a foreign government for military intervention. Regarding the first count,

⁴⁰"Hungary: Constitutional Court Decision No. 2086," p. 636.

⁴¹"Hungary: Constitutional Court Decision No. 2086," p. 636.

⁴²"Hungary: Constitutional Court Decision No. 2086," p. 639.

⁴³Pataki, p. 24.

Kadar's defence was that, at the time, the Constitution was declaring the social order of the country in terms of socialism. Consequently, according to Kadar's defence, it was Nagy who betrayed the constitutional order of that time and not Kadar. Concerning the second count, it was pointed out that, again at the time, calling on a foreign government for help was not part of the legal definition for treason. Kadar was acquitted based on this defence, and the Hungarian Constitutional Court was trying to prevent trials similar to this from being encouraged by the Zétényi-Takacs law.

The decision of the Hungarian Constitutional Court on the Zétényi-Takacs law was praised by some as an opportunity for the Constitutional Court to adopt "a vigorously independent role,"⁴⁴ and by others as a proof of judicial activism.⁴⁵ The Constitutional Court's activism, or independence, was measured against two points, identifiable in the arguments of the decision. The first point referred to an enlarged substantive due process. The Constitutional Court declared in this sense that the constitutionality of penal laws "is not to be evaluated merely by reference to the criminal law guarantees expressly detailed in the Constitution."⁴⁶ The second point in the arguments of the decision, consisted in the Court's *outward* move from the mere constitutional principles, looking for transnational norms which would support and justify the decision taken in a practically domestic issue.

⁴⁴Michel Rosenfeld, "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?" A forum on the recent Hungarian Constitutional Court decision upholding statutes of limitations, East European Constitutional Review 1, no. 2 (Summer 1992): 18. Errera, p. 19.

⁴⁵Schulhofer, p. 26.

⁴⁶"Hungary: Constitutional Court Decision No. 2086," p. 640.

In this sense, the Constitutional Court drew upon prevailing international norms and made direct reference to its comparative study of the constitutions of other European states and the USA for the statutory law of crimes and criminal procedure, as well as for the details of police investigatory practices.⁴⁷ The Constitutional Court also stated that “an evaluation of the State measures necessitated by the ‘change of system’ cannot be understood separately from the requirements of a State under the rule of law, as crystallized by the histories of constitutional democracies and also posited by the 1989 Hungarian constitutional revision.”⁴⁸

In the decision itself, the Hungarian Constitutional Court referred to two constitutional idioms. Firstly, it elaborated on the declaration that Hungary is a “state under the rule of law”⁴⁹ and secondly, that Hungary recognises “inviolable and inalienable fundamental human rights.”⁵⁰ From these two constitutional principles the Court creatively decanted two new constitutional axioms, the “security of the law” principle, and the principle of the “protection of the rights previously conferred.”

The extent to which these two new principles apply to a (potentially) amended statute of limitations was considered debatable, and it depended upon the view held on the nature

⁴⁷Schulhofer, pp. 28-30.

⁴⁸“Hungary: Constitutional Court Decision No. 2086,” p. 631.

⁴⁹The Constitution of the Republic of Hungary, Art. no. 2(1) (unofficial translation).

⁵⁰The Constitution of the Republic of Hungary, Art. no. 8(1) (unofficial translation).

of the retroactivity ban.⁵¹ Indeed, this nature can be perceived as one of a universally applicable principle to any conceivable legal act, or on the contrary, as a principle dominating mainly within the substantive criminal law domain. Between these two extreme positions, there are, of course, various degrees of applicability of the ban on retroactivity. Taking into consideration the alterations and differentiations this ban has undergone in time,⁵² it is indeed controversial whether the security of law principle would have been damaged by the Zétényi-Takacs law. The supporters of the law reminded the Parliament that premeditated murder, aggravated assault, and even treason, have all been part of the Penal Code both before and after 1989, and that the Zétényi-Takacs law did not in any way change the definition of these categories of criminal acts.⁵³ Therefore, it could be argued that the substantive dimension of the provisions on the statute of limitations introduced by the Zétényi-Takacs law - the one most directly protected by the ban on retroactivity - is not contradicting fundamentally the security of law principle.⁵⁴ It is also debatable whether the benefit of the statute of limitation by a criminal can be

⁵¹Remo Caponi, "La nozione di retroattività della legge," *Giurisprudenza Costituzionale* 35 (1990): 1338-1339. T. Bonneau, *La Court de Cassation et l'application de la loi dans le temps* (Paris: Press Universitaires de France, 1990), pp. 36-37. L. H. Tribe, *American Constitutional Law*. (The Foundation Press, 1978), chapter 9 "The Model of Settled Expectations," and chapter 10 "The Model of Governmental Regularity," and also, pp. 477-478.

⁵²L. C. Green, "The Maxime Nullum Crimen Sine Lege," *Harvard Law Review* 38 (1962): 471.

⁵³Teitel, "Dilemmas of Justice," p. 32. As to the question raised with respect to the crime of treason, its defects were said to be rather a shortcoming inherited "mechanically," with the definitions imported from the Communist legislation, than a weakness of the Zétényi-Takacs law itself.

⁵⁴Ginger G. Mayer, "Retroactive Application of Constitutional Rules Regarding Criminal Procedure," *Cincinnati Law Review* 56 (1988): 1099.

characterised as a right, rather than a privilege.⁵⁵

In spite of these distinctions, the Hungarian Constitutional Court's opted for an over-stretched retroactivity ban. "There is no constitutional basis" concluded the Constitutional Court in its justification, "for the selective application of the prohibition of retroactivity, or the retroactive imposition of a harsher sentence, onto specific elements of the criminal process. For this reason, the Constitutional Court examined the problem of the statute of limitations on the basis of the legality of the criminal law, without taking into consideration the theoretical disputes concerning the procedural nature of the statute of limitation or its status as a legal-subject right."⁵⁶

Accordingly, the court referred to the different aspects of the retroactivity ban as clearly covering any aspect of criminal law. *Nullum crimem* and *nulla poena sine lege*, argued the Constitutional Court, are basic constitutional principles whose legal content is determined by a number of criminal law provisions.⁵⁷ The individual's constitutional human rights and freedoms are affected not only by the select provisions and specific punitive sections of the criminal law, but especially by the interconnected and closed system of regulations of criminal liability, culpability and sentencing guidelines. The modification of every regulation of criminal liability would fundamentally and directly

⁵⁵Schulhofer, p. 26. Matthew E. Van Tine, "Application of the Federal Parole Guidelines to Certain Prisoners: An Ex Post Facto Violation," Boston University Law Review, vol. 62 (1982): 543-546.

⁵⁶"Hungary: Constitutional Court Decision No. 2086", p. 637.

⁵⁷"Hungary: Constitutional Court Decision No. 2086," p. 636.

impact the individual's freedom and constitutional position. The Constitutional Court decided therefore that modifications of the statutes of limitations can proceed only if they remain consonant with the basic constitutional requirements of criminal liability.⁵⁸

On this issue again, the Constitutional Court's position did not remain unchallenged. Ruth Teitel for instance, contested the meaning given by the Court to the principles of *nullum crimem* and *nulla poena*, and argues that in the specific case of the Zétényi-Takacs law amending the statute of limitations one did not deal either with *nullum crimem* or with *nulla poena sine lege*. The crimes addressed by the Zétényi-Takacs law, Teitel argued, were already crimes at the time of the Communist regime.⁵⁹

In spite of these arguments, the Court appeared concerned uniquely with the potential of legislative abuse of power through the proposal submitted to its scrutiny, than with the alleged human rights violations and executive abuses addressed by the law. This choice reflects the difficulty of the legal discourse, placed in a rigid formal position, to acknowledge the "exceptional circumstances" which disabled the laws themselves from being applied during the Communist regime. This higher, formalistic rationale has the important consequence of making the assessment of a totalitarian regime legally impossible.

⁵⁸Ibid.

⁵⁹Teitel embraces the distinction made by other authors as well, within the criminal law discourse, between substantive and procedural retroactive changes. On the theoretical level, this distinction corresponds to the already institutionalised differentiation within the legal discourse, respectively within the criminal law discourse itself. Teitel, "Dilemmas of Justice," p. 32.

2.2.3 Legal Security v. “Exceptional Circumstances”

“Exceptional circumstances” which have been used to refer to the Communist regime have been suggested and included in the Zétényi-Takacs law through the idiom of “political reasons.”⁶⁰ In spite of the basic individualism of the Zétényi-Takacs law, the construction of the proposal around the notion of “political reasons,” which might have impeded the application of criminal law during the Communist rule in Hungary, appeared to suggest an implicit evaluation of the Communist regime itself. The Hungarian Constitutional Court found the invoked “political reasons,” which allegedly influenced decisively the expiry of the limitation period for numerous crimes of serious character, of indirect relevance for the process of legal justice. The Court declared these “political reasons” or “exceptional circumstances” as insufficient for justifying tampering with the sense of legal security, and therefore rejected the amendments to the statute of limitations based upon these circumstances.⁶¹

Therefore, the idea of political justice as a *locus* of competing legitimate expectations, originating inside but also outside the legal discourse, and addressing the legal discourse, was rejected by the Hungarian Constitutional Court for the sake of an absolute procedural

⁶⁰Article (1), para (1) from Zétényi-Takacs law, cited in the “Hungary: Constitutional Court Decision No. 2086,” p. 630.

⁶¹“Hungary: Constitutional Court Decision No. 2086,” p. 634.

sense of legal security.⁶² Given the undeniable constitutional link between a political regime and its legal and judicial system, this concentration of the Constitutional Court solely on a sense of absolute legal security excludes almost any chance of a normative evaluation of a totalitarian regime. According to the Constitutional Court, this evaluation would have to be performed strictly from within, by using exclusively the past regime's legislation, as well as its way of applying and interpreting the norms.

This unnegotiable value of legal security appears to be enhanced by the "negotiated" nature of the Hungarian anti-Communist revolution. According to the Constitutional Court the constitutional changes brought by the 1989 revolution were secured without damaging the principle of legal security.⁶³ The peaceful, "negotiated" character of the Hungarian revolution received the constitutional seal at the very beginning of the Constitutional Court's activity. In its first resolution, in 1990, the Constitutional Court declared that no differentiation would be made in its constitutional reviews between pre- and post-constitutionally (Communist) enacted laws.⁶⁴ Therefore, the process of political justice in Hungary excluded from the beginning any appeal to exceptional circumstances. The idea of a "revolutionary gap"⁶⁵ in which - provided a degree of proportionality was

⁶²Halmai and Scheppele, pp. 162-64. Schulhofer, p. 24.

⁶³"Hungary: Constitutional Court Decision No. 2086," p. 632; Halmai and Scheppele, p. 157. Kis, "The Firing Squad Trials," p. 28 ff.

⁶⁴"Hungary: Constitutional Court resolution No. 1/1990(II.12)AB," reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 3, Laws, Rulings, and Reports, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 631.

⁶⁵Teitel, "Dilemmas of Justice", p. 18.

safeguarded - measures of substantive justice could be taken without being strictly bound by all the formal requirements of the rule of law, was also rejected.

By expressing the constitutional continuity of the Hungarian legal system, the Constitutional Court did not deny the reality of a genuine political revolution in Hungary, and it did not imply the absence of an essential degree of “conceptual” violence leading to a change of political regime. However, the absence of “constitutional violence” appears as essential for the Hungarian Constitutional Court, in evaluating and justifying the expectations for political justice. This conclusion is revealed by the Court’s decision of unconstitutionality of the Zétényi-Takacs law. In the arguments underlying its decision the Court stated that “the politically revolutionary changes ushered in by the Constitution and the pivotal laws following on its heels were all effected in *a procedurally impeccable manner*, fully in accordance with the old legal system’s regulations of the power to legislate, thereby gaining their binding force. The old law retained its validity. With respect to its validity, there is no distinction between ‘pre-Constitution’ and ‘post-Constitution’ law. The legitimacy of the different (political) systems during the past half-century is a matter of indifference from this perspective, that is, from the viewpoint of the constitutionality of laws it does not comprise a meaningful category” (emphasis mine).⁶⁶

These arguments of the Constitutional Court appeared to ignore two aspects. Firstly, that the Zétényi-Takacs law, with all its possible defects of formulation, did not proceed from a distinction between the pre-Constitution and post-Constitution law, but rather from a

⁶⁶“Hungary: Constitutional Court Decision No. 2086,” p. 632.

re-affirmation of the commitment to the application of criminal norms valid under both political regimes.⁶⁷ Secondly, the Constitutional Court's position regarding the relation between law and revolution ignored the fact that constitutional correctness and "procedurally impeccable" constitutional changes fail to offer legal protection to citizens against not only the "unresponsive" and "irresponsible" governments,⁶⁸ but also - as the Zétényi-Takacs law implicitly claimed - against illegitimate and criminal governments.⁶⁹

Without considering these two aspects, the Hungarian process of political justice - as accepted, or rather tolerated, by the Constitutional Court - started from a "retroactivation" of the rule of law. Indeed, the Constitutional Court suggestively characterised its position as "the revolution of the rule of law."⁷⁰ Asking the question as to whether the legal discourse should provide for the unique historical circumstances constituting "the change of system," the Constitutional Court stated that this question too "must be answered in

⁶⁷Teitel, "Dilemmas of Justice," pp. 31-32.

⁶⁸Cotterrell speaks about the rule of law as "an ambitious programme for responsible and responsive government," while also pointing out the failure of the protective arrangements offered by the rule of law "to safeguard citizens generally against arbitrary power." Roger Cotterrell, "The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality," *Social and Legal Studies* 5, no. 4 (1996): 466 and 454. Analysing one of the forms of manifestation of arbitrary power, despotism, Montesquieu came to a significant distinction between regimes: the moderate and the immoderate power. According to Shklar, by political moderation Montesquieu meant more than just the principle of aristocratic republics, or the personal ability to inhibit, freely or under compulsion, the despotic impulses that afflict a society. Fully developed moderation for Montesquieu, says Shklar, is "a political form of intelligence," the capacity to calculate correctly and to act accordingly. "Because political power offers every opportunity and temptation to cast off one's inhibitions, moderation can be instilled only by rules and constraints. It is thus a public rather than a private virtue. . . Without institutionally enforced restraints, *whether formal or informal*, moderate politics are not even imaginable" (emphasis mine). Judith N. Shklar, *Montesquieu* (Oxford: Oxford University Press, 1987), p.85.

⁶⁹Pataki, p. 23.

⁷⁰"Hungary: Constitutional Court Decision No. 2086," p. 633. Halmai and Scheppele, pp. 161-164.

a manner which comports with the requirement of the State under the rule of law,”⁷¹ understanding by this the absolute principle of legal security. The question then, of how to answer the exceptional challenges put to the rule of law by history becomes mere rhetoric. From the Constitutional Court’s formalist position the answer to the question about exceptional circumstances becomes almost identical to: “according to the rule of law, there *are* no exceptional circumstances.” Therefore, any legal evaluation of the Communist regime based on these exceptional circumstances seems, yet again, excluded through the Court’s formal position.

2.2.4 Formal v. Substantive in the Constitutional Discourse

The Hungarian Constitutional Court’s formal stand, however, is not legally unusual. Its position on the issue of the statute of limitation should not be attributed automatically to the influence of the political context; not more than in any other constitutional decisions anyway. In fact this position reflects what is defined as the formal conception of the rule of law, and therefore, can be tracked down to the theoretical debate concerning the essence of the rule of law.⁷² The predominantly substantive essence of the right to revolution obviously contrasts with this formal conception. The contrast however, is relative, depending upon the “exceptional” character - or rather upon its basis in

⁷¹”Hungary: Constitutional Court Decision No. 2086,” pp. 633-634.

⁷²Paul P. Craig, “Formal and Substantive Conceptions of the Rule of Law,” Diritto Pubblico (Saggi, 1995).

“exceptional circumstances” - of the revolution itself.⁷³ In rejecting this character, the Hungarian Constitutional Court rejected the actual dependence of the formal parameters of justice upon “historical impediments.”⁷⁴

The Court seemed to ignore however that in the absence of this recognition one might succeed to preserve the formal parameters but not the justice. Some would even contest that the true nature of the formal parameters is preserved. Weinrib for instance argues that a specific legal content is intelligible to the extent of its adequacy to the form of justice relevant to the category of interaction which the law is endeavouring to order.⁷⁵ It becomes evident however that - from the Constitutional Court’s position - the way the law endeavours to order a legitimate revolutionary context is never going to yield more than a sterile intelligibility. This is due to the law’s inadequacy to deal with the very substantive expectations brought by a revolution.

In its argument, the Hungarian Constitutional Court *chose* to oppose “formal and objective” parameters of the rule of law, to the “partial and subjective” justice allegedly pursued by the Zétényi-Takacs law. However, when examining closer the contrast

⁷³J.M. Finnis, “Revolution and the Continuity of Law,” in Oxford Essays in Jurisprudence (Second Series), ed. A. W. B. Simpson (Oxford: Clarendon Press, 1978), p. 65 ff. “By introducing the institution of legal order, the society ... can restrict, yet not entirely eliminate the necessity of weighing and balancing.” See also, Aleksander Peczenik, “Weighing Rights,” in Enlightenment, Rights and Revolution, eds. Neil McCormick and Zenon Bankowski (Aberdeen: Aberdeen University Press, 1989), p. 178.

⁷⁴Finnis, p. 67.

⁷⁵“A specific legal content is intelligible to the extent of its adequacy to the form of justice relevant to the category of interaction which the law is endeavouring to order.” Ernest Weinrib, “The Intelligibility of the Rule of Law,” in The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), p 75.

suggested by the Court between the nature of the rule of law and the process of substantive justice, one identifies a similar dichotomy present within the concept of the rule of law itself. An internal perspective opposes the formal and objective principles to the individualised and substantive justice as two sets of distinct and competing aims of the law itself.⁷⁶ The internalisation of this dichotomy between formal and substantive objectives renders the choice between the two less obvious, and more in need of coherent argumentation. Within this argumentation one cannot actually avoid making a choice,⁷⁷ and hence being “biased” in spite of all the rationality involved in supporting this choice.⁷⁸ This is the reason why, what one constitutional authority considers necessary to be “primarily evaluated with reference to the impact on the security of the law,”⁷⁹ another Constitutional Court considers it (as we shall see in the next chapter) necessary to be judged “in relation with the matter at issue.”⁸⁰ Again, this does not relativise the legal character of both decisions, it only lifts the discussion on political justice from the domain of domestic constitutionalism and politics, to the one of legal theoretical debate about the nature of the rule of law and its constitutive elements.

⁷⁶Craig, p. 35.

⁷⁷Raz for instance, conceives the rule of law in its formal conception as “just one of the virtues by which a legal system may be judged and by which it is to be judged,” by this suggesting the inescapable “virtue-judgement” which society might have to make sometimes. Joseph Raz, “The Rule of Law and Its Virtue,” pp. 195-196, and also 206-207.

⁷⁸On the need for a “bias” in favour of substantive justice see Klenner’s analysis of the right to revolution in Section 1.5.

⁷⁹Hungary: Constitutional Court Resolution of 10/1992 (II.25.)AB referred to in the Constitutional Court Decision No. 2086. See Kritz, vol. 3, p. 632.

⁸⁰“Czech Republic: Constitutional Court Decision, December 21, 1993, reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regimes,” vol. 3, Laws, Rulings, and Reports, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 626.

The Constitutional Court attempted to externalise this dichotomy between formal and substantive values, creating the impression that the controversy was placed somehow *outside* the concept of the rule of law. In fact the controversy belongs to the very core of this principle.⁸¹ The Hungarian Constitutional Court induces terminologically the perception of the rule of law as an uncontroversial concept, opposing the principle of security of law to the pejoratively named “pursuit of some other constitutional task seeking the protection of the rights of others.” The Court found this pursuit “of no consideration in this matter [of the constitutionality of the Zétényi-Takacs law].”⁸² Through this formulation, the Court dismissed as irrelevant the exceptional historical context to which the gross violations of human rights related. Moreover, through its formal position, the Hungarian Constitutional Court also dismissed as irrelevant the issue of justice as a substantive dimension of the same principle of the rule of law. This dimension appears just as possible conceptually as the formal dimension of justice of the same principle of the rule of law.

The Hungarian Constitutional Court is right to put the principle of legal security upfront. In general, this is a legally and socially wise course of action.⁸³ In extreme circumstances however, this position brings the issues of legality and justice only half way towards a solution.⁸⁴ Ultimately, the principle of security deserves safeguarding because it offers

⁸¹Sunstein, “Problems with Rules,” pp.956-958. See also, *infra* Section 6.2.

⁸²“Hungary: Constitutional Court Decision No. 2086,” p. 633.

⁸³Sunstein, “Problems with Rules,” p. 976.

⁸⁴Craig, pp. 44-47.

the best chance for justice. The reason why the issue of a right to revolution was raised in Chapter One is exactly because, in the very exceptional circumstances of a totalitarian regime, there is no way in which the very same principle of security could offer a single chance for legal, or any other kind of justice.⁸⁵ Revolution - even when a “Velvet Revolution” - implies a retroactive evaluation of the political class of a past regime, and this evaluation cannot be measured solely against an absolute principle of security.⁸⁶

It is evident that the main reason for qualifying the Zétényi-Takacs law as unconstitutional was the position the Constitutional Court took over the essence of the rule of law and its intrinsic values.⁸⁷ Applied rigidly, this position can bring two main shortcomings to a process of justice founded upon the right to revolution. These two shortcomings are actually two sides of the same coin often used by legal formalism. Firstly, an inflexible position about the rule of law and its intrinsic values inhibits the

⁸⁵However, the rule of law does not necessarily need “extreme circumstances” in order to become dysfunctional. “The rule of law appears in one aspect as a weapon to ensure adequate control of [the *underclass*]. While in theory in contemporary democracies they can appeal to its protection no less than can other citizens, in practice their appeal will often be weakened not only by the inadequacy of the Rule of Law protections in relation to the particular kinds of regulation often used against them but by the assumption that these populations threaten the conditions of general security, one of the central values associated with the Rule of Law.” Cotterrell, “The Rule of Law in Transition,” pp. 463-464.

⁸⁶See *supra* Section 1.5.

⁸⁷The adherence of the Hungarian Constitutional Court to the values entrenched in the doctrine of legal formalism is clearly stated: “In the Constitutional Court’s opinion, in a constitutional State under the rule of law, the violation of rights can only be responded to by upholding the rule of the law. The legal system of a State under the rule of law, cannot deprive anyone of legal guarantees. These guarantees are basic rights appertaining to all. Wherever the value of the rule of law is entrenched, not even a just demand can justify the disregard of the State under the rule of law’s legal guarantees. Justice and moral argument may, of course, motivate penal sanction but its legal foundation must be constitutional.” “Hungary: Constitutional Court Decision No. 2086,” p. 634. This choice however is not self-evident, it does not exclude the debate over the choice in itself between the values embedded in the rule of law, and other possible values. Furthermore, it does not exclude the debate over the content of the concept of the state under the rule of law and its implications.

socially and legally healthy view that the rule of law is only one of the values of a legal system.⁸⁸ Secondly, it exacerbates the sometimes socially counterproductive view⁸⁹ that a law must always be evaluated “primarily . . . with reference to the impact on the security of the law.”⁹⁰ Therefore, it is difficult from this position to envisage a meaningful answer to the expectations for substantive justice, including an evaluation of the Communist regime.

2.2.5 The Law No. 53/1993 on the Statute of Limitations: Context and Content

Despite the rigid formal position of the Constitutional Court regarding the law suspending selectively the application of the statute of limitations, the initiators and supporters of the Zétényi-Takacs law did not give up their hopes for justice to be restored. Whilst retaining the final goal of the Zétényi-Takacs law, that of bringing to justice the individuals who took part in the long term political repression in Hungary, two additional legislative initiatives were taken in February 1993 before a second draft law also took shape.⁹¹ The first initiative attempted to address the Constitutional Court’s criticism about the eventually redundant provisions of the Zétényi-Takacs law. This criticism pointed out

⁸⁸Raz, “The Rule of Law and Its Virtue,” pp. 195-196.

⁸⁹Sunstein, “Problems with Rules,” p. 984.

⁹⁰Hungary: Constitutional Court Resolution of 10/1992 (II.25.)AB referred to in “Hungary: Constitutional Court Decision No. 2086,” p. 632.

⁹¹Yves-Michel Riols, “Les exactions du regime Communist,” Le Monde, 20 February 1993, p. 23.

that if suspending the statute of limitations for the period of the Communist regime was constitutionally permissible, then there would be no need to pass new legislation regarding this statute of limitations, and consequently the matter should remain in the hands of the courts. The courts then could decide upon each individual case.⁹²

Preempting this criticism, the Hungarian Parliament passed an “authoritative resolution” in February 1993. In the constitutional framework of Hungary this type of resolution offers an interpretative guideline for laws that are already in existence.⁹³ Through this specific guideline, the courts were instructed to ignore the period from 1944 to 1989 when calculating the statute of limitations.⁹⁴ This legislative initiative was also used by the supporters of change in the statute of limitations to counter the accusations of applying inadmissible political criteria for discriminating between similar crimes. Consequently, unlike the Zétényi-Takacs law, the authoritative resolution was applicable to any of the crimes of treason, premeditated murder and aggravated assault leading to death, if these failed to be prosecuted, or the prosecution was dropped for no obvious reasons, during the period from 1944 to 1989.

Although preventing the criticism from the point of view of the principle of equality in

⁹²“If the statute had indeed been tolled by the law prevailing at the time of the commission of the offence then declaration of this fact in a new law is unnecessary. Determination of whether or not the statute had run - by application of the law pertaining to the specific offense - it is exclusively for the prosecutor and, in the last instance, to the courts. The legislature cannot retroactively decide this question. . . What did not then constitute a legal fact warranting the tolling of the statute cannot be so declared retroactively.” “Hungary: Constitutional Court Decision No. 2086,” p. 639.

⁹³“Hungary: Constitution Watch,” East European Constitutional Review 2, no. 1 (Winter 1993): 9.

⁹⁴Halmai and Scheppele, 164-165.

front of the criminal law, the authoritative resolution still remained fragile from the perspective of the formal position embraced by the Constitutional Court when assessing the Zétényi-Takacs law. In principle, the Court found that the authoritative resolution was meant to induce the same legally intolerable *ex post facto* consequences as the Zétényi-Takacs law.⁹⁵ This time however, these consequences were not even coming from a proper law, but from mere “instructions” given by the legislative body. Not surprisingly then, the Hungarian Constitutional Court declared this act unconstitutional as well.

The second initiative designed to avoid the statute of limitations took the form of a statute amending the Hungarian Criminal Procedure Act of 1973. The legal outcome of this amendment, which amounted to an order from the Parliament to the public prosecutor, would have been that the public prosecutors had to put forward indictments even for those cases for which the statute of limitations period had expired.⁹⁶ However, the Constitutional Court refused, yet again, to allow retroactive justice from coming into the criminal law through the back door.⁹⁷

From the failed authoritative resolution and amendment of the Criminal Procedure Act, in which any implication of an eventual assessment of the Hungarian Communist regime had been carefully excluded, it became obvious that the Constitutional Court’s position

⁹⁵Hungary: Constitutional Court Decision 41/1993 (VI.30) AB h., cited in Halmai and Scheppele, p. 165.

⁹⁶Riols, p. 23.

⁹⁷Hungary: Constitutional Court Decision 42/1993 (VI.30) AB h., cited in Halmai and Scheppele, p. 165.

on the statute of limitation would not be changed as long as the shadow of retroactivity was cast over any proposal trying to amend it. At this point, another legal proposal was put forward, based on rather different legal arguments. Since, according to the Constitutional Court at least, the domestic law was irreconcilable with the retroactive tendencies of the process of political justice, the promoters of the political justice process looked for a legal basis which would give an outside authoritative basis, and in the same time be coherent enough to dismantle the ban on retroactivity. Therefore, a second new law took shape by making use of public international law: The Law Concerning Procedures in the Matter of Certain Criminal Offenses During the 1956 October Revolution and Freedom Struggle, Law No. 53/1993.⁹⁸

The basis for the Law No. 53/1993 was offered by two international treaties: The Geneva Conventions on the treatment of prisoners and the protection of civilians of 1949,⁹⁹ and The New-York Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 1968.¹⁰⁰ The use of the Geneva Conventions for the prosecution of crimes from 1956 stood in its applicability to any case of armed conflict, and not just to declared wars between states: violence to life and person, together with

⁹⁸The Law Concerning Procedures in the Matter of Certain Criminal Offenses During the 1956 October Revolution and Freedom Struggle, No. 53/1993 (February 1993), from now referred to as the Law No. 53/1993, reproduced in Halmai and Scheppele. Also, Morvai, "Retroactive Justice," p. 32 ff.

⁹⁹Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 U.N.T.S. 135 (Third Geneva Convention entered into force the 21st of October 1950), and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 U.N.T.S. 287 (Fourth Geneva Convention entered into force the 21st of October 1950).

¹⁰⁰Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1968) G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218.

several other forms of wrongdoing, are prohibited also “in the case of armed conflict not of an international character.”¹⁰¹ At the same time, the New-York Convention offered a way to avoid the ban on retroactivity by stating that “no statutory limitation shall apply to several categories of war crimes and crimes against humanity irrespective of the date of their commission.”¹⁰²

The Law No. 53/1993, which like the Zétényi-Takacs law addressed the statute of limitations, combined the provisions of the international conventions, interpreting the most brutal episodes of the 1956 Hungarian Revolution as war crimes and/or crimes against humanity. The provisions of the international conventions were upheld on the basis of the interpretation of Article 7 of the Hungarian Constitution which states that “the legal system of Hungary shall respect the universally accepted rules of international law, and shall ensure furthermore the accord between the obligations assumed under international and domestic law.”¹⁰³ Although the universally accepted rules from the 1949 Geneva Conventions did not include the absence of a statute of limitation covering war crimes and crimes against humanity, Hungary undertook the obligation to prosecute those crimes retroactively, by ratifying the 1968 New-York Convention for the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

¹⁰¹See Art. 3 of the Third Geneva Convention and Art. 3 of the Fourth Geneva Convention. Also, International Committee of the Red Cross, Basic Rules of the Geneva Conventions and Their Additional Protocols (Geneva: International Committee of the Red Cross, 1983), p. 52 ff.

¹⁰²See Art. 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218.

¹⁰³The Constitution of the Republic of Hungary, Art. 7(1), (unofficial translation).

2.2.6 The Revolution of the Rule of Law: The Constitutional Court's Decision on the Law No. 53/1993

The Hungarian Constitutional Court abstained from making any major criticisms against the new proposal, apart from one issue.¹⁰⁴ The issue which the Court criticised was, yet again, the one concerning the alleged crimes of high treason committed especially in 1956 by the Communist “hard-liners” who called in the Soviet troops. The attempt to criminalise and retroactively prosecute the acts of treason took as a basis the same international conventions as for the crimes of premeditated murder and aggravated assault leading to death. As a legal basis for the prosecution of the acts of treason, a domestic law from 1945 was also used.¹⁰⁵ This law defined a war crime as any form of activity that could jeopardise the peace or the collaboration between people after the war, or as any form of activity that has the potential of causing international conflicts.¹⁰⁶ Presuming that the calls upon the Soviet army could have caused such an international conflict, the Law No. 53/1993 succeeded to define these acts as war crimes. In this way, the acts related to the Soviet invasion were included under the jurisdiction of the 1949 Geneva Conventions which protects civilians in armed conflicts even when not of an international character.

¹⁰⁴Hungary: Constitutional Court Decision 53/1993 (X.13)AB h, cited in Halmai and Scheppele, p. 166.

¹⁰⁵“Hungary: Constitution Watch,” East European Constitutional Review 1, no. 3 (Fall 1992): 7.

¹⁰⁶Schulhofer, p. 26. The Constitutional Court's attitude could be interpreted in two ways: that the Court (a) set an example of judicial activism and considered it unwise to punish such acts even if legally possible, or (b) detained some information not yet made public, since it considered that the agreement given by the Communist leaders for the Soviet invasion in 1956 could in no way jeopardize the peace or the collaboration between people, and that it had no potential of causing international conflicts.

Also, the 1968 New York Convention which established the non-applicability of statutory limitations to war crimes and crimes against humanity became applicable to the alleged acts of treason. Despite this clear but elaborate legal construction combining valid domestic and public international norms, the Hungarian Constitutional Court declared that the acts of treason referred to in the Law No. 53/1993 belonged to the domestic domain and not to the public international law domain. Therefore, according to the Court, to apply an *ex post facto* statute of limitations was unconstitutional.¹⁰⁷

In spite of the issue of treason during the 1956 events, the Constitutional Court's ruling on the Law No. 53/1993 restored to a certain extent the Court's reputation among the more radical thinkers and among the adepts of a more substantive approach to justice.¹⁰⁸

Although this time the Court largely confirmed the implicit amendments to the statute of limitations brought by the Law No. 53/1993 on the basis of international law, the Court's decision on this law was also seen as an exercise in judicial activism.¹⁰⁹ The Hungarian Constitutional Court took a clear position in the theoretical debate over the scope of international (criminal) law, proclaiming the authority of the community of civilised nations over state sovereignty.¹¹⁰

This decision of the Constitutional Court came as even more of a surprise than the

¹⁰⁷Huyse, "Justice after Transition," p. 337.

¹⁰⁸Morvai, p. 33.

¹⁰⁹Morvai, p. 34.

¹¹⁰"Hungary: Constitutional Court Decision No. 2086," p. 631.

decision on the Zétényi-Takacs law, especially taking into consideration the strong formal stand the Court took in its decision on the latter law.¹¹¹ From this formal stand, the Constitutional Court was expected to use two sensitive aspects of the Law No. 53/1993 in order to strike it down. Firstly, there was the dichotomy of domestic law versus international law. The Court used this dichotomy in order to reject only the applicability of public international law to certain acts of treason, but allowed the international conventions to be applied with respect to the other crimes addressed by the Law No. 53/1993.¹¹² Secondly, the Constitutional Court had in its legal arsenal the argument of the separation of powers. This argument was used by the Court in its decision on the Zétényi-Takacs law, and basically it denied the legislature the competence of interpreting existing norms of criminal law, in favour of the judiciary. One could have therefore expected the same reasoning arguing that if certain crimes are crimes of war and crimes against humanity, it was for the judicial power and not for the legislature to establish it. The argument of “vagueness” - an argument often attached to a law based on international treaties - received no mention from the Court either. As we shall see however in the end of this section when looking into the implementation of the Law No. 53/1993, the argument of the vagueness of this law will come inevitably into the Hungarian debate on the process of political justice.

The same legal reasoning, resting upon international law, failed to work with respect to

¹¹¹Morvai, p. 33.

¹¹²„Hungary: Constitution Watch,” East European Constitutional Review 2, no. 4 (Fall 1993/Winter 1994): 10.

the crime of treason.¹¹³ Perhaps the Court's position on this issue should not be so surprising, taking into account the more political nature of this crime. Similar to many other cases in Eastern Europe, it appeared easier to sentence the persons who executed the orders, rather than the officials whose orders and policy the former were carrying out. In the specific case of Hungary, however, there is an inevitable relationship between the crimes acknowledged by the law and the Constitutional Court, and an evaluation of the Communist regime. In this sense, the events surrounding the 1956 Soviet invasion can be perceived under two mutually exclusive perspectives: One perspective implies both individual and governmental responsibility for human rights violations in Eastern Europe, while the other perspective practically implies none of these.

From the first of these two perspectives, the violent acts committed could be seen as crimes against humanity and crimes of war as the Constitutional Court actually acknowledged. In this case, as it was shown in Chapter One, one cannot avoid having to evaluate the regime responsible for condoning, or even committing, those crimes.¹¹⁴ From this perspective, by way of inference, treason could be considered as one of the acts which directly contributed to the violations of the basic human rights of the Hungarian

¹¹³"Hungary: Constitution Watch," East European Constitutional Review 2, no. 4 (Fall 1993/Winter 1994): 11.

¹¹⁴Art. 2 of the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is very clear in this respect: "If any of the crimes mentioned in article I [crimes of war and crimes against humanity] is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission." Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1968) G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218.

population in the 1950s when a foreign army was called in by the Hungarian Communist government.

The alternative perspective is that the Hungarian Communist hierarchy is not “criminally responsible” for those crimes but only causally responsible. This alternative, however, is logically acceptable only if the aggressions and killings of the citizens during the events in 1950s could be said to amount to a legitimate use of force in defence of a legitimate order. As mentioned earlier, this argument was successfully used in court by the defendant Kadar.¹¹⁵ However, the Constitutional Court, in its decision on the Law No. 53/1993, accepted that some of the events in 1950s were crimes against humanity and crimes of war, and that prosecution could be pursued on this ground. These facts mean that it is logically inconsistent to ignore the Communist power structures and their major role and responsibility for those crimes.

Therefore, in the context of the events from 1950s in Hungary, the crimes of treason are related to the crimes against humanity and the crimes of war which have already been acknowledged by the Constitutional Court. A certain parochialism of the national legal system could have prompted the Court to opt for the domestic arguments offered for these crimes by the law of 1945, rather than to rely entirely on international conventions; especially since the Hungarian legal system was procedurally unprepared for the application of these conventions.¹¹⁶ However, the crime of treason would have implicated

¹¹⁵Morvai, p. 33.

¹¹⁶Errera, p. 34.

the highest ranks of the Party leadership and not only the mere rank and file of the Party, or the army officers involved in the repression. Therefore, the political implications of the Law No. 53/1993 - illustrated by what we have just seen to be logically inconsistent perspectives over the events from the 1950s in Hungary - made the Constitutional Court more cautious in allowing the lower courts to decide upon the legal meaning of the word “treason.” Nevertheless, given the acknowledgement of the crimes against humanity and crimes of war committed under the Hungarian Communist regime, the implication of the Communist regime could come into play even without invoking the crime of treason.

It should also be noted that the Law No. 53/1993 and the Constitutional Court’s decision on it only apparently escaped the shadow of retroactivity being cast over it. In its decision, the Constitutional Court accepted two exceptions from the ban on the retroactivity, apparently based on formal aspects. The first aspect of retroactivity was that the Constitutional Court agreed that the ban on retroactive alterations of the statute of limitations did not apply if there was no statute of limitations in force in the domestic law at the time when the specific crimes were committed, even if, at a later date, under the Communist regime, a statute of limitations had been introduced. Accepting this argument however, still amounts to a violation of the principle of non-retroactivity, or more precisely to a violation of the exception to this principle. Since the Hungarian Criminal Procedure Code had later introduced a statute of limitations for those crimes, not taking this newly introduced statute of limitations into consideration amounts to withdrawing

the benefit of the most favourable law from the persons concerned.¹¹⁷ Therefore, this benefit - a recognised exception to the ban on criminal law retroactivity - is actually withdrawn retroactively. The violation of the principle of applicability of the most favourable criminal provision appears just as difficult to fit into a formal interpretation of the rule of law, as would be the direct retroactive suspension of the statute of limitations.

The second aspect conveying retroactivity was the very reliance of the Law No. 53/1993 upon the two international treaties.¹¹⁸ The crimes against humanity and the crimes of war have been exempt from the application of the statute of limitations through the New York Convention from 1968. Accordingly, if the Hungarian Constitutional Court aspired to consistency in its general formal approach to the rule of law - the very rational basis on which the Zétényi-Takacs law was rejected - this second law, the Law No. 53/1993, should have appeared just as unconstitutional as the Zétényi-Takacs law. Therefore, the Constitutional Court rejected the substantive reasons for retroactivity of a domestic law - the gravity of the human rights violations perpetrated - only in order to accept these reasons when they are promoted through international treaties. Although they are well founded reasons for this “discrimination,” they could never account for the disregard of what the Constitutional Court considered of paramount importance: the absolute security of the law.

¹¹⁷Anita L. Richardson & Leonard B. Mandell, “Fairness Over Fortuity: Retroactivity Revisited and Revised,” *Utah Law Review* 11, no. 1 (1989): 59-60.

¹¹⁸Errera, p. 34.

Therefore, the right of any individual to receive a fair warning concerning the content of criminal norms is no better protected through retroactively applied international treaties, than through retroactive criminal procedure acts. The Communist bureaucracy's awareness of the degree of political repression that was taking place in the society could appear as a far more consistent "fair notice" of legal actions which are going to come from the society, and therefore a far more consistent reason for suspending the statute of limitations. In a way, one could say that the right to revolution, which is the basis on which these measures of justice are initiated, existed before the New York Convention. The public international law practice allows, of course, for the international treaties to be applied in the retroactive manner sanctioned by the Hungarian Constitutional Court. Nevertheless, the issue at this stage is the consistency of the Constitutional Court in professing rigidly a formal understanding of the principles of the rule of law, and especially of the ban on retroactivity.¹¹⁹

Without a certain right to political (retroactive) justice being recognised, it could be concluded that crimes of governments amounting to what can *now* be characterised as crimes against humanity, could not have been the object of legitimate expectations for justice before the Geneva Conventions were signed. Now, of course, it is very handy to have international treaties covering these crimes. One should not forget however that sometimes serious crimes cannot fit the definitions given by the international treaties,

¹¹⁹In fact, the formal approach of the Hungarian Constitutional Court - expressed in detail in its decision on the Zétényi-Takacs law - does not coincide with the very rationale based on exception, from which the two international treaties emerged, and which the international treaties tried to address and preempt. Orentlicher, p. 2539 ff.

exactly because governments don't easily sign treaties which involve issuing a blank check to be used later on in assessing their performance.¹²⁰ This aspect can in fact make serious crimes of states practically unpunishable in spite of their seriousness.¹²¹

Apart from the inconsistencies stemming from these issues of retroactivity, there is also another issue worth considering. Being based on international treaties, the approved version of the Law No. 53/1993 which amended the statute of limitation would need - for a consistent application - a detailed set of procedural rules destined to integrate the international treaties, and to render their norms functional on the national level.¹²² Since these procedural rules were not detailed in the Law No. 53/1993, the actual provisions of this law which concerned the prosecution of crimes of war and crimes against humanity became very difficult to apply consistently. For example, in January 1995, two different chambers of the Budapest City Court passed two judgements on two instances from 1956 in which the Communist government forces shot unarmed crowds of

¹²⁰Joseph H. H. Whiler, "On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State" in International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, eds. Joseph H. H. Whiler, Antonio Cassese and Marina Spinedi (Berlin, New York: Walter de Gruyter, 1989), p. 319 ff.

¹²¹Some Human Rights lawyers for instance would even disagree with the definition of the crimes occurred in 1956 Hungary as crimes against humanity. In this sense, it is claimed that the inclusion of these specific crimes under the definition of crimes against humanity would mean in practical terms that the definition established for the crimes against humanity would be enlarged, a fact which would endanger the concept of crimes against humanity itself and its applicability. Natalie Jean Ferringier, Crimes Against Humanity: A Legal Problem in War and Peace (Charlottesville, University of Virginia, PhD, 1980, Ann Arbor: University Microfilms International, 1991), p. 24.

¹²²Halmai and Scheppele, 169 ff.

demonstrators.¹²³ Because the law on retroactive justice failed to specify the adequate system of criminal procedure, the two resulting sentences in these trials were - in spite of their similar facts - completely different.¹²⁴ This situation prompted the Supreme Court, as the last instance of appeal in the Hungarian legal system, to petition the Constitutional Court for another constitutional revision of the already revised Law No. 53/1993. This second revision made the Constitutional Court rule against the Law No. 53/1993 on the basis that the parliament had failed to follow all the directives the Court had given when it first considered the constitutionality of this law.¹²⁵ Since this ruling, the Parliament has undertaken the task of changing the Hungarian procedural code. These changes, however, still remain to be tested by the courts in the new cases of war crimes and crimes against humanity, before eventually being brought again to the attention of the Constitutional Court.

In conclusion, it could be said that the Hungarian constitutional debate on the process of political justice through criminal law left this process lessened, impoverished and - as it was revealed in the end - actually inapplicable. Firstly, the process of justice for the

¹²³More than fifty such cases were investigated. "Hungary: Constitution Watch," East European Constitutional Review 2, no. 4 (Fall 1993/Winter 1994): 10-11.

¹²⁴In one of the cases the shooting was accepted as crime against humanity, while in the other case it was decided that the shootings were not such prohibited acts within international law, and therefore the domestic statute of limitations was applied to end the procedure. Halmai and Scheppele, p. 169.

¹²⁵"Hungary: Constitution Watch," East European Constitutional Review 3, no. 2 (Summer 1994): 8. Among the latest changes demanded by the Constitutional Court were establishing of the sort of punishment which could legitimately meted out for crimes against humanity and crimes of war, as well as providing for specific degrees of culpability in individual cases which should accompany the application of the norms of the international treaties, etc. Hungary: Constitutional Court decision 36/1996 (IX.4) AB h. cited in Halmai and Scheppele, p. 170.

Communist past appears lessened through the fact that only those expectations for justice closely related to the 1956 repression were acknowledged by the Constitutional Court. This approach excluded any other criminal acts which took place before, or even after 1956. Secondly, the possibility for justice was made available through the Law No. 53/1993 which amended the statute of limitations, but it was also impoverished by the fact that the Court refused to acknowledge the “political reasons,” and therefore the implicit political responsibility, for the acts of violence and/or for their cover up. Finally, preferring a law based on legal formalism combined with international treaties (with all the potential of vagueness this can sometimes entail), over a substantive but maybe clearer and more easily applicable law, the Constitutional Court made the expectations for justice impossible to meet. The way in which the prosecutions brought about by the Law No. 53/1993 have proceeded until now confirm this conclusion.

2.2.7 Collective Political Agency and Responsibility

The *political reasons* mentioned in the analysis of the Zétényi-Takacs law represented not only the context in which the alleged crimes of treason, murder and aggravated assault have been committed and remained unprosecuted, but they referred also to the roots from which those crimes emerged. In its decisions on the Zétényi-Takacs law the Hungarian Constitutional Court declined to address this political context. Nevertheless, looking beyond the direct outcome of the legislative process, that is, ignoring the fact that the first attempt - the Zétényi-Takacs law - of political justice actually failed, and that the

second one - the Law No. 53/1993 - was amended in ways which made it ineffective, elements appear which confirm the pervasive presence of the issues of responsibility of the governmental agencies.

Starting with the Zétényi-Takacs law, the first element which demands attention in this respect, is the embedded controversial character upon which the search for justice was built. The controversial character of the search for justice stems from the fact that this proposal addressed actors in the political arena who were seen as inseparable parts of the Communist repressive machine. This latter machine cannot be conceived as functional by only relying on some individuals' discretionary power. Solving the problem of the unprosecuted crimes because of "political reasons" appears to require the acknowledgement of something more than mere individual responsibility. It requires a legal assessment of the role played by the Communist governments in committing, as well as condoning, unlawful acts.¹²⁶

The fact that a government endorses - formally or informally - politically convenient crimes brings another element to the fore. This element was suggested, although not directly addressed, by the Zétényi-Takacs law. This second element, which can be deduced from the Zétényi-Takacs law itself, is inseparably related to the problem of the statute of limitations. Since the argument on which the law was based was that for some crimes the time limit which permitted prosecution for certain crimes had already expired due to the "political context," it becomes unavoidable to attribute the responsibility of

¹²⁶Huyes, p. 114.

this situation to the state, as the one who frustrated the course of justice by creating and actually *being* that political context.¹²⁷ Indeed, even if one supports the position of the Hungarian Constitutional Court, that the rule of law opposes any change in the statute of limitations at this point, the responsibility for creating this legal vacuum, remains open to prosecution, even with respect to crimes committed half a century ago. This is so given the systematic official attitude towards politically motivated or tolerated crimes; an attitude which could be seen as a continuous breach of law, renewed with each deliberately unprosecuted crime, and consequently renewed with each day that passed.¹²⁸ Since the post-Communist Hungarian government claims constitutional continuity with the Communist government, it becomes its duty to inquire into the failures of the Communist government, in order to ensure the legality and justice of what is to be understood as a consistent constitutional framework linking the two otherwise completely opposed political regimes.¹²⁹

The Hungarian Constitutional Court recognised this aspect of the issue of justice in times of transition: the implicit entanglement of individual and governmental responsibility for the crimes committed. Nevertheless, the Court used the argument of the old government's responsibility in order to support its decision of rejecting retroactive amendments of the statute of limitations affecting the individual persons, rather than to combine individual

¹²⁷Pataki, p. 21.

¹²⁸Podgorecki, "Totalitarian Law," p. 19 ff.

¹²⁹Kelsen, General Theory of Law and State, p. 368. Finnis, pp. 44-49. J. M. Eekelaar, "Principles of Revolutionary Legality," in Oxford Essays in Jurisprudence, Second Series, ed. A.W.B. Simpson (Oxford: Clarendon Press, 1973), pp. 25 ff.

criminal responsibility with the collective political responsibility for the politically sponsored crimes. The Court argued that “[it] is the old-Government responsibility of not having punished these acts. Only the state and not the individual persons can be considered as guilty” (emphasis mine),¹³⁰ and also that, “the offender cannot be burdened by the State’s dereliction of its duty” (emphasis mine).¹³¹ This statement of the Constitutional Court had no legal weight however, because the Court was only justifying its formal approach to the Zétényi-Takacs law.

Nevertheless, the Hungarian Constitutional Court draws our attention, maybe involuntarily, to the fact that the Hungarian legislature, as well as the courts, forget that unfulfilled governmental duties, such as the duty to protect and promote human rights, carry themselves a responsibility. This is particularly true with respect to the duty to secure the protection of the basic rights of citizens and to ensure that (criminal) justice prevails.¹³² As mentioned before, this responsibility can be translated into legal terms. However, judging from the Court’s propensity towards a formalistic approach, it is unlikely that the latter would accept a legal initiative addressing directly the government responsibility for unprosecuted crimes. From the Constitutional Court’s perspective, such a case would appear as restricting the right to an absolute security of the persons involved in government.

¹³⁰„Hungary: Constitutional Court Decision No. 2086,” p. 638.

¹³¹„Hungary: Constitutional Court Decision No. 2086,” p. 639.

¹³²See Orentlicher on the duty to protect human rights violations of a prior regime, in Chapter One, Section 1.4.

Certain basic rights *can* sometimes be legitimately amended or restricted. By refusing to consider the historical context created by the Communist regime, the Hungarian Constitutional Court fails to consider properly those cumulative conditions under which one could legitimately consider restricting those rights, such as the right to an absolute security of law.¹³³ If it was to alter any basic right, the laws reviewed by the Hungarian Constitutional Court should have been tested against the parameters of unavailability, necessity and proportionality.¹³⁴ Although mentioned by the Court,¹³⁵ neither of these aspects has been given proper consideration. The consideration of these parameters requires placing the law in its proper historical context, acknowledging the need for justice and especially for deterrence from future abuses.

As examined in Chapter One, revolutions come exactly with this type of claim of necessity, unavailability, and ultimately justice. Therefore, apart from the procedural weaknesses, underlined by some but minimised by others, the Hungarian approach to the statute of limitations suffers more than anything else from a lack of normative context. An approach outside such context risks to add to the injustice of the totalitarian regime. Searching for justice outside a contextual approach might result in punishing some who have as sole and feeble excuse the obedience of orders, while those who have given the

¹³³Erica-Irene A. Daes, Freedom of the Individual Under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights (New York : United Nations, 1990), pp. 132-37 & 172-182.

¹³⁴On the shadows of discrimination and justifiable distinctions see Janos Kis, What Shall We Do With Former Agents? (TD), 1994, p. 6 ff.

¹³⁵"Hungary: Constitutional Court Decision No. 2086," p. 635.

orders and fully participated in creating the favourable context for the crimes to go unpunished will still be eligible for positions of power.

Of course, by amending the statute of limitations, the Law No. 53/1993 will allow for some of the high ranking members of the Communist bureaucracy to be brought to Court. This might appease the social expectations for justice up to a certain extent. The real question however is whether this approach succeeds in exhausting both the legal need and potential for justice. There will always remain *in law* the question of who is responsible for creating the conditions for those crimes to be committed, and who left those crimes unpunished, especially when one is aware that leaving serious crimes unpunished in itself can represent a determinant cause for even more crimes.¹³⁶

Thus, taking into account the complexity of the Communist power structures, and the extent of the crimes which accompanied it,¹³⁷ even if the prosecuted persons belong to the highest levels of the Communist bureaucracy, would it be possible to say that responsibility belongs only to discrete individuals? Judging from the Hungarian experience, and especially from the elements underlined by the Hungarian Constitutional Court's position, one could answer "yes" to this question. This would mean discarding

¹³⁶Who could truthfully argue today for instance, that the Brazilian Government has no responsibility in the dispute between the tribal people and the white farmers and ranchers, when the Government deliberately supports legislation which gives the latter the right to "challenge" (outside the Court) the tribal people's use of the land, and prevents the tribal people from owning the land they have used for generations. This legislation instigates the extinction of the tribal people's livelihood and, indeed leads to their genocide. *Survival*, October 1996.

¹³⁷See Courtois, et al.

Fuller's "Sixth Deputy's" suggestion that the repressive regime should be assessed not only from the perspective of individual responsibilities, but also directly, as a repressive system.

Nevertheless, as we have just seen, from the Hungarian experience there are contradictory signals emerging. One might arrive to believe that these contradictory signals, especially with respect to the concept of collective responsibility, happen because of the predominantly criminal law approach and its procedural constraints. Therefore, a look into the other major approach to political justice, the one taking place outside the boundaries and constraints of the criminal law, will only complete the picture of the process of political justice in Eastern Europe. Nevertheless, before looking into this approach, the picture of the criminal law approach will be completed by discussing elements of a predominantly judicial criminal approach, as opposed to the predominantly legislative and procedural excursion offered by the Hungarian legal debate. These elements are rooted in the border guards trials which took place in Berlin, following the German re-unification. These trials bring into the discussion important aspects of the relation between individual and collective responsibility for the crimes of the Communist regime.

2.3 Formal v. Substantive: Aspects of the German Border Guards Trials

A preliminary point to note is that, in a criminal law context, the issue of a potential

collective responsibility of the Communist government, like the issue of suspending the statute of limitations for certain crimes, would be a matter for the courts to decide upon, rather than for the legislator to draft. A special law should not be required in order that certain events under valid international treaties qualify as crimes against humanity and crimes of war. In general the legislator should not be required to decide whether an individual or an organisation counts as legal agent, that is who can stand in court and who cannot. It is true however that the controversial character of the issue of justice related to a revolution makes the intervention of the legislative body seem somehow more appropriate.¹³⁸ At the same time, the results coming from a legislative approach can sometimes - by the mere fact that legislating is predominantly a creative matter - be more controversial and open to criticism relative to the abuse of the legal discourse for political aims, than an approach through the courts. The difference between the Hungarian and the German criminal law approach to political justice starts from here, from the different weight given to the courts in deciding politically controversial issues.

Initially, the unified Germany seemed to offer a double protection against almost any measures of political justice through criminal law. First of all, this protection was ensured through the notion of *Rechtsstaat*, or the state under the rule of law principle included in

¹³⁸For example, it could be argued that the Zétényi-Takacs law was pointless, if it wasn't for the need of uniformity of attitude in the action of the criminal courts which were supposed to undertake the prosecution of the crimes of the past regime. This idea is addressed by the Constitutional Court itself when addressing the argument which states that one does not actually deal with a new statute of limitations but with the original one which has been tolled by the historical circumstances. "If the statute had indeed been tolled by the law prevailing at the time of the commission of the offense then declaration of this fact in a new law is unnecessary. Determination of whether or not the statute had run - by application of the law pertaining to the specific offense - is exclusively for the prosecutor and, ultimately, for the courts." "Hungary: Constitutional Court Decision No. 2086," p. 639.

the Basic Law, and secondly through the provisions included in the Unification Treaty of 1990. This Treaty expressly stipulated that the citizens of the former GDR could be prosecuted for acts committed before the reunification, only according to the East German penal code.¹³⁹ This double constitutional protection brought the challenge of bringing justice for the Communist crimes by following - just like in the Hungarian case - the legislation of the former Communist regime.¹⁴⁰ In Hungary, the coagulating issue for the demands for political justice was represented by the repression from 1956; in Germany the demands for justice started primarily around the issue of the killings which took place along the Berlin wall.¹⁴¹ These demands for justice resulted in the trials of the border guards accused of having shot at innocent Germans trying to flee to West Germany with the intention of killing them.

Judging from the two elements of the constitutional framework of the German reunification, (as well as from the Hungarian constitutional experience with the issues of political justice through criminal law), it appears that the way in which the legal argumentation of the border guards trials evolved was rather unexpected. The sentence passed in the first border guards trial seems to have been based not so much on the

¹³⁹Peter Quint, "The Constitutional Law of German Unification," Maryland Law Review 50, no.3 (1991): 475-631. Paul Schwartz, "Constitutional Change and Constitutional Legitimation: The Example of German Unification," Huston Law Review 31, no.4 (Winter 1994): 1027-1104.

¹⁴⁰John Borneman, Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe (Princeton, New Jersey: Princeton University Press, 1997), pp. 52-56.

¹⁴¹Besides these trials ("Mauerschützenprozesse"), there have been important indictments and convictions entailing governmental criminality also with respect to judicial illegalities, Stasi illegalities, and economic crimes. Borneman, p. 100.

positive laws of former GDR as on a substantive view of the rule of law.¹⁴² The judge presiding at the first trial made a specific point in building his argumentation of guilt upon the natural law theory constructed by Gustav Radbruch.¹⁴³ Recalling the solution offered by Fuller's second Deputy to the problem of the grudge informer, the German judge denied any authority to the laws of a regime whose leaders "enjoyed no form of legitimation."¹⁴⁴ According to the judge, the legal standards of the GDR have been in "crass contradiction to the generally recognized foundations of the rule of law."¹⁴⁵

As it could be expected, this first sentence proved extremely controversial. Its argumentation was not followed in the subsequent border guard trials. On the contrary, in the second trial the judge made a special point of keeping strictly within the limits of the GDR laws,¹⁴⁶ especially within the limits of the Border Law, a law dating from 1982. Notwithstanding this formal commitment, the second border guards trial delivered again the guilty verdict as in the first trial. However, between the two verdicts there was

¹⁴²Judge Seidel's ruling, Landgericht Berlin ([523] 2 Js 48/90 [9/91]) of January 20, 1992, pp. 136-140, quoted in James A. McAdams, "The Honecker Trial: The East German Past and the German Future," *The Review of Politics* 58, no. 1 (Winter 1996): 62. In support of this judgement it was asserted that the court's decision avoided the retroactivity problem by applying the milder penalty, and relying on fundamental human rights and natural law rather than just positive law. Mary Albon, "Project on Justice in Times of Transition," The Charter Seventy Seven Foundation, New York. Report of the Project Inaugural Meeting, Salzburg (7-10 March 1992): 5-18, reproduced in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, *General Considerations*, ed. Neil L. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 49.

¹⁴³On the sentence passed by Judge Seidel in this first trial see in McAdams, "The Honecker Trial," p. 61 ff.

¹⁴⁴Judge Seidel quoted in McAdams, "The Honecker Trial," p. 62.

¹⁴⁵*Ibid.*

¹⁴⁶Borneman, p. 56.

apparently a major difference of legal argumentation. While the first verdict was based on the principles of natural law, the second verdict was based on principles of the GDR's legal system, such as the general requirement that the means employed for preventing a crime should be proportionate to the crime which is committed.¹⁴⁷

A closer examination of the second verdict reveals, however, that the formal commitment of the court to the former GDR laws is inevitably altered by the rather subjective nature of the key concept upon which the verdict was built: the concept of "proportional means." The problem with this concept is that what to an average person - in the context of the Communist regime, and under the tacit blessing of the hierarchy - appeared as "proportionate means," could very well appear as "disproportionate" in the post-Communist context.¹⁴⁸ In spite of this relative dimension, the second sentence was considered as being an important step towards the re-affirmation of the somewhat lost procedural safeguards for justice derived from the process of re-unification: the protection offered through the Basic Law, and the provisions of the Reunification Treaty establishing the GDR penal code as the only law applicable to the crimes committed before the re-unification.¹⁴⁹

These cyclic returns to substantive evaluations in the border guards court cases are rather

¹⁴⁷McAdams, "The Honecker Trial," p. 64.

¹⁴⁸A similar difficulty is underlined by Borneman with respect to the notion of "normal behaviour" which was one of the key issues in the Wolfgang Vogel trial for extortion. Bornemann, pp. 81-86.

¹⁴⁹McAdams, "The Honecker Trial," p. 58 ff.

suggestive of the debate on the political justice in general. Of an even greater importance, however, appears to be the basis upon which Judge Ingeborg Tepperwein decided, after sentencing the border guards in the second trial, to suspend the latter's sentences. The judge argued that "not selfishness or criminal energy" had led them to crime, but "*circumstances over which they had no influence*, such as the political and military confrontation in divided Germany [and] *the special conditions of the former GDR*" (emphasis mine).¹⁵⁰ As one might realise, this argument sounds very similar to the one used by the Hungarian Constitutional Court in its decision of unconstitutionality of the Zétényi-Takacs law.¹⁵¹

Through the suspension of the border guards' sentences Judge Tepperwein succeeded to induce into the legal discourse what legal scholars like McAdams called a "tantalising question." If the border guards could not invoke the superior order defence, and if at the same time they were not fully to blame for their actions, the immediate legal implication would be that some "residual responsibility," which could not be attributed to the individual perpetrators, should legally be assigned to other actors. "Who then should also be held accountable?" asks McAdams.¹⁵²

This dramatic question was already on the way to being answered at the time when the

¹⁵⁰The ruling of the Landgericht Berlin ([518] 2 Js 63/90 Kls [57/91]) of February 5, 1992, pp. 50-52, quoted in McAdams, "The Honecker Trial," p.64.

¹⁵¹See also supra Section 2.2.7 for the position of the Hungarian Constitutional Court on the "old-Government's responsibility" for not having punished politically motivated crimes.

¹⁵²McAdams, "The Honecker Trial," p.64.

second sentence was passed. On the 12th of May 1992, the Prosecutor General's office in Berlin issued an indictment which charged the ex-President Erich Honecker, together with five other members of the GDR National Defence Council,¹⁵³ with the crime of "collective manslaughter."¹⁵⁴ Through the meticulous research done in linking each of the defendants to the crimes, the indictment came close to the quality of a detailed "truth report" on at least part of the activities of the GDR's repressive system. In the justification for the indictment the prosecution mentioned the "unlimited influence" the members of the Council had in determining how the border was run, as well as the defendants having been "key figures. . . in everything that happened."¹⁵⁵ The charges brought against Honecker, Mielke and Stoph were later dropped for reasons of poor health, whilst on the 16th of September 1993 the remaining three defendants - Kessler, Streletz and Albrecht - were declared guilty of the crimes they were charged with: Kessler and Streletz as instigators in border deaths, and Albrecht as an accessory.¹⁵⁶

The sentencing of the Communist GDR hierarchy for crimes already punished in individuals in which both *mens rea* and *actus reus* had been identified, represents an important step forward in the discourse of collective responsibility of a political bureaucracy. It is true that the focus of the criminal procedures still remain limited to

¹⁵³The other codefendants were the former secret police chief Erich Mielke, minister-president Willi Stoph, defence minister Heinz Kessler, and his chief-of-staff Fritz Streletz, and Suhl district party secretary Hans Albrecht. McAdams, "The Honecker Trial," p. 65.

¹⁵⁴Borneman, p. 68.

¹⁵⁵McAdams, "The Honecker Trial," p. 66.

¹⁵⁶McAdams, "The Honecker Trial," pp. 72-73.

specific acts such as the shootings by the border guards (or the repression in 1950s in Hungary), and that the responsibility is still only cast over individual Communist officials, that is to say over a rather restricted circle of “privileged” persons. However, the references made to the Communist regime and its partocracy reveal as inescapable that tantalising question which the legal discourse finds so difficult to accommodate. Can an oppressive and criminal regime be equated to a multitude of individual criminal responsibilities? For the time being it seems that Hungary answered “yes” to this question, while Germany paused, before giving a more sophisticated, open-ended answer, a kind of “to be continued.”

And indeed, the casting of responsibility at the top of the former GDR partocracy continued with other cases which also brought new elements into the legal debate.¹⁵⁷ While the first trial of the Communist leadership was based upon the membership of the defendants in the GDR National Defence Council, in a follow-up trial which began on the 15th of January 1996, only four out of seven defendants were members of this body.¹⁵⁸ Instead, a much broader criterion of Politburo membership was used. As to the legal argumentation of this indictment, there are at least two interesting aspects. Firstly, in this trial two out of seven defendants were charged with “active involvement” in the decisions related to the border regime, although they were directly responsible only for economic policy and cultural affairs. Secondly, the other five defendants were indicted

¹⁵⁷The last to be convicted for the border killings was Egon Krenz and two of his politburo associates. Heribert Prantle, “Writing on the Wall for Krenz,” *The Guardian*, 27 August 1997, p. 14.

¹⁵⁸McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame & London: University of Notre Dame Press, 1997), p. 260.

not for specific acts, but for “having the power to do more to secure the rights to life and freedom” of the GDR’s citizens and failing to use that power,¹⁵⁹ and for “consciously failing to use the possibility to work to achieve a humanization of the border regime, and thereby prevent killings and wounding of escapees.”¹⁶⁰

The broadening of the charges in order to include other members of the Communist Party (SED)¹⁶¹ regime represents a broadening of the notion of *mens rea*, and it inevitably suggests one’s membership in a collectivity as basis for assigning criminal responsibility. As to the *actus reus*, the indictment suggests that a person can be made responsible not only for specific violations of the law, but for failing to perform to higher (moral or professional) standards. Moreover, as it is understood that one Politburo member could not change the policy over the running of the borders only by his words and vote, without the agreement of at least the majority of the Politburo members, then the last court sentence also implies a collective criminal responsibility of the Politburo as a whole, for failing to initiate and agree on a more humane border policy.¹⁶²

¹⁵⁹Quoted in McAdams, “Transitional Justice,” pp. 260-261.

¹⁶⁰McAdams, “Transitional Justice,” p. 261. Borneman, p. 68.

¹⁶¹*Sozialistische Einheitspartei Deutschlands*

¹⁶²See also *infra* Chapter Four, note 47 and discussion of Virginia Held’s position on the responsibility of random organisations for ‘failing to organise’. Virginia Held, ‘Can a Random Collection of Individuals Be Morally Responsible?’ In *Collective Responsibility*, eds. Larry May and Stacey Hoffmann (Savage, Md.: Rowman & Littlefield Publishers, 1991).

2.4 Preliminary Conclusions

On the basis of the examination of these approaches to political justice within the criminal law discourse one could draw some preliminary conclusions. Unlike the Hungarian case, the German discourse of criminal responsibility made its way upwards, from a basic criminal individual responsibility, based on a classic *mens rea* and *actus reus*, towards a kind of composite - individual and collective - criminal responsibility. Therefore, it is possible to argue that the seed which was dropped (accidentally or not) by the Judge when suspending the sentence of the first border guards, has turned into a fruit which strives to be referred to as 'legal'. Most probably however, this fruit is the result of some sort of cross-pollination between different social discourses: the political, moral and legal discourses.¹⁶³ This fruit, however, should not be contested as long as it can still hang from the branch of the legal tree.¹⁶⁴

The Hungarian legislative power, and the German judiciary had, of course, to deal with different legal problems, using different legal tools. For example, the German search for justice did not involve problems derived from the expiry of the period of limitation of the

¹⁶³Borneman, p. 139 ff.

¹⁶⁴A negotiation between different social discourses is also envisaged by Sunstein when arguing for 'legitimate rule revision' for the situations when, a dramatic change in the context in which the rule operates would make the rule-following senseless. "Legitimate rule revision make rules 'on the books' operate differently than from how they appear. Moreover, rule revision can help promote the democratic character of the law, by allowing constraints on the application of rules to cases where they no longer fit with public convictions." Sunstein, "Problems with Rules," p. 1008. See also Mortimer R. Kadish, and Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (Stanford, Calif.: Stanford University Press, 1973), p. 120.

prosecuted crimes.¹⁶⁵ Beyond these domestic differences it is possible to identify a more fundamental one: a difference of attitude and legal ethos of the process of political justice.¹⁶⁶ The difference of legal ethos manifests in itself a readiness to assess the historical context and the parameters of a regime which are hard to ignore. The result is the acknowledgement of a certain pervasiveness of substantive aspects. The consideration of substantive aspects¹⁶⁷ is precisely what a right to revolution demands.¹⁶⁸ Acknowledging some of these demands in the legal discourse - accompanied by an appropriate procedural framework - would correspond to a 'legitimate revision of rules' without which justice risks to remain neglected.¹⁶⁹

Among the demands for justice through criminal law the presence of the discourse of collective responsibility is undeniable, although sometimes very feeble. Several aspects have been identified to suggest this: the 'political reasons' as the key argument used in the Zétényi-Takacs law, the arguments of the Hungarian Constitutional Court even if not reflected in its actual decision, the implied government responsibility for crimes of war

¹⁶⁵Starting with the amendment of the Criminal Law in 1979, murder in Germany was not a subject to the statute of limitations. Germany: Act Repealing the Statute of Limitations for the Crimes of Genocide and Murder. Sixteenth Act for the Amendment of Criminal Law (July 16, 1979), Article 1. The statute of limitations for murder was originally 20 years. In the case of Nazi crimes, this period was computed as starting from 1949. In the 1960s, the statute of limitations for murder was extended to 30 years. It was essential for the prosecution of Nazi criminals to lift the statute for murder in general, since only a prosecution for murder does not present *ex post facto* problems.

¹⁶⁶Borneman, p. 139 ff.

¹⁶⁷Kadish and Kadish, pp. 219 & 120-127.

¹⁶⁸See *supra* Section 1.5, and also *infra* Section 6.2.1.

¹⁶⁹Sunstein, "Problems with Rules," p. 1010 ff.

and crimes against humanity, the pardon of guilty border guards, and the sentencing of Politburo members for ‘collective manslaughter’ and especially for ‘consciously failing’ to set up a more human policy. All these elements suggest an assessment of the Communist regime as a whole *from the criminal law perspective*. In both cases however, the legal discourse struggles, in different ways and with different results, to accommodate and ‘tame’ the implications of this perspective.

As mentioned at the beginning of this chapter, this perspective is not the only one. Assessing a repressive regime sometimes takes the legal discourse beyond the boundaries of the criminal law. In the following chapter we shall follow one of the representative cases - through its relative ‘legislative success’ and coherent debate - of political justice performed from outside the criminal law boundaries.

Chapter Three
ON SCREENING: POLITICAL JUSTICE THROUGH
ADMINISTRATIVE PROCEDURES
AND NON-CRIMINAL LAW

Abstract

The controversial character of a normative concept of collective responsibility determines that sometimes collective responsibility is approached indirectly, through legal means other than the criminal law. One such case is debated in this third chapter of the thesis. This chapter illustrates the non-criminal law approach to political justice taken in Eastern Europe. It concentrates on the debate which took place in the Czech Republic around the process of screening from office of the collaborators of the Secret Police and of Party officials. The emphasis is placed both on the substantive and the procedural difficulties encountered when imposing disqualifying conditions from outside the legal discourse. In this respect, the chapter highlights the dangers of contamination between the non-criminal and criminal legal discourse. The overall impression retained after looking into this debate, is first of all of the inevitability of an implied collective political responsibility accompanying a process of screening, and secondly, of inherent difficulties and inconsistencies accompanying such a process in the absence of a coherent, legally acknowledged concept of collective responsibility.

**3.1 The Non-Criminal Law Approach to Political Justice in
the Czech Republic: Historical Background**

Although the Czechoslovak¹ process of political justice emerged from the same need to deal with the communist legacy as the Hungarian one, the former is radically different

¹Until January 1993, when the Czech and Slovak Federation decided on devolution by referendum, the approach to political justice was common to the two federal republics. After the constitutional separation however, the two countries evolved differently with respect to their attitude towards the process of decommunisation. This paper will refer in detail only to the debate on political justice which took place in the Czech Republic, and contains elements stretching beyond the moment of secession of the two republics.

from the latter, both in terms of the path that led to justice, and in terms of the originality in identifying the political and legal actor. Historically, however, Communist Czechoslovakia had many points in common with Hungary, especially with regard to the way in which the Communist regime developed. The Czechoslovak Communists monopolised power in February 1948, after forcing the resignation of a coalition government. Many of the political leaders and other personalities in the country were arrested and sentenced to death, or to many years in prison. The political trials which were organised against the opposition followed the Soviet model. This type of action was even taken against the democrat and socialist allies, some of whom were genuinely interested in collaborating with the Communist party.²

Beyond this violent political process of cleansing, Czechoslovakia was marked by one of the most extended and cruel repressions against civil society as a whole.³ All the elements of civil society - cultural, religious and sport associations, boy scouts associations, etc. - were all practically annihilated by fierce judicial persecution, purges, occupation of premises and confiscation of property. The “arm” through which the Communist Party of Czechoslovakia (PCT) accomplished this repression was the Secret

²The culmination of these trials was reached in 1950 with trials taking place in different provincial cities in order to mark the “national dimension” of an alleged conspiracy. During 35 such trials, there were 639 sentences, including 10 death sentences, 48 life sentences, and other prison sentences totalling 7,850 years. Karel Bartosek, “L’autre Europe victime du communisme: Europe Centrale et du Sud-Est,” in Le livre noir du communisme: crimes, terreur et répression, ed. Stéphane Courtois, et al. (Paris: Editions Robert Laffont, 1997), p. 442.

³David Rodnik, The Strangled Democracy: Czechoslovakia 1948-1969 (Lubbock, Tex: Caprock Press 1970), pp. 47-58. François Fejtő, Le coup de Prague 1948 (Paris: Editions du Seuil, 1976), p. 73 ff. From 1948 to 1956, over 100,000 political prisoners were sent to prison or labour camps, and thousands were killed by government forces.

Police. The latter was acting under the cover of “action committees” created in February 1948 after the coup, precisely with the scope of ensuring the PCT’s control over all domains of social life.⁴

In this way the Communists imposed a system of government based on single-party control of the entire State apparatus. Moreover, the Secret Police initiated its activity of monitoring the citizens in all aspects of life. Arbitrary arrests, especially of dissidents, became very common and persisted throughout almost the entire period of the Communist regime; the only difference being in the frequency and degree of violence of these arrests. As in the other countries in the Eastern bloc, foreign travel was tightly restricted and closely monitored. Through different repressive tactics the religion, the culture and the media were all politicised or reduced merely to empty institutions.⁵ From the 1960s onwards the tendency towards democracy was, as in the Hungarian case, brought to a halt by the hard-line Czechoslovak Communists, supported by the invasion of Soviet, East-German, Polish and Bulgarian troops. The military invasion was followed by a period of “normalisation,” actually characterised by the repression of the dissident movement.⁶

In the early 1980s though, due to political as well as economic factors, the Czechoslovak

⁴Bartosek, p. 444.

⁵Bartosek, pp. 429-436.

⁶John Francis Nejez Bradley, Czechoslovakia's Velvet Revolution: A Political Analysis (Boulder: East European Monographs. New York: Columbia University Press, 1992), p. 72 ff.

society arrived at a forced compromise, not very different from the Hungarian one, in which the citizens benefited to some degree from economic and social freedom in exchange for silence regarding political matters.⁷ This limited change was accompanied by the inevitable coagulation of new independent groups campaigning for a wider range of economic reforms and democratisation of government. It culminated in November 1989 with the “Velvet Revolution.” The term “velvet revolution” designated the peaceful manner in which the shift from the totalitarian Communist society to a society based on democratic principles was made.⁸

3.2 The Czechoslovak Revolution: From Velvet to the Shirt of Penitence

The population’s relation with the Czechoslovak Communist regime was characterised both by political ruthlessness and political sacrifice, fight and compromise, repression and buy-out. These extremes explain to a large extent, why the Velvet Revolution brought with it two opposing sets of expectations. On the one hand, the extent and the atrocity of the crimes committed by the regime, and the continuous and systematic nature of the violations of the basic human rights of the Czechoslovak citizens nourished the legitimate expectations for justice concerning the individuals who committed crimes, as well as the

⁷Jan Urban, “Keeping Silent about Silence,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 86-87.

⁸Bernard Wheaton and Zdenek Kavan, The Velvet Revolution: Czechoslovakia, 1988-1991 (Boulder: Westview Press, 1992), p. 12.

system which demanded, ordered and facilitated those crimes. On the other hand, the compromise with the regime into which the Czechoslovak population was inevitably caught up, prompted part of the society to hold the view that the cohabitation with the totalitarian regime had, to a certain extent, tainted everyone. Because of this “contamination,” it was argued, the process of justice should not reach beyond the limits of a strictly contained use of the criminal law.⁹ In the debate on political justice, however, these limits of responsibility slowly eroded. As in the case of the German border killings, the question of responsibility and guilt pushed these limits of responsibility, forcing the legal reasoning to reach almost beyond its boundaries.

The expression of the generalised moral guilt was given by the President and former dissident Vaclav Havel, in a speech given on the New Year’s Day of 1990, in which he spoke about the “decayed moral environment” to which everyone had participated.¹⁰ Soon though it was discovered that the need for a distinction between this all-enhancing moral responsibility and a legal and political responsibility was far too great to ignore. President Havel himself soon reached a more balanced position between his personal views and inclinations towards forgiveness and reconciliation, and the society’s need for justice.¹¹

⁹Urban, pp. 92-93.

¹⁰“When I speak about a decayed moral environment... I mean all of us, because all of us became accustomed to the totalitarian system, accepted it as an unalterable fact, and thereby kept it running... None of us is merely a victim of it, because all of us helped to create it together... We cannot lay all the blame on those who ruled us before, not only because this would not be true but also because it could detract from the responsibility each of us now faces - the responsibility to act on our own initiative, freely, sensibly, and quickly.” Lawrence Weschler, “The Velvet Purge: The Trials of Jan Kavan,” The New Yorker 68, no. 35 (19 October 1992): 78-79.

¹¹“It is important to find the right balance, the right approach, one that would be human and civilized, but would not try to escape from the past. We have to try to face our own past, to name it, to draw conclusions from it, and to bring it before the bar of justice. Yet we must do this honestly, and with

Along with a large part of the Czechoslovak society, President Havel seemed to realise that the magnanimous position on the issues of political justice did not actually address directly the abuses of power and the crimes inherited from the totalitarian regime.

By not addressing the abuses of power society could not solve them. Moreover, society could not avoid similar abuses, and it could not prevent their consequences from persisting in the emerging democratic societies. This failure to act is what the people of Czechoslovakia called the “unfinished revolution,” suggesting by this a logical link between the revolutionary process itself and the process of political justice. “I personally am inclined” says President Havel, “to let this matter rest. I have a considerable distance toward all this because I have come to know the machinery [of the police state] and how it can destroy people... I have no need to punish anyone for having acted badly. Yet as president, I must bear in mind that society needs some kind of public action in this regard because otherwise it would feel that the revolution remains unfinished.”¹²

The consequence of these strong sentiments, was that in spite of its velvet character the revolution must be finished with an attempt to reinstate social justice. This meant that the Czechoslovak society chose the bold path of combining criminal law justice with justice which could be brought by a systematic eradication of the formal and informal structures

caution, generosity, and imagination. There should be a place for forgiveness wherever there is confession of guilt and repentance...Our society has a great need to face that past, to get rid of the people who had terrorized the nation and conspicuously violated human rights, to remove them from the positions that they are still holding.” Adam Michnik and Vaclav Havel, “Confronting the Past: Justice or Revenge?” Journal of Democracy 4, no. 1 (January 1993): 22.

¹²Michnik and Havel, pp. 21-22.

of Communist power. Issues such as the legitimacy and the empty legality on which the Communist police state was based, were confronted and debated in order to search not for an alternative but for a complement to the hard way to justice through criminal law. In this search for social justice, it appeared necessary to establish a process of screening or purging of the most active actors of the Communist regime who had been employed in key state institutions. Along with the prosecution of the crimes and atrocities of the Communist regime, the screening of society's structures of power was seen as an integral part of the process of decommunisation and was required for reinstating justice and democracy.¹³

A series of key questions need to be answered by a society which chooses to follow the path towards justice and democracy, and the Czechoslovak society was no exception to this.¹⁴ First, a valid purpose and justification for a process of revolutionary cleansing had to be established and agreed upon. These questions have not only moral or political implications, but also legal ones. As it was seen in the case of Hungary and Germany, the biggest difficulty of all in the debate on political justice is that in the complex historical circumstances following a totalitarian rule, the antagonism between moral justice and legality is so great that they both become "imperative." From a formal position, strictly within the boundaries of the legal discourse, moral justice seems unattainable, and vice-

¹³On similar imperatives of justice and democracy after the Nazi regime in Germany see John H. Hertz, "Denazification and Related Policies," in From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism, ed. John H. Hertz (Westport: Greenwood Press, 1982), p. 19.

¹⁴Herman Schwartz, "Lustration in Eastern Europe," Parker School of East European Law 1, no. 2 (1994): 141-171.

versa, a moral position towards serious crimes and injustice of the Communist regime appears as irreconcilable with the (Communist) legality. Therefore, a “bias” towards one of the two - justice or legality - becomes inevitable whatever rational choice might be made.¹⁵

To justify a screening process, two key arguments are usually put forward, one is based on the idea of retribution, the other is developed from the need for protective measures for the emerging post-Communist democracies.¹⁶ Firstly, within the retributive discourse it is argued that the sense of justice should not be damaged by allowing the Communist abusers to retain positions of power and privilege while the victims of the regime have to struggle through the period of economic transition from an economy ruined by the Communist rule.¹⁷ This argument centres around the privileges of the Communist bureaucracy. The promoters of this argument argue that, due to the persistence of the old structures, it is the ordinary citizen who suffers political discrimination. A substantive principle of equal opportunity, it is argued, demands that Communist party bureaucrats, former agents of Secret Police, and the secret collaborators, be temporarily removed from their privileged positions, in order to gradually eliminate the long-standing discriminatory measures against the non-party masses. Secondly, some of the promoters of the screening

¹⁵For the necessity of a bias in revolutionary circumstances see *supra* Section 1.5.

¹⁶Maria Los, “Lustration and Truth Claims: Unfinished Revolutions in Central Europe,” *Law and Social Inquiry* 20, no. 1 (Winter 1995): 143.

¹⁷Michael Kraus, “Settling Accounts: Post Communist Czechoslovakia,” Revised version of paper delivered at 1992 Annual Meeting of the American Political Science Association, The Palmer House Hilton (September 3-6, 1992), in *Country Studies*, vol. 2 of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 548-549.

process argue that the newly emerging democracies could be endangered by potential sabotage committed by persons loyal to the Communist regime, or by the possibility that persons linked to the Communist regime might be blackmailed into sabotage by those with knowledge about their tainted past.¹⁸

These justifications have been criticised, and strong arguments have been brought against the process of decommunisation. The danger of blackmail for instance, was used again as an argument, but this time against the decommunisation process. Since the main source of information for a process of decommunisation appeared to be the files of the Communist Secret Police, many of the opponents of the process of screening are usually concerned with leaks and misuse of those files.¹⁹ Another concern which appears often is that dealing with large numbers of persons by categories and not individually, and having as unique or at least main source of information the Secret Police archives, would inevitably bring unfair discrimination among those included in the same category but who might not be equally culpable or equally innocent.²⁰ For instance, dealing collectively with categories such as collaborators with the Secret Police, or the Communist party hierarchy, cannot account for relevant differences among the members of those categories. Collaboration could have been agreed upon willingly or under pressure, or

¹⁸Klaus Offe, "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions," Journal of Political Philosophy 1, no. 1 (March 1993): 17. Andrzej Rzeplinski, "A Lesser Evil?" East European Constitutional Review 1, no. 3 (1992): 33-35.

¹⁹Ethan Klingsberg, "The Triumph of the Therapeutic: The Quest to Cure Eastern Europe Through Secret Police Files," in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 8-10.

²⁰John Herz, ed., From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism (Westport Conn.: Greenwood Press, 1982), pp. 17-20. Rzeplinski, p.34.

even under duress. These differences in the reasons for collaborating, as well as differences in the level of commitment to the Communist regime, and in the actual harm which has been caused, would remain unaccounted for. Wherever responsibility is entailed - and, it is argued, being screened inevitably suggests that - mitigating circumstances have to be considered. This could not be done by dealing with people in categories.

Another argument used against screening belongs to the economic discourse. This argument expresses the concern that the economic and social resources of the societies in full economic transition would be affected by a screening process. A decommunisation process can prove to be demanding upon the financial resources of a country in economic transition. Besides, it is argued that a screening process would deplete the country of inherently scarce managerial, administrative, and professional talents.²¹

The chief argument against decommunisation, not least because it entailed important legal implications, was the collective dimension of such a process. Insofar as the screening process is based entirely on a person's association with an at-the-time-legal political organisation, such as the Communist party, or with an equally legal state institution, such as the Communist Secret Police, the process of decommunisation, it was said, "smacks of collective responsibility and guilt by association."²² As we might

²¹Victor Yasmann, "Legislation on Screening and State Security in Russia," RFE/RL Research Report 2, no. 32 (1993): 11-16.

²²Herman Schwartz, "Lustration in Eastern Europe," Parker School of East European Law 1, no. 2 (1994): 149.

remember, a similar position made the first of Fuller's Deputies advise against political justice actions, claiming that there were only ideological differences between the Purple Shirt regime and the following democratic regime.²³

This latter argument against screening leads to another question which should be answered by a society willing to go ahead with a process of screening. This other question concerns the selection of offices and positions which are to be affected by screening.²⁴ A process of screening could apply to a large number of offices and positions in both governmental and non-governmental bodies, or can apply to just a particular activity. Of course, in either case, the selection of offices and positions has to be coherent with the declared scope of the process of screening. For instance, if the declared scope of a screening process is the protection of the emerging democracy against corruptible ex-Communists, it would seem exaggerated to screen wide categories of Secret Police collaborators, or whoever was employed in the Communist institutions, regardless whether the person was a director or a mere secretary in that institution.

Another important aspect is that the wider the process of screening is, the more likely it is that the logistical difficulties in using the courts for such a process, and the general pressure on human and financial resources of the society, will incline the balance towards dealing with this issue at a collective level, rather than on an individual basis. This links up with the third question, the question concerning who is to be disqualified, and in what

²³See *supra* Section 1.5.

²⁴Schwartz, p.153.

manner. The answer to this question and to the issues implied by it - how long should the disqualification apply for, should there be any extenuating circumstances, etc. - has again to be coherent with the justification given for the screening process. Last but not least, the screening procedures should prove to be both efficient and fair.

In the screening attempts following the totalitarian Communist regime the answers to all these questions refer in one way or another to the most important instrument of a Communist state, the Secret Police. The justification of the screening processes always refers back to the repressive and undemocratic means this “arm” of the Communist state used against any democratic movement.²⁵ Moreover, given the close relationship between the Communist regimes and their repressive machines, most of the offices and positions affected by screening are presumably related in some way to the Secret Policy. This aspect inevitably influences the procedures used in the process of screening, not least through the fact that, more often than not, Secret Police files are used as a primary, or even as a single source of information and evidence concerning the persons to be screened.²⁶

Thus, the process of decommunisation inevitably introduced into the discussion the role of the Communist Secret Police and the legacy of its files as the main source of information on the Communist government’s activities, as well as information about its thousands of agents, informers, and collaborators. The archives of the Secret Police and

²⁵Yasmann, pp. 13-14.

²⁶Klingsberg, “The Triumph of the Therapeutic,” p. 14.

its activities became to a large extent part of the justification, and at the same time a source of information, for the process of screening. The Communist Secret Police as an institution, became both the expression of the repressive nature of the Communist regime, and the detainer of the archival legacy which was to be used for proving this repressive nature.

The debate on the use of the Communist secret archives took place, with differing intensity, in all post-Communist societies. Even in countries which, like Hungary, excluded the screening process from the spectrum of justice measures, the issue of the Secret Police archives had to be considered.²⁷ Therefore, the debate on the Secret Police files became particularly important in shaping the process of political justice taking place inside, and more especially outside the criminal law discourse. The process of decommunisation being undeniably linked to the issue of Secret Police, it becomes necessary to look into this issue in order to acquire a better understanding of the screening process initiated in the Czechoslovak society.

²⁷The Hungarian parliament did pass some screening legislation in 1994. Its application, however, was sparse. Edith Oltay, "Hungary's Screening Law," RFE/RL Research Report 3, no. 15 (15 April 1994): 13-15. Halmai and Scheppele, pp. 157-158. Also, "Hungary: Law on Background Checks To Be Conducted on Individuals Holding Certain Important Positions. Law No. 23 (March 8, 1994)," in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 418-425.

3.3 The Use and Abuse of the Secret Police Files in the Process of Political Justice

Article 12 of the Universal Declaration on Human Rights states that “[no] one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Similar provisions are included in the European Convention on Human Rights,²⁸ as well as in the International Covenant on Civil and Political Rights.²⁹ Either by ratifying these conventions, or by inescapable political awareness of the rights spelt out through these declarations, the Eastern European governments have, both before and after 1989, been under the duty to provide conditions for the fulfilment of these rights.

When the right to privacy and respect of dignity is mentioned, one almost automatically thinks of the all-encompassing Secret Police activities in Eastern Europe. The

²⁸European Convention on Human Rights (1950). Article 8, para. (1) “Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), U.K.T.S. 71; 213 U.N.T.S. 221, Cmd.8969, E.T.S. 5, entered into force the 3rd of September 1953.

²⁹Article 17, para. (1) of the International Covenant on Civil and Political Rights : “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Para. (2): “Everyone has the right to the protection of the law against such interference or attacks.” International Covenant on Civil and Political Rights, (1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

implications of the human rights provisions, however, are far from being one-sided. On the one hand, these provisions are invoked for proving the injustice of a political regime which brought the activity of spying on its own citizens to the highest level. On the other hand though, due to the complexity of the situation, the same human rights provisions are also invoked while trying to prevent the use of the Secret Police files by the post-Communist regimes, in the process of political justice. The right of people who have been spied upon to have access to information gathered about them, and the right of informers to the protection of their private life which has been linked to Secret Police activities become sources of competing expectations in the process of justice.

The use of the Secret Police files, either as a source of information in criminal prosecutions, or as a starting point for identifying a political agent as the object of a collective political responsibility, is often seen as an integral part of the process of establishing an authoritative interpretation of history.³⁰ This process though is more difficult than one might have thought when dreaming of justice and freedom of information while under the Communist regime, especially if one wants to achieve a (legal) consensus over the Communist past.

A general difficulty in this process of establishing an authoritative interpretation of history appears to be the fact that, in political matters, the recent past appears always more ambiguous and elusive to historical interpretation than the more remote past, in spite of an apparent availability of sources of documentation. Thinking back to

³⁰Kis, "What Shall We Do," p. 8 ff.

Kirchheimer's "historical risk" in undertaking a process of political justice,³¹ it could be argued that history becomes clearer when the dust lies thickly over the past. In Eastern Europe, a direct consequence of the apparent ambiguity and elusiveness of the recent Communist past is the fact that different sections of society arise with competing claims. This means that society as a whole is divided over the social and legal authoritative interpretation of the Communist period, and therefore over the usefulness and use of the Secret Police archives.

The controversy around the use of the Secret Police files for the purpose of justice could be polarised around two main lines of the debate, one dystopian and one affirmative.³² The dystopian part of the debate points to the Communist archives as a source for creating even more injustice, while the affirmative arguments see the use of the archives as indispensable to a genuine approach to justice. On the one hand, the information detained in the files is presented as "knowledge that kills." On the other hand, there is an emphasis on the "vital truth" about the Communist past which society should know about, and which lies hidden in the files.³³ The argument of the "poisonous truth," for instance, belongs to the first category, to the "knowledge that kills" type of argument. It starts from a rather paternalistic assumption that society may not be able to handle the truth about the extent and the depth of the infiltration by the Secret Police. In this sense,

³¹See Kirchheimer, *supra* Chapter One, note 74.

³²This terminology belongs to Maria Los. See Los, "Lustration and Truth Claims," pp. 125 & 143.

³³This classification follows Los' discussion on the pros and cons of a screening process based on information provided by the Secret Police archives. Many of the arguments analysed by Los relate to the society's (in)capacity to handle the truth. Los, "Lustration and Truth Claims," pp. 125-154.

some view the claims for using the Secret Police files in a screening process as part of the negative totalitarian legacy. If this legacy is not compounded in time, it is argued, it risks to perpetuate the deep social atomism so much encouraged by the Communist regimes themselves.³⁴

Another position, similar to the latter one, conceives the information accumulated in the files as deadly poison for society. The eventual truth contained in the Secret Police files is presented sometimes as a “corrupted truth,” or more precisely a “corruptible” truth, easily manipulated for political purposes. Going almost to the extreme of its logical consistency, some critics have also put forward the idea of “fabricated truth” in which the files are presented as the ultimate revenge of the totalitarian regimes. From this perspective, the credibility of the files should be considered vitiated from the start, due to the essence of the system which created them: a system based on lies.³⁵

The use of the Secret Police files has also been opposed from a strictly practical point of view. The overturning of the Communist regimes in Eastern Europe was an incredibly

³⁴On the political enemy endlessly and artificially generated within the Communist societies see Claude Lefort, Un homme en trop: réflexions sur “L’archipel du Goulag” (Paris: Editions du Seuil, 1986), p.15.

³⁵Arthur Eisenberg, “Truth and Justice: The Delicate Balance: Reflections on a Conference Held at the Central European University, Budapest, Hungary,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 148-149. Also, Andrzej Paczkowski, “Notes on the Problem of Establishing the Material Truth about the Network of Agents,” Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 98.

rapid process which swept over half a continent.³⁶ At the institutional level though, the whole process was much slower and eclectic. Many of the Communist intelligence agencies had enough warning or “premonitions” which allowed them to conceal the most compromising material. Secret Police files concerning important key events of Communist history, as well as the ones of the most important collaborators, have allegedly been destroyed or “sent into exile.”³⁷ This tampering with the files is claimed to have left the dark map of collaboration incomplete and unusable for the process of political justice.³⁸

As to the remaining files, many of them allegedly contained inaccurate information included in order to fulfill an imposed recruitment plan, or for special rewards.³⁹ Anecdotal stories exist where Secret Police officers were creating files of collaboration with names of persons collected from the city's graveyard.⁴⁰ Though maybe true in some

³⁶Recalling Marx's image, Timothy Garton Ash suggests the rapidity of the Eastern European changes by speaking about a sudden going into labour of “an old world... pregnant with the new.” Timothy Garton Ash, We the People: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague (Cambridge: Granta Books, 1990), p. 68.

³⁷Dan De Luce, “Destroyed StB Files,” Prague Post, 31March - 6 April 1992, p. 1.

³⁸Ruti Teitel, “Documentation of Prior Regimes and Individual Rights,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 5 ff.

³⁹Due to the economic aspect of supervising a whole nation, both the directing officers in charge of recruiting informers, and her/his direct superior were equally interested in the “doctoring of the statistical records” so that they could receive greater operational funding. Paczkowski, p. 100. Rzeplinski, p. 33.

⁴⁰The Secret Police archival inheritance could be compared with Chichikov's wealth of serfs, from Nikolay Gogol's famous novel “Dead Souls.” Collegiate Councilor Pável Ivanovich Chichikov, an ambitious, shrewd, and unscrupulous adventurer, goes from place to place, buying, stealing, and wheedling from their owners the titles to serfs whose names appeared on the preceding census lists but who had since died and were, accordingly, called “dead souls.” With this “property” as security Chichikov plans to raise loans with which to buy an estate with “live souls.”

cases, the tendency to generalise these practices can also be an attempt to justify, without embarrassment, the high figures of collaboration.⁴¹ Due to these claims of tampering with the files, some put in question the latter's reliability and usefulness for a legal approach to political justice. In this sense, the impossibility of constructing a coherent picture of the past by using *only* the Secret Police files is underlined. Related to the same point, the adepts of the "all or nothing" approach to justice underline the injustice of orientating the legislation on those agents who were unlucky enough to have their files preserved while the most important collaborators have cleared their tracks.

Last but not least, the attempt at using the Secret Police files as a source for a normative overview of the Communist past is hindered by the ambiguity of the act of collaboration itself.⁴² This is evident particularly when analysing exclusively the discrete instances of this process, ignoring the significance of the institutionalised mechanisms of collaboration. For instance, there have been cases in which the same person was, at different moments in time, a collaborator and then a dissident or vice-versa. When one also takes into consideration the high demand for compliance during at least some periods of the Communist regimes, the potential of the Secret Police files to offer legally and morally useful information becomes even more uncertain. Given the sheer extent of a process of decommunisation, an almost inevitable mechanical processing of the Secret

⁴¹Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism* (London: Vintage, 1995), pp. 43-66. According to the StB register there are approximately 140,000 names of so-called StB collaborators. Half of these, 70,000, are registered as "candidates for collaboration." Jirina Siklova, "Lustration or the Czech Way of Screening," *East European Constitutional Review* 5, no. 1 (Winter 1996): 58.

⁴²Klingsberg, "The Triumph of the Therapeutic," p. 22.

Police files in the process of screening makes it very difficult, if not impossible, to draw exculpating distinctions between “camouflage compliance” and compliance under a considerable threat on the one hand, and “wrongful collaboration” on the other hand.⁴³

There have also been cases in which the Secret Police files identified persons, even dissidents, as collaborators, and these persons challenged the information contained in the files, and proved their innocence in court.⁴⁴ Situations like this, it was said, showed the unreliability of the Secret Police archives in establishing responsibility at either individual or collective levels. Therefore, it is claimed that the information contained in the Communist archives would only offer society a “surrogate truth,” hiding the reality of the “tacit collaboration” of the entire society.⁴⁵ This opinion throws a blanket of moral guilt over society in general, and uses the moral responsibility based on this guilt as an argument against the discussion of any other type of responsibility, including the one based on *active* collaboration with the Secret Police. From this perspective, a screening process aimed at the collaborators of the Communist regime appears as a mere search for a scape goat.⁴⁶

⁴³“To varying degrees, depending on the time period and the region, a Communist state demands of outward compliance were so great, that the only significant space left for subversion was in one's heart - a space not readily subject to documentation.” Klingsberg, “The Triumph of the Therapeutic,” pp. 23-24.

⁴⁴Jan Kavan, the Czech dissident in exile, is only one such example. For details, see Siklova, p. 60. Lawrence Weschler, “The Velvet Purge,” pp. 78-79. Also, an important part of Tina Rosenberg’s “Haunted Land” emphasises the ambiguity of political moral attitudes. Rosenberg, The Haunted Land.

⁴⁵Urban, pp. 86. Also, Siklova.

⁴⁶“They [the politicians of the first post-totalitarian generation]” writes the Czech dissident Jan Urban “seem more to be in need of inexpensive substitutes and a sacrificial lamb for the public - not of the harsh and untasty truth about all and for all. Because the truth about dictatorship always and inevitably stinks. We all got smelly - the victims in the same way as the rulers and the silent population. The dissidents in the same way as the ‘StBeasts.’” Urban, p. 87. This position resembles what Jaspers would

So much for the “knowledge that kills” side of the debate on the Secret Police archives. On the other hand, the positive arguments, portraying these archives as the repository of a “vital truth,” tuned the process of political justice both prospectively and retrospectively.⁴⁷ In this respect, the “historical truth” argument stresses the importance of an authoritative interpretation of the Communist past - sanctioned eventually by law - as the best way of avoiding the repetition of the same mistakes and injustices. According to this argument, the information gathered by the Secret Police is invaluable for establishing this authoritative historical truth. In spite of what is lacking in the files and the nature of the source of this information, it is claimed that it is still possible to extract from these files invaluable information about the violations of human rights which occurred under the Communist regime.

Another affirmative argument often found in the debate on political justice is the “minimal justice” argument. This opinion states that one should do what one can to bring justice to the victims of the Communist regime, without being too troubled by the thought that absolute justice is unattainable. According to this opinion, the important thing is not to reward “the villains” by wiping their records clean simply because they are difficult to read.⁴⁸

call a “dodging into a generality.” Karl Jaspers, “Differentiation of German Guilt,” in Guilt and Shame, ed. Herbert Morris (Belmont: Wadsworth Publishing Company, Inc., 1971), p. 53.

⁴⁷Los, “Lustration and Truth Claims,” p. 143 ff.

⁴⁸Paczkowski, p. 96 ff.

Last but not least, the opening of the Secret Police files and their use in the process of decanting off the “social impurities” is supported from a more practical position of “state security.” According to this argument, office holders with a past as collaborators could easily be blackmailed by forces following illegal private or political interests. Also, the collaborators could themselves represent a direct danger to a fragile democracy through their potential to reactivate repressive anti-democratic structures. These arguments of state security interests amount to little more than a blame-free conflict of interest. The only difference would be that while the traditional concept of the conflict of interest refers to two conflicting loyalties located within the same person, the screening based on “state security” arguments refers to two conflicting bodies of knowledge located in one person: the knowledge of totalitarian ruling and the knowledge of respect for human rights and democracy towards which the society would aim.⁴⁹ In the discourse of “state security” this incompatibility is seen as creating a real danger for an emerging democracy. This danger, it is argued, justifies screening procedures as temporary administrative restrictions.

Looking at all the social factors implicated in the discourse on justice in post-Communist Eastern Europe, and considering both dystopian and affirmative arguments on the use of the Secret Police files, some authors concluded that procedural and legal-institutional issues occupy a marginal place in the debate.⁵⁰ This is true only apparently though, and

⁴⁹George Ross, “Crime and Punishment,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 120.

⁵⁰Los, “Lustration and Truth Claims,” pp. 154-155.

only because the general discourse employed by the media and the political speeches often appear to ignore the legal nature of the very arguments they use. The arguments against application of sanctions based on people's status (of Secret Police collaborator, for instance) and not on their actions, are of legal and not moral or political origin. The debate on the shift of the burden of proof onto the persons accused of collaboration, and the debate on the alteration of the presumption of innocence of the same persons, are based within the legal discourse as well. This is also true concerning the discussions on the concept of collective responsibility, retroactivity, extra-judicial procedures, which are all inherently legal in nature, and which dominate the debate on the process of justice in Eastern Europe. Taking into account all these legal issues, it appears difficult to argue consistently that procedural and legal-institutional issues occupy only a marginal place in the debate on post-Communist justice.

Besides these general legal aspects of a process of political justice, beginning at the end of 1989, the law has been confronted with an acute dilemma related directly to the regulative approach to the Secret Police files.⁵¹ Due to the lack of social and political consensus over the Communist past, the legislature was unable to provide a framework in which the Secret Police files could be used, both as a source for criminal prosecutions, and for a broader debate on the responsibility of the Communist regime.⁵² At the same time, it was too late to destroy or effectively seal the state security archives, as was

⁵¹Edith Oltay, "Intelligence Services Burdened by Communist Legacy," Radio Free Europe Report on Eastern Europe 2, no. 19 (10 May 1991): 14.

⁵²Teitel, "Documentation of Prior Regimes," p. 6.

proposed by some.⁵³ A large amount of these archives were already in circulation through different informal channels.⁵⁴ It is true that, from a legal point of view, and in accordance with the Communist regulations, the access to the Secret Police files might be restricted, or even totally denied. However, soon after the political changes had started in Eastern Europe, information contained in these files was leaked out and was used extensively in the process of settling political accounts.⁵⁵ It was thus, a legal task to provide a structure through which this kind of misuse could be prevented, or at least limited. The use of the files also had to be regulated so that their use for purely political ends was prevented as much as possible.⁵⁶

The question of the access to these Secret Police files had to be answered on a legal ground. At the same time, the regulator could not ignore totally the reality of the expectation for substantive justice in the post-Communist societies. When the Communist regimes in Eastern Europe were overthrown in the years 1989-1990, the tradition of total secrecy within those regimes was replaced by the highest social expectations for total openness and disclosure regarding these Secret Police files. On the

⁵³Mary Albon, "Truth and Justice: The Delicate Balance. Rapporteur's Report," in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 34-35.

⁵⁴Taken by the former security agents, as originals or photocopies; bought on the black market by the mass media; etc. In a now, market oriented society, it proves difficult, if not impossible, to take out of the transactions a highly required commodity such as these files. Mihai Sturdza, "The Files of the State Security Police," RFE/RL Research Report 2, no. 37 (13 September 1991): 22-31.

⁵⁵Dan Ionescu, "Romania's Public War over Secret Police Files," RFE/RL Research Report, 1, no. 29 (17 July 1992): 9-15.

⁵⁶Sturdza, pp. 26-27.

one hand, in those cases in which attempts to impose restrictions have followed Western standards, they have been difficult to apply because of the high social expectations for absolute freedom and transparency in the public affairs. On the other hand, on political grounds, these expectations have been translated into ideological criticism. The legislature sometimes was accused of taking sides, of trying to hinder the dissemination of truth in society. This state of affairs as a whole, made it very difficult to achieve consistency and justice in dealing with the Communist archives, especially in the process of screening.

The expectations for disclosure and absolute transparency, together with the unavoidability of political criticism of whatever solution the legislator might find concerning the access and use of the Secret Police files, illustrate the controversial role played by these files not only in the quest for an authoritative interpretation of history, but also in the attempt to give a legal answer to the expectations for justice. Since the approach to justice has been largely via these contentious files, the failure to attain a consensus over the Communist history had severe implications for the successful emergence of an uncontroversial process of political justice. This failure to attain a consensus was to a large extent due to a unilateral approach to the Secret Police. An analysis of this institution, concentrating exclusively on individual aspects of collaboration, was bound, as mentioned earlier, to be controversial; not least because of the various factors which had to be considered concerning each individual collaborator.

On the contrary, an institutional approach to the Secret Police, and implicitly to its

archives, emphasising the nature of the institution itself, would have revealed the nature of the regime, and the extent to which it contributed to the systematic violation of human rights. Acknowledging the institutionalisation of collaboration as a means of oppression constitutes an important condition for a meaningful process of political justice. Nonetheless, this perspective has generally been discarded, and preference has been given to the methodological analysis of the Secret Police operations, e.g. the intelligence gathering, and to the actual by-product of the Secret Police mechanism, the network of secret agents and collaborators.

The consequence of this methodological analysis was two-fold. On the one hand, this perspective justifiably discredited the blind trust in the accuracy of the files, preventing their mechanical use against discrete individuals through administrative screening procedures. On the other hand, the focus on the institutional methodology and the preoccupation with only individual cases, meant that the essence of the Secret Police as such, that is as a repressive institution, was forgotten or neglected. By failing to take into consideration the repressive nature of the Secret Police, an important element of the institutional evaluation of the Communist regime was lost.

This unilateral perspective also institutionalised the opinion that the Communist past was totally ambiguous, with everybody at least morally if not legally guilty. This approach risked blurring completely the distinction between correct and incorrect (or even criminal) political behaviour, and ignored the seriousness and the systematic character of the human rights violations in Eastern Europe. The systematic nature of the human

rights violations and the extent to which these violations took place in all Communist societies could put into question the attribution of responsibility to discrete individuals alone.

From the point of view of the nature of the Secret Police, and implicitly of the Communist regime itself, the Czechoslovak process of political justice appears as one in which the Secret Police was at the same time both rejected and accepted as an important element in the evaluation of the Communist regime. As we shall see in the following pages, the Czechoslovak search for justice - through its different stages and approaches - will appear to combine the individualistic approach to the Communist archives with the institutional approach. This latter approach takes into consideration the nature of the pivotal institutions of a totalitarian regime. However, as it will become evident in the following pages, the Czechoslovak approach to decommunisation has been far from smooth and uncontroversial, in spite of all its aspirations of fairness and justice.

3.4 The Screening Process in Post-Communist Czechoslovakia

3.4.1 The First Round of Screening in Czechoslovakia

On the 9th of January 1991, the Federal Assembly of Czechoslovakia adopted the Bill of Fundamental Rights and Liberties (hereafter referred to as the Bill of Rights), an act which included the basic human, civil and political rights already affirmed in

international conventions.⁵⁷ The adoption of the Bill of Rights was seen as an important step towards the drafting of new federal and republican constitutions. Among the general provisions it was stated that all people are free and have equal rights and dignity; that all other constitutional laws, as well as regular laws and their interpretation, must not contravene the Bill.

As for human and political rights, the Bill of Rights reiterated provisions contained in international agreements already ratified by Czechoslovakia at that time, including the right of any person to have his name, honour and dignity protected, the right to found and be a member of political parties, the right to participate in government either directly or through being elected as a representative, and the right to equal application of the electoral law to all citizens.

Concerning the access to courts and legal protection, the bill included the right to ask the courts or some other state body to protect one's rights, the right to refuse giving self-incriminating evidence, and the right to legal assistance. Courts were declared the correct forum to decide whether somebody was guilty of an offence, and the courts could accordingly impose punishment. Furthermore, the Bill of Rights granted any accused the right to a defence attorney.⁵⁸

⁵⁷Jiri Pehe, "Bill of Fundamental Rights and Liberties Adopted," RFE/RL Research Report 2, no. 4 (27 January, 1991): 1-4.

⁵⁸Pehe, "Bill of Rights," p. 3.

On the 11th of January 1991, only two days after passing the Bill of Rights, the same Federal Assembly voted for a resolution calling for the screening of all Members of the Parliament and Federal Government. The resolution will be referred to as the resolution of the 11th of January. The purpose of this screening procedure, called for by the resolution of the 11th of January, was to determine whether any of the representatives, ministers, their deputies, employees of the prime minister's office or of the Federal Assembly were registered as collaborators in the Czechoslovak State Secret Police (StB) files.⁵⁹ A parliamentary commission was responsible for vetting the deputies, and was in charge of the enquiries concerning the events of the November 1989 Velvet Revolution. After identifying the StB agents and collaborators, the commission also had to inform those who were positively identified as having been agents and collaborators of the StB, about the results of the investigation. If, within fifteen days of notification, the identified persons failed to voluntarily relinquish their posts, the resolution required the commission to make their names public.

Establishing a rather striking contrast to many of the provisions in the Bill of Rights enacted two days previously, the resolution of the 11th of January of the Federal Assembly was not an unprecedented legal event. Surrounded by fierce debates, this resolution was preceded by two other administrative screening waves. Also, in its turn, the 11th of January resolution became a step closer to the final Czechoslovak act of screening. It is on the analysis of this final act that we shall concentrate, as the act which

⁵⁹Resolution 94 passed by the Federal Assembly on January 11 (1991), in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 307.

represented the peak point of the process of political justice in Czechoslovakia, and to a certain extent in the whole Eastern Europe.⁶⁰ However, for a better understanding of the context from which this final law emerged, and of the debate which generated it, we should look to the process of screening in its entirety, considering all its stages - both before, and after the resolution of the 11th of January.

The debate on the necessity of screening the state apparatus of the Communist party bureaucracy and Secret collaborators began before the resolution of the 11th of January 1991. In fact the debate began soon after the Velvet Revolution in November 1989.⁶¹ In May 1990, before the first free elections, President Vaclav Havel announced that in order to avoid possible scandals during and after the elections, all political parties *should be entitled to request* that the Federal Ministry of Internal Affairs check the names of their candidates against the StB files. Regardless of the result of the inquiry, in each particular case, the parties were free to decide themselves whether a candidate was fit to run for office or not. All parties, except the Communist party - which preferred consistency to any other electoral qualities - submitted their candidates to the vetting procedure suggested by President Havel. In spite of the wide application of this first screening wave, the whole process was relatively unsystematic and unreliable, not least because the

⁶⁰Halmai and Scheppele, p. 178 ff. Rosenberg, p. 108.

⁶¹Klingsberg appreciates that, according to different political circumstances, the process of screening was used for specific political purposes. Klingsberg, "The Triumph of the Therapeutic," p. 14. Started initially as a process of disempowering the ex-Communist political class, the screening process was occasionally used against Slovak politicians, or even to voice resentments against dissidents. Weschler, "The Velvet Purge," pp. 69-70. The screening commission also appears to have functioned as "an instrument of factional politics." In most of the countries the archival evidence has been used, officially or unofficially, in order to discredit the political careers of former dissidents. Ibid.

Ministry of Internal Affairs, the only one having at that time legal access to the relevant documents from the StB archives, was only able to consult a small number of files.

Though based on a shortage of resources, the procedure was not without consequences. In early May 1990, Oldrich Bursky (Minister of Agriculture) and Vladimir Prikozky (Minister without Portfolio) left their posts, allegedly due to their former collaboration with the StB.⁶² Josef Hramdka, minister and former dissident, refused to resign in front of similar allegations, but after the elections he was not reappointed to Government.⁶³ Other leading officials, in the state-run mass media, as well as other state-run institutions, were also vetted on the direct orders of the Federal and Republican Governments. In spite of this very wide scope of the first screening procedure, the purpose of this exercise was never fully explained officially, but left to mass media speculation.

The political scandals related to the screening process intensified around the June 1990 general elections. On the 6th of June, two days before elections, Josef Bartoncik, the chairman of the People's Party, was accused by the Deputy Minister of Internal Affairs of having collaborated with the StB. Though Bartoncik rejected the accusation, his party blamed this scandal for its unsatisfactory election results. After elections, Jan Budaj, another political leader, this time from Slovakia, was also accused of collaboration. He admitted to have signed a declaration of collaboration, in order to get a passport, but he

⁶²Dan De Luce, "Alleged StB Collaborators Barred from Public Office," *Prague Post* 1, no. 2, 8-14 October 1991, p. 1.

⁶³De Luce, "StB Collaborators," p.1

denied ever having fulfilled any task for the StB.⁶⁴

The chain of political scandals in both republics of the Czechoslovak Federation resulted in the Federal Minister of Internal Affairs, together with his Czech and Slovak counterparts, publishing a statement warning of the possible difficulties and consequences of the vetting procedure.⁶⁵ The statement pointed out that around fifteen thousands files on the most active agents had disappeared after 1989, that the most valuable informers had never been recorded, in order to protect their identity, and that it could be certified there was in existence a series of misleading files. These misleading files contained names of persons in which the Secret Police was interested, but who had never been contacted, or had been contacted without success. Based on these observations about the state of the StB files, the three Ministers called upon the Federal Government to address the sensitive problem of vetting as soon as possible, and to acknowledge its possible destabilising effects.

3.4.2 The Second Round of Screening in Czechoslovakia

In spite of the three Ministers' recommendation highlighting the problems associated with the vetting procedure, the Federal Assembly postponed taking a decision on this issue.

⁶⁴For a case by case approach revealing the ambiguity of the act of collaboration, see Rosenberg, pp. 3-66.

⁶⁵Jan Obrman, "Laying the Ghosts of the Past," Report on Eastern Europe 2, no. 24 (14 June 1991): 5.

Meanwhile, at the end of October 1990, the Czech National Council asked the Czech Electoral Commission (CEC) to order all parties to screen their candidates competing in the forthcoming Czech local elections.⁶⁶ This second screening procedure turned out to be at least as unsystematic and as unsatisfactory as the first one. The CEC chose to ignore the order of the Czech National Council to investigate all fourteen thousand candidates, and only “recommended” that such screening should be done. Consequently, some parties simply ignored the CEC’s recommendation in spite of the fact that they were not obliged to withdraw a candidate from the election lists in case of positive identification. The result of this screening procedure on the local level has never been made public.

As expected, after the two unsuccessful administrative screening procedures both on the federal and the national level, the pressure mounted for legislative measures to be developed to substitute the administrative approach. A systematic and rapid investigation into the past activities of all members of the federal and republican parliaments and governments, as well as of a limited number of state institutions was also demanded. This was the state of affairs in January 1991 when the Federal Assembly approved the resolution of the 11th of January calling for the screening of all Federal Assembly deputies, federal ministers and their deputies, and all employees of the Prime Minister and Federal Assembly offices. According to the resolution of the 11th of January, the deputies identified as former informers of the StB were to resign voluntarily within 15 days of notification. In case they failed to do so, their names were to be publicly disclosed

⁶⁶The Slovak National Council did not ask for any such investigation. Obrman, “Laying the Ghosts of the Past,” p. 5.

in the Federal Assembly. Due to parliamentary immunity, no other measures were proposed against the deputies identified as having originally collaborated with the StB. As to the employees of the governmental offices, they were either to leave voluntarily on notification, or to be dismissed.⁶⁷

The resolution of the 11th of January set up an Investigative Commission in charge of the screening procedures. This commission was made up of fifteen members who were approved by the Federal Assembly and screened by the Ministry of Internal Affairs.⁶⁸ All parties in the parliament were proportionally represented and the decisions had to be taken unanimously. The Commission first had to pass through a preliminary stage of learning how the filing system of the StB functioned. Then, the Commission had to establish a set of “unambiguous” criteria for determining what should be considered as “evidence of collaboration.”⁶⁹ “Evidence of collaboration” had to satisfy three cumulative conditions: a name had to appear in more than one file; it had to be evident that the person was aware of his/her status as an informer; a signature or a binding agreement to

⁶⁷Jan Obrman, “The Parliament Approves Screening of Deputies,” Report on Eastern Europe 2, no. 5 (February 1, 1991): 5-7.

⁶⁸The Investigative Commission was formally the same as the one in charge of inquiring about the November 1989 events. In fact, the members of the Commission had been changed at the end of 1990, when the poor results of the Commission's activity were blamed on the fact that part of its members were former collaborators. “Czech Republic: Constitutional Review,” East European Constitutional Review 1, no. 1 (Spring 1992): 3-5.

⁶⁹It should be mentioned that some additional files had appeared. Three categories of files were available for investigation, and not only one, as was previously the case. Besides, it was claimed that, due to methodological developments, even if it was not possible to detect all collaborators at least one could be certain that those pointed out were real collaborators. Dan De Luce, “In the Eyes of the Law: Prisoners of Past and Present See Screenings in a New Light,” Prague Post 1, no. 3, 22-28 October 1991, p. 3.

collaborate, or a hand-written report had to be produced.⁷⁰

After about two months of activity by the Investigative Commission, the result was that on the 22nd of March 1991, during a Federal Assembly broadcast live on television, Petr Toman, the Spokesman of the Commission, read a report about the commission's activity. After explaining the "archeology of collaboration," Toman stated that the commission "considered the registry of files of the Federal Ministry of Internal Affairs to be the fundamental evidence on which [the Commission] based [its] conclusions."⁷¹ All members of the commission ruled out the possibility of falsification, that is, the possibility that falsification would not have been evident in the cases investigated. In conclusion, the commission considered the registry of files to be reliable. After these introductory remarks Petr Toman went on to name ten deputies⁷² who had been positively identified as StB collaborators.⁷³

Four days after this session, through a resolution, the Federal Assembly called on those

⁷⁰"Czech and Slovak Federal Republic: Report of the Parliamentary Commission on StB Collaborators in Parliament" in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 307-311.

⁷¹Obrman, "Laying the Ghosts," pp. 5-6.

⁷²The list included, among others, the name of Jan Kavan, member of the Civic Forum, an ex-dissident and ex-responsible of "Palach Press," the press agency of the Czech dissidence in London where he was exiled, who had allegedly collaborated from 1968 to 1970. A similar case which appeared few weeks later was the one of Francisek Michalek of the Christian Democratic Party who under great pressure had collaborated between 1963 and 1968, after having served 12 years in prison for political reasons. For aspects on the dichotomy "dissident - collaborator," see Vojtech Cepl, "Ritual Sacrifices: The Mania for 'Lustration' in Czechoslovakia," East European Constitutional Review 1, no.1 (Spring 1992): 24.

⁷³"Czech and Slovak Federal Republic: Report of the Parliamentary Commission on StB Collaborators in Parliament," in Kritz, ed., Laws, Rulings, and Reports, p. 307-311.

who had been identified as collaborators to resign. Later on, fourteen more ministers and deputy-ministers were positively identified and had to resign, together with thirty-three employees of the Office of the Prime Minister and twenty-five employees of the Office of Federal Assembly, eleven of whom still held responsible positions.⁷⁴

At the end of this screening process the Spokesman for the Commission made three proposals. Toman proposed the screening of the federal prosecutors, as well as the screening of the mass media personnel in both republics. At the same time, in order to avoid the use of the StB files for possible blackmailing of politicians, the spokesman proposed the ratification of a new Federal Assembly resolution calling for the publication of the names of all state security employees, agents, collaborators and informers.⁷⁵

The reaction to these waves of screening varied from strong criticism to full support. Alexander Dubcek, the Chairman of the Federal Assembly claimed that the public identification of deputies had damaged the reputation of the Parliament,⁷⁶ while President Havel declared himself to be uneasy about screening.⁷⁷ However, Havel agreed that a certain amount of vetting was “painful but necessary.” In this sense, in order to prevent

⁷⁴Obrman, “Laying the Ghosts,” p. 8.

⁷⁵The StB register contained approximately 140,000 names of so-called StB collaborators. Half of these were registered as “candidates for collaboration.” Four thousands of the alleged collaborators have asked their cases to be reviewed. Siklova, p. 58.

⁷⁶Confirming this position, an opinion poll showed that only one third of the respondents had confidence in the findings of the Commission (20% in Slovakia and 40% in the Czech Republic). When asked whether the screening procedures had influenced their confidence in the parliament, 6% answered that their confidence had increased, 40% that their views had not changed and 30% that their faith in the highest legislative body had been shaken. De Luce, “StB Collaborators” p. 2.

⁷⁷Ibid.

the process of vetting to be continued on the basis of a mere Parliamentary resolution, as it had been done until then, the President urged the government to prepare a draft law in this respect which would be submitted to the legislature according to the requirements of the constitution.

The draft law prepared by the government acknowledged some of the expectations voiced by the supporters of the screening process.⁷⁸ Nevertheless, although the proposal included banning the former Communist officials from holding government positions, it was a timid answer to the expectations for social justice. In dealing with the aspect of culpability for instance, the draft law stated that in order to ban someone from holding a senior-level government post, he or she had to be identified as an StB agent, an StB collaborator, or a former Communist official who had “participated in suppressing human rights between February 25, 1948, and November 17, 1989.”⁷⁹ The argument against this draft law was that, given the complexity of the political and historical situation, in most of the cases it would have been virtually impossible to prove that someone had violated human rights. Instead, it was argued, *mere membership* in some of the agencies that had constituted “the backbone of the Communist system of oppression”⁸⁰ should be reason enough to forbid certain categories of people from holding senior positions in the new democratic government. Following the debate of the government’s proposal, a number

⁷⁸Ibid.

⁷⁹Jiri Pehe “Parliament Passes Controversial Law on Vetting Officials,” Report on Eastern Europe 2, no. 43 (25 October 1991): 5-9.

⁸⁰Pehe, “Vetting Officials”, p. 6.

of amendments were made, and the result was the enactment of a law which meant to bring to a close the Czech and Slovak screening adventure.

3.4.3 The Helsinki Proposal

In setting the scene for this final act of screening, the recommendations given by Human Rights organisations with respect to the attempts of political justice in Eastern Europe need to be taken into account. It has been already mentioned that the Czech and Slovak republics were not the only post-Communist societies in which an intense debate on the idea of screening took place. In Poland, the debate failed to transform into legal measures, although the debate stormed the political arena for a good while.⁸¹ The vehemence of the debate was such that the Helsinki Committee and the Helsinki Foundation for Human Rights, after analysing the different proposals put up by the political parties, came up with detailed guidelines for a process of political screening. The Helsinki Proposal was instigated by the debate which took place in the Polish Sejm, but it was meant and seen as an answer to all screening attempts in Eastern Europe.

The Helsinki Proposal aimed to channel the demands for screening into a coherent limitative legal format, and to voice substantive criticism towards certain tendencies in the Eastern European countries with respect to screening. The Helsinki Committee recommended first of all that any notion of collective responsibility should be carefully

⁸¹Halmai and Scheppele.

rejected.⁸² Any attempt at decommunisation, understanding by this the mass deprivation of political rights of the former Communist hierarchy, was also considered inappropriate. Former party “apparatchiks” were to be held responsible for concrete actions only, and only through normal civil and criminal procedures. The Helsinki Committee recommended that the screening laws define very precisely the acts which were considered reprehensible. In other words, this recommendation meant that retroactive designation of new “reprehensible acts” was not completely excluded. In the case of the screening of the collaborators of the StB, the Helsinki Committee recommended for instance, that the law specifies what “collaboration with the secret services” really meant.

A series of other recommendations were also meant to ensure that all the safeguards usually present in a criminal adjudication would be present in the case of a screening process as well. It was recommended, for instance, to allow space in the law for mitigating circumstances such as causes that may have impelled an individual to become a collaborator or an informer, the duration of collaboration, the extent of damage caused by the informer, etc. Also, since the screening law is concerned with reprehensible acts, it was said, it should respect the principle of presumed innocence. Firmly rejecting the creation of special commissions in charge of the implementation of the screening procedures, the Helsinki Committee recommended that the courts should be in charge of the application of the screening law, since it was the most appropriate channel which would respect the rights of the defendants. In the Committee’s view, a screening law would also guarantee the defendant the right to defence, and adequate financial

⁸²Based on a report by Andrzej Rzeplinski. Rzeplinski, pp. 34-35.

compensation in case the accusation was unfounded. Moreover, addressing specifically the issue of evidence, the Helsinki Committee found it necessary for such a law to presume that the archival resources used to prove collaboration were not credible. Accordingly, it recommended that the data from the StB archives be necessarily corroborated by other evidence.

Since the Polish debate on screening did not consolidate into any legal act addressing the issue of decommunisation of the State apparatus, it could be implied that the Polish legislature and courts have not found the Helsinki Committee's guidelines very easy to apply. It might also be that the results one would have achieved by following the strict procedural prescriptions of the Helsinki Committee were too demanding on both legal and non-legal resources to be worth following. It is certain though, that the first Czech and Slovak waves of screening have not attained such high procedural standards as recommended by the Helsinki Committee. At the same time, the pressure mounted in the Czechoslovak Federal Parliament to solve this Gordian knot of political screening by passing a proper legislative act.

3.4.4 The Lustration Law: The Main Provisions

The long awaited screening law came into effect on the 4th of October 1991, the day of its promulgation,⁸³ and it was to be valid, in both Czech and Slovak federal republics, until the 31st of December 1996. The full title of the law⁸⁴ was shortened to “Lustration Law.”⁸⁵ This suggestive name expressed in fact the expiatory and cathartic nature of the process of screening better than the supporters of the law were willing to recognise.

When accompanying a screening process there are four main questions which any Lustration Law inevitably has to answer. Firstly, it has to address the validity of the justification for the process of screening. Secondly, it has to state clearly the positions and offices within the scope of the screening process. Thirdly, it has to identify the general criteria on the basis of which it can be established who should be disqualified (individuals, groups, criteria for defining the groups, the temporal dimension for selecting the different agents to be disqualified, extenuating circumstances etc). Last but not least, it has to provide the procedures to be followed for achieving fairness and efficiency. For

⁸³In the Federal Assembly the law was passed with a vote of 148 to 21, with 22 abstentions, and 29 deputies boycotting the vote. All the deputies of the right-of-centre Civic Democratic Party voted for the law, and all the deputies of the Communist party voted, of course, against it. See Pehe, “Vetting Officials,” pp. 5-9.

⁸⁴Act Stipulating Certain Additional Requirements for the Holding of Certain Offices in State Organs and Organizations of the Czech and Slovak Federal Republic, The Czech Republic and the Slovak Republic, Act No. 451/1991 Sb. Unofficial translation used at the Conference on Justice in Time of Transition, Prague, January 1992. Hereafter referred to as “Lustration Law.”

⁸⁵Etymologically, the term “lustration” comes from the Latin word *lustrare*, and signifies purification by expiatory sacrifice and ceremonial washing. Concise Oxford English Dictionary, s.v. “lustration” (Oxford: Oxford University Press, 1964).

the purpose of the construction of the argument of this section, the first question regarding the justification of a process of screening will be addressed later in this chapter. The positions and offices included within the scope of the Lustration Law, the general criteria set for the purpose of screening, and the procedures to be followed within this process, will be established first within this section.

From the point of view of the positions and offices affected by the process of screening, the Lustration Law could be described as rather wide in scope. The law prescribed additional conditions of service for posts filled by election, nomination or appointment, at both federal and republican level. The range of institutions entering the scope of the law included bodies of the state administration, army, security information services, police force, castle police guards, Czech and Slovak National Councils Offices, Constitutional Court, Radio and Television, Press Agency (CTK), state firms, state railways, state banks, elected academic officials, posts approved by the academic senate, judge, prosecutor, state notary, etc.. The applicability of the Lustration Law was also expanded because the law allowed the chairpersons, representatives of political parties, political movements and associations, to request being vetted themselves, or a member of the leadership of their organisation.⁸⁶

With respect to the general criteria on the basis of which the disqualification was to be based, the persons affected by the restrictions prescribed in Article 1 of the Lustration Law were identified through a negative prescription: the person filling a position or post

⁸⁶Lustration Law, Article 21.

in the categories mentioned above should not have been, during the period 25th of February 1948 to 17th of November 1989: a) an officer of the National Security Corps engaged in the state Security Service; b) recorded in the materials of the State Security Service as a resident, agent, or occupier of an apartment lent to the State Security Service, or used as a place of conspiracy, an informer or an ideological collaborator of the State Security Police; c) a conscious collaborator of the state Security Service;⁸⁷ d) the secretary of an organ/authority of the Communist party, a member of staff of these organs, or a member of a series of national or local Communist party organisations; e) a member of the People's Militia or, f) a former student in the special schools for the members of the State Security Service in USSR.⁸⁸

Shifting the burden of proof, the law prescribed that the citizen concerned was supposed to prove the fulfilment of these negative conditions with a "certificate" issued by the Federal Ministry of Interior. He or she was also obliged, before taking up a post in the categories mentioned above, to submit a declaration saying that he or she was not and is not a collaborator with any foreign intelligence or reconnaissance services.⁸⁹

With respect to the Lustration Law's potential for fairness and efficiency, defining the

⁸⁷By "conscious collaborator of the State Security Service" it was meant that "the citizen was recorded in the materials of the state Security Service as a confident, candidate for secret service cooperation or a reliable secret service collaborator and who knew that he had contact with an officer of the National Security Corps and that he submitted information to him in the form of confidential dealings or carried out for him set tasks." Lustration Law, Article 2, para. (2).

⁸⁸The party officials who rose to power during the Prague Spring (between 1 January 1968, and 1 May 1969) were not affected by the ban. Lustration Law, Article 2, para. (2d).

⁸⁹Lustration Law, Article 4.

conditions for office relative to the membership of a person in an organisation opened up the law to criticism from those who excluded any idea of a collective approach to screening as a valid path to justice following a totalitarian repressive regime.⁹⁰ The accusation of swapping the presumption of innocence for the “presumption of guilt” was also often made.⁹¹ With respect to the procedures to be followed in the process of screening, the law inclined more towards efficient and expedient bureaucratic paper work than towards an adjudication process with all the necessary provisions for fairness. For most of the categories of posts listed for screening, the law provided no possibility for appeal, once a person had been positively identified.

The only exception to this lack of appropriate provisions for an appeal was the “category (c)” included in the law, which referred to the “conscious” or “knowing” collaborators.⁹² In order to investigate the contestations coming from persons who claimed that the Ministry of Internal Affairs had wrongly certified them as conscientious collaborators of the StB, an independent commission was to be established which would be attached to the Federal Ministry of Internal Affairs.⁹³ The person to whom the commission’s proceedings referred was to be given the chance “to become acquainted with all the

⁹⁰“Czech Republic: Constitution Watch,” East European Constitutional Review 2/3, no. 4/1 (Fall 1993/Winter 1994): 6.

⁹¹Urban, p. 85 ff.

⁹² According to the law, persons qualified as “knowing collaborators of the Secret Police” are those who were registered with the Secret Police as “trustees” or “candidates for secret cooperation.” The criteria for qualifying as such was the proof that the person knew that he or she was in contact with a member of the Secret Police, was giving him information, or was performing tasks for him. See Lustration Law, and also the analysis of the law in Pehe, “Vetting Officials,” pp. 6-7.

⁹³ Lustration Law, Article 11.

evidence,” including all relevant written working documents. During the proceedings the person was also to be given the possibility to express his opinion on all the evidence presented in the case. The proceedings of the independent commission were to be closed to the public.

The Lustration Law did not refer specifically to any crime already in existence in the Czechoslovak penal laws, nor did it create explicitly new crimes. However, it prescribed that the penal code was suitably valid with regard to the obligation to testify and to conclude, with respect to the ban on questioning, to the right to refuse to testify, and to the request for an expert and his obligations. No provision was made for the right to defence.⁹⁴

Following the above-mentioned proceedings, the commission had to issue an adjudication which had to be substantiated. In case of non-fulfilment of the conditions of the Lustration Law for occupying one of the mentioned posts, the employment of the concerned person would terminate by means of a notice to quit given by the organisation within fifteen days at the latest from the date the organisation learned of the disqualifying adjudication. Finally, if the citizen insisted that details stated in the adjudication of the independent commission were false, he or she could request the court to revise the content of this adjudication.

⁹⁴On the procedural flows of the anti-agent legislation see Klingsberg, p. 10-11.

3.4.5 Procedural Aspects of the Lustration Law

Leaving aside the accusation of “witch hunting,”⁹⁵ the way in which the Lustration Law answered the questions raised by the process of screening and depolitisation, has been criticised under different more relevant headings. Although the discourse of decommunisation through screening is rather different from the criminal law approach, it is routinely assumed - as revealed by the Helsinki Proposal - that a process of screening should stay more or less within the confines of the criminal law. From this perspective the retroactivity ban appears as the criticism which requires a coherent answer.⁹⁶ The reason why retroactivity came into play was obvious. The Lustration Law, critics said, and likewise any screening act and procedure which addressed the StB agents and collaborators, and/or the former Communist officials, was creating new reprehensible acts, criminalising in a hidden way the act of collaboration with the StB and the affiliation to the Communist hierarchy. Given this implicit criminalisation, the critics of the screening procedures argued that the ban on retroactive legislation should apply, and the Lustration Law should be declared unconstitutional.

A second strong criticism, this time of the procedural aspects of the screening process,

⁹⁵Jeri Laber, “Witch Hunt in Prague,” *The New York Review* (23 April 1992): 5-6. This accusation of witch hunting is still used by those opposing movements of justice after a repressive regime. However, the expression has very little chance of saying something meaningful about the process of political justice in Eastern Europe. After readings Solzhenitsyn’s “Gulag,” or Courtois’ *“Livre noir du communisme,”* there are only two alternatives left: either political justice processes taking place in Eastern Europe are not a witch hunt, or the witches do exist.

⁹⁶Urban, pp. 90-91.

refers to the distribution of competences in establishing the screening parameters. In all the proposals preceding the Lustration Law, as well as in the Lustration Law itself, these competences have been given to specially created commissions.⁹⁷ Only as a final resort, did the Lustration Law provide the alleged conscious collaborators with the right of appeal to a court. The main reason for avoiding a general right of appeal to a court appeared to be the need for expediency.⁹⁸ This need could not be satisfied through court proceedings, and therefore the right to appeal was included as an exception rather than the rule. Lengthy and costly trials could also be more demanding with respect to the safeguards of a proper due process. The reversal of the burden of proof and the emasculation of the right to defence - to mention only two of the often mentioned procedural weaknesses of the Lustration Law - could not be accepted by a court without weakening the power and authority of the judiciary. A judge's duty to instruct a case would impose on that judge to search for the truth beyond the mere, allegedly unreliable, files of the StB. As we are already aware of the discussions surrounding the use of Secret Police files as evidence, it is easy to understand this criticism. The StB files have been instituted by the Lustration Law as the only source of evidence, and no judge could be bound by these limiting sources without considerably altering his or her judicial powers.

Not without importance for the discourse of historical justice, is the fear of political manipulation of the whole process. As one could see following the Odyssey of the

⁹⁷Siklova, p. 59.

⁹⁸Paulina Bren, "Lustration in the Czech and Slovak Republics," RFE/RL Research Report 2, no. 29 (16 July 1993): 20.

Lustration Law, there were numerous occasions when political claims and gains have been made in the name of (political) justice. Nevertheless, this is not an element inherent to the screening process. The same political claims and gains could be harboured, in the absence of a law, through the political and moral discourse.⁹⁹ Indeed, some claim it a virtue to have the screening process legislated upon, as this would actually diminish the possibility of political manipulation of the past by establishing the authoritative truth about the Communist regime.¹⁰⁰

3.4.6 Punishing and Discriminating: In Search of a Rationale

For such an authoritative or official truth of the Communist past to indeed have “authority” though, the screening law has to contain a set of inner qualities. As stated earlier, these qualities should answer consistently the four essential questions to be addressed in a screening law. Until now we have approached and detailed only three of the four essential questions to be answered by a screening law: (1) the positions and the offices within the scope of the screening process; (2) who is to be disqualified, and (3) the procedures prescribed by the Lustration Law to be followed in the screening process. We have not yet approached that question which the legislator logically should answer first, but which from the angle of research can wait until one gets more acquainted with

⁹⁹Ruti Teitel, “How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?” The Council on Foreign Relations Latin America Project Paper (New York, 17 May 1990).

¹⁰⁰Eisenberg, pp. 148-149.

the main parameters of the Lustration Law. This question refers to the valid justification of the screening process; it refers to the grounds - both legal and non-legal - on which a restrictive discriminatory measure can be imposed. And, in the end, the way one reads the other three questions addressing the Lustration Law depends upon the answer given to this question of the justification of the discriminatory measures.

In answering the question of the valid justification of a screening process it is necessary to address the basis and the nature of the discrimination brought by a screening law. In particular, the Lustration Law supporters have to address the very substantive criticism referring this time to the alleged punitive dimension of the discrimination established, and especially to its anti-agent and anti-collaborator provisions.¹⁰¹ The punitive character of the Lustration Law becomes an important issue from the moment one claims that such a legislative act would be needed in order to fill a gap in the Penal Code. Incriminating the different acts of collaboration with the Communist regime, could be seen as adding to the substantive criminal law, and therefore violating the imperative ban on retroactivity which applies to this domain of law.

Theoretically at least, the Lustration Law was not enacted as an amendment to the Czechoslovak Criminal Code.¹⁰² Notwithstanding this formal distinction, the critics of the screening process often claim that the Lustration Law actually represents a disguised

¹⁰¹ Arthur Berney, "A Critique of Lustration," in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 141-143.

¹⁰² Schwartz, p. 149 ff.

retroactive criminalisation of behaviour legally acceptable in the past.¹⁰³ In this sense, it is argued that the penalising of the act of collaboration performed through the Lustration Law took the form of a mere administrative discrimination simply to avoid having to comply to the stricter due process rules specified by the criminal law. Related to this aspect it is also claimed that it actually does not matter whether a certain type of punishment is called criminal punishment or not. The only aspect that would matter for these critics is the individual perception of the consequences of the law; what is important from this perspective is the fact that there is something which *appears* as a punishment.¹⁰⁴

The supporters of the Lustration Law argue that this law was passed by the Czechoslovak Parliament not in order to create retroactively a crime out of lawful behaviour, but in order to draw, along political lines, an “administrative discrimination” which would single out a certain group in society, helping to segregate the new democratic regime from the old totalitarian practices. The criterion used for this “administrative discrimination” was the act of collaborating with the Communist regime. Generally speaking, discriminating laws are not unconstitutional *per se*, and they do not necessarily disregard the rule of law. In democratic societies the positive discriminations are almost a matter of course, to such a point that we would not even notice them anymore if it was not for the attention given to them by some legal scholar who points out that, as positive as they

¹⁰³Siklova, p. 59.

¹⁰⁴Ibid.

might be, they are still “discriminations.”¹⁰⁵

Nevertheless, a negative discrimination stays under stricter rules than the measures of positive action and, in general, it must be strictly prospective. Non-retroactivity though, is not sufficient to make it acceptable. In order to pass the test of the rule of law, the legal distinctions or discriminations have to meet three cumulative conditions: to serve a *reasonable purpose*, to be *necessary* and to qualify as *proportionate* when the consequences imposed upon the discriminated group are compared to the social benefit derived from that discrimination.¹⁰⁶ In order to evaluate the fulfilment of these requirements, a clear and coherent statement would be needed reflecting the expectations the legislator has decided to uphold through the discriminating law.

Starting with the first of the cumulative conditions, it should be mentioned that most of the time it is unnecessary to include in the legal text the purpose for which it was enacted. We assume for instance, that all criminal restrictions are meant to further our understanding, as a community, of what is acceptable or unacceptable behaviour towards one another.¹⁰⁷ Nevertheless, no one can know the purpose of a discriminatory measure which does not fit easily into any of the classical domains of the law. By not knowing the purpose of the norm, one could not possibly decide upon its reasonableness. Of course,

¹⁰⁵J. Edwards, “The Moral Dilemmas of Positive Discrimination,” Social Policy and Administration 22, no. 3 (December 1988): 210-221.

¹⁰⁶Kis, “What Shall We Do?” p. 6 ff.

¹⁰⁷Nicola Lacey and Celia Wells Reconstructing Criminal Law: Critical Perspective on Crime and the Criminal Process (London: Butterworths, 1998), p. 1 ff.

one could argue that such a purpose can easily be isolated from the debate which takes place in the society which produced the law. However, unlike most other social issues, in the case of a process of justice emerging from a revolution, the social expectations are not clustered in easily identifiable and symmetric antinomies. For example, in the case of abortion, if an act criminalises abortion, one would understand - as a matter of common knowledge derived from the social debate - that the legislator has chosen to uphold expectations attached to the idea of the foetus as an individual, and to deny expectations attached to the right of a woman to decide with regard to her own body.¹⁰⁸

While the two competing positions appear together around the moral issue of abortion, regardless of which one of them is confirmed by the legal discourse, choosing one position implies that the reason for the normative intervention is the relative rejection of the other position, and vice-versa.

As we have seen earlier when analysing the debate on the use of the Secret Police archives,¹⁰⁹ the affirmative discourses reclaiming the right or even the duty to take legislative action against the former collaborators or Communist party leaders offers too complex a network of reasons and counter-reasons. It is thus, impossible for anyone to identify and assess the legislative intent for which the legislator has decided to act in the form of the Lustration Law.¹¹⁰ It could be for the constitutional protection of the emerging

¹⁰⁸Jenny Morgan, "A Woman's Fight to Choose," Fulcrum Production for Channel 4 (documentary transmission: 1 November 1997). Also, Susan Dwyer and Joel Feinberg, eds., The Problem of Abortion (Belmont, CA : Wadsworth Pub., 1997).

¹⁰⁹See supra Section 3.3.

¹¹⁰Los, "Lustration and Truth Claims," p. 155.

democracy, by preventing political sabotage. It could also be in order to enforce certain moral standards in the political life, by ensuring that a repressive political regime is assigned the responsibility for its crimes, and by not allowing members of the repressive regime to take part in the process of re-building the democratic institutions. Finally, legislative action could also be undertaken to prevent former agents being blackmailed while in office.¹¹¹ These are all rather distinct reasons, and each of them would bring a different perspective to the fulfilment of the conditions of reasonableness, necessity and proportionality.

Indeed, the Lustration Law does not contain enough information to indicate its main purpose. On the one hand, banning an important part of the Communist party-state apparatus, including the former collaborators, from public office does not automatically offer the purpose intended by the legislature when imposing the discriminating conditions of employment contained in the Lustration Law. On the other hand, searching for an answer in the parliamentary and public debate or in the social expectations around the issue, is not likely either to shed more light on the issue. This is because the debate in this case offers a cluster of distinct purposes and justifications, which are all very different. These justifications appear to have influenced and shaped different parts of the Lustration Law. Nevertheless, these justifications are not necessarily cumulative aspects. The fact that the justifications are not cumulative creates incompatibilities within the law itself, and makes it appear inconsistent, thus unable to offer a clear and coherent answer to the question of reasonableness, necessity and proportionality of restrictions imposed

¹¹¹Kis, "What Shall We Do?" p. 9.

retroactively.

Let us take for instance, one of the arguments used most often in the parliamentary debate, that the law is supposed to prevent the Communist ex-officials, or the StB agents and collaborators from sabotaging the move that the society undertakes towards democracy and a free market economy.¹¹² In order for this justification to be backed by the three conditions of reasonableness, necessity and proportionality, the law should concentrate on a narrower area of the Communist bureaucracy and security apparatus, limiting its scope to the governmental positions and office. However, if prevention of sabotage is the rationale of the Lustration Law, then it is rather difficult to argue under this latter justification why the screening law should include such a wide range of positions, some of which - such as elected academic posts, or leadership positions in any organisation to which the Lustration Law allowed the chairperson to ask for the screening - could hardly be seen as a credible target of sabotage.

Screening the elected members of the legislative body has also been seen by some critics as an over-reaction to the threat of sabotage, and in the end as an undemocratic measure. In this sense, the only type of measures seen possible by the critics of the anti-agent legislation is the creation of free access to vital information about the candidates in elections.¹¹³ The right to an informed decision for the voters is seen as the only reasonable

¹¹²Cepl, p. 26.

¹¹³Janos Lakos, "Some Remarks on the Access to the Archives of the Former Regime," in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 75 ff.

purpose for an anti-agent legislation. From this perspective the disclosure of the candidates' political past is considered both necessary and proportionate if the voters are to decide the political destiny of each specific candidate. In this way only, it is said, one would deal with a non-discriminatory law which would eventually affect only some former agents, through the voters' will.

In conclusion, it is difficult to see how an emerging democracy would be defended by such an overstretched political screening. Such an approach would only confirm Kirchheimer's understanding of the political justice process as a manipulation of the legal discourse for pure political goals. If the protection against sabotage is indeed offered as the valid justification of the screening process brought by the Lustration Law, then this law presents an inconsistency between this justification and the actual range of "hazardous categories" which the law proposes to be screened.¹¹⁴ Consequently, this type of justification of the law does not allow one to assess whether the Lustration Law is necessary and proportionate.

Likewise, if one considers as a justification for the Lustration Law the fear of potential blackmail against the persons with a tainted past, the disqualification of many, if not all, of the persons concerned can appear as both unnecessary and disproportionate. The same otherwise reasonable purpose of preventing the blackmail of persons in positions of authority, could be achieved by less harsh means. Screening and exposing only the

¹¹⁴"Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law," in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 358.

candidates' past, but without disqualifying the candidates from office because of their past, could be an alternative to screening and banning. By exposing in advance the tainted past of the candidates and officials, any attempt to blackmail a candidate or official which has already been exposed would become pointless: the public would already be aware of those persons' political past.¹¹⁵

The conclusion one could draw from here is that, while protection from sabotage could seem a reasonable justification for screening (with the necessary reserve being made concerning the unnecessary and disproportionate measures taken), banning from positions of authority persons with a politically tainted past as a measure of protecting those persons, and thus their institutions, from blackmail appears clearly as an un-necessary and disproportionate measure. Consequently, under this justification of the protection against eventual blackmail, the Lustration Law appears even more inconsistent, promoting excessive and unfair restrictions on certain categories of persons.

If fear of sabotage or blackmail appear as inconsistent justifications of screening in the context of the Lustration Law, a punitive dimension of this law might appear even more difficult to argue for. To put to the test the consistency of this justification within the framework of the Lustration Law the legislator should have made clear a series of aspects.

First of all there is the aspect of retroactivity. A justification based on the idea of

¹¹⁵Berney, pp. 140-141.

punishment would attach the Lustration Law to the criminal law domain. Accordingly, the legislator should provide a clear explanation for retroactively criminalising the acts of collaboration with the StB, or of having been part of the Communist structures of power. This criminalisation would be very difficult to defend without invoking the “exceptional circumstances” of the Communist regime. Even so, we have seen that some similar attempts at having these “exceptional circumstances” acknowledged within the legal discourse failed in Hungary. Besides, while in the Hungarian case the proposed retroactive measure referred to a more procedural aspect where retroactivity might be sometimes tolerated, the Lustration Law would have to argue for a retroactive substantive criminal norm.

Admitting though that the “exceptional circumstances,” and especially the repressive nature of the Communist regime would be acknowledged legally, the Lustration Law would still remain inconsistent. The major inconsistency would manifest itself with respect to the way in which responsibility - since we are not dealing with “protective measures” like in the first two lines of justification anymore - is assigned. If responsibility is meant to be assigned individually, then the Lustration Law fails to provide all safeguards necessarily attached to this type of attribution of responsibility.¹¹⁶ Besides a forfeited right to defence and to appeal, and a questionable respect of the right to a fair trial in front of a proper court, the Lustration Law fails to provide for an individualised assessment of the persons concerned.

¹¹⁶Rosenberg, p. 43 ff. Siklova, pp. 59-60. Cepl, p. 25.

It is largely agreed, for instance, that some of the informers and collaborators of the StB have been blackmailed into working for this organisation. The moral stand of the Lustration Law therefore, the only one on which the “exceptional circumstances” might be acknowledged legally, is weakened by the fact that the law does not provide space for considering the eventual extenuating circumstances. Without these provisions it is difficult to conceive of individual responsibility coherently implemented. Also, as it has already been mentioned, the Lustration Law failed to include a government proposal by which a former Communist official could have been banned from occupying certain positions of authority only after demonstrating in a court of law that he or she has been violating human rights.¹¹⁷ All these aspects make the provisions of the Lustration Law insufficient for providing a legitimate attribution of criminal responsibility.

On the other hand, one of the chief criticisms of the Lustration Law has always been the implied collective responsibility based upon mere membership to different Communist structures.¹¹⁸ The Lustration Law, however, fails to argue for a coherent concept of collective agency which might be made responsible for the human rights violations which took place during the Communist regime. It also does not provide for any appropriate legal structures through which such responsibility should be implemented. On the contrary, the promoters of the law tried hard to deny any implication with an attempt to implement measures of collective responsibility, and the usual justification offered for

¹¹⁷“Czech Republic: Constitution Watch,” East European Constitutional Review 2, no. 4 (Winter 1993): 6. Siklova, p. 61.

¹¹⁸“Czech Republic: Constitution Watch,” (Winter 1993), p. 6. Siklova, p. 61.

the screening law was, as it was shown in the previous section, the need for protection against sabotage or blackmail. Hence, even this last justification, based on punitive arguments, fails to offer a coherent image of the Lustration Law as a law based upon a reasonable purpose, necessity and proportionality.

As shown above, the Lustration Law can easily be criticised from all perspectives. None of the offered justifications can provide the Lustration Law with the necessary coherence.¹¹⁹ On the other hand though, none of the three lines of justification - sabotage, blackmail, or punishment - is mentioned in the Lustration Law itself: the law does not say directly for which of the analysed reasons it has been promulgated. Since one is dealing here with a law belonging to a political justice process, one would need to know which of the affirmative discourses was sanctioned: the need of protection against blackmail, against sabotage, or the need of deterrence through punishment. Only by knowing what this choice is, would one be able to assess the coherence of the Lustration Law.

A formal legal statement clarifying the purpose of the law is not usually an imperative requirement for a new law. In the specific situation of political justice though, it is necessary to fulfill this requirement because each of the three claims analysed so far carries with it different implications and degrees of responsibility and guilt. The argument claiming the need for the protection of the constitutional democracy against sabotage, for

¹¹⁹Referring to the same difficulties related to the ambiguity in the formal justification of a legal (in this specific case, constitutional) provision, Sunstein writes that “sometimes the problematic origins of a constitutional provision will give that provision dubious legitimacy. When leaders are aware of those problematic origins, a constitutional provision may not mean much.” Cass R. Sunstein, “The Dubious Status of the Charter of Rights and Freedoms: A Constitutional Anomaly in the Czech Republic?” *East European Constitutional Review* 4, no. 2 (Summer 1995): 51.

instance, projects the image of the Communist counter-revolutionary agent, eventually in the service of a foreign intelligence service, who is waiting, from his high, eventually elected post, to undermine the fragile democracy.¹²⁰

As to the second argument, it presents the agent not as an active actor but as a passive one, an agent upon whom one risks to have exercised pressure and blackmail. A legal measure based on this argument could be seen simply as trying to protect the democratic institutions by protecting the agent or collaborator against his own potential weaknesses. From this position, the question of responsibility and guilt is indistinguishable; both collaborators and Communist officials are presented simply as persons trapped by circumstances over which they had no significant individual control. On the other hand, the question of responsibility and guilt would come up if the third type of justification, the one based on the need for deterrence through punishment, would be used.

Only after clarifying the purpose for which the Lustration Law was enacted, it is possible to consider the law's constitutionality, its reasonableness, necessity and proportionality. Most importantly though, clarifying the question of the justification of the Lustration Law makes possible the decision upon the other point of criticism, the one referring to the collective punitive character of the Lustration Law.

¹²⁰This is the affirmative or "revolutionary" argument. This argument is derived from the social scepticism considering the possibility of an ideological rebirth of the Communist elite. Kis, "What Shall We Do?" p. 9.

3.4.7 The Constitutional Court Decision on the Lustration Law

The decision by the Constitutional Court on the Lustration Law added some “clarifications” to the debate on the intention of the legislator regarding the Czechoslovak screening law.¹²¹ The decision was made public on the 26th of November 1992, and it confirmed to a large extent that the content of the law was constitutional. The Court also acknowledged, however, that the StB files were unreliable, by removing “category (c)” of the law referring to the conscious collaborators. This “category (c),” referring to the persons “knowingly collaborating with the Secret Police,” included those persons registered with the Secret Police as “trustees” or “candidates for secret cooperation.”¹²² Unlike in the case of “informers” or “ideological collaborators,” or indeed party officials, there are no official documents, such as signed papers of collaboration, from which the status of “conscious collaborator” could formally be established. The affiliation of a person to the category of conscious collaborators had to be demonstrated by proving that the person was in contact with a member of the Secret Police, was aware of this fact, and was knowingly giving information, or performing tasks for an StB agent.¹²³ The Court

¹²¹Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, Pl. US 1/92, in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 361-363.

¹²²Lustration Law, Article 2 and Article 3.

¹²³Pehe, “Vetting Officials,” p. 8. For the criteria for determining who collaborated with the StB, see “Czech and Slovak Federal Republic: Report of the Parliamentary Commission on StB Collaborators in Parliament,” in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 308-310.

found the procedural safeguards offered by the law to be insufficient in assessing whether persons fitted into the category (c). At the same time, by eliminating “category (c)” from the scope of the Lustration Law, the Constitutional Court made obsolete the Independent Commission of the Federal Ministry of the Interior which was supposed to deal with identifying persons falling into this category.¹²⁴

Apart from this adjustment to the law, the decision of the Constitutional Court is very important as it attempts to offer a systematic justification of its decision, and implicitly a justification for the Lustration Law itself. In upholding the law, the Constitutional Court specified the right of the State to protect the constitutional democracy against potential disruptions caused by persons representing the previous regime.¹²⁵ This position makes one believe that protection against sabotage, and/or supposed blackmail, is indeed the rationale behind the Lustration Law. In approving the law, the Constitutional Court emphasised in its decision one element pointing towards the same rationale.¹²⁶ In the explanatory notes to its decision, the Court quoted lengthily from a number of classified documents. These documents revealed the StB machinery still to be a real threat to the

¹²⁴For a analysis of the Commission see Bren, pp. 18-19.

¹²⁵“[The] State cannot be denied the right to specify certain requirements imposed on the persons employed in selected categories in the institutions, functions or activities significant for the protection of the democratic constitutional system, State security, its economic and political interests, protection of State secrets or the persons who can significantly interfere with public affairs in the discharge of their functions.” Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, Pl. US 1/92, in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 355.

¹²⁶This proved once more that the protective measures against the legacy of the Communist regime could not be reduced to a “witch-hunt” story, as some authors have claimed. Laber, pp. 5-6.

new democratic political structures.¹²⁷ Along the same lines promoting the idea of screening as protective and not punitive measures, the Court suggested that the Lustration Law had a “labour law character,” and not a criminal punitive one.¹²⁸

Notwithstanding these claims, the Court seems in fact to endorse more the retributive rationale of the process of screening than the protective rationale since there are references in its decision to “the rule-of-law State’s *openness to the discourse of values*”

¹²⁷The Court quoted lengthily, for instance, from the Directive no. CB-002040/03-89 issued on the 28th of November 1989, eleven days after the beginning of the Velvet Revolution. The Directive contain dispositions like: “- despite existing agency positions and official contacts in the respective bodies, for future objectives, maintain the conditions for the possible transfer of the State Security members into their structures...; - increase substantially the conspirative character of operative activities in the whole scope of State Security; - reassess the network of agents, ensure its stabilization and gradual expansion to genuinely high-quality positions. Emphasize agency in influential and leading positions. Activate maximally the work of agents, particularly through the use of influential agents; - aim active measures at the misinformation of the opponent by compromising the most confrontation-minded representatives of these structures in the eyes of the public, and at the increase of ideological, personal and operational clashes; - with maximum speed, acquire high-quality influential agents in mass media and among the students of higher-grade schools, capable of influencing the operative situation in these structures to the benefit of the Communist Party of Czechoslovakia.” Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law (Ref. No. Pl. US 1/92), in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 349.

¹²⁸“The proposal [that the Lustration Law should be declared non-compliant with the Bill of Basic Rights and Freedoms] does not respect the specific character of the problems of Act No. 451/1991 and confuses its labour law character with the concepts and qualifications of criminal law (the introduction of responsibility, even collective responsibility, for unspecified ‘facts of the case’, based on collective responsibility for membership in a vague, formally defined circle of persons). The contested Act, however, is not of criminal law character either in contents or in its meaning, nor does it formulate any type of legal responsibility. Its substance is the adjustment, for a certain transition period, of the conditions for the discharge of certain closely defined functions or activities to the value criteria of a democratic State.” Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, Pl. US 1/92, in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 352-353.

(emphasis mine),¹²⁹ to the discourse of natural rights,¹³⁰ and to legal certainty as a legal principle *dependent upon values and natural rights*.¹³¹

Therefore, the Constitutional Court's decision did not add much to the justification of the collective responsibility which appears to be imposed through the Lustration Law, and the confusion regarding the legislative intention remained. The screening undertaken in the Czech circles of power looks therefore more and more like "lustracims," a mixed bread placed between the blame-loaded lustration and the blame-free ostracism.

The question stemming from here is whether a blame-free procedure would answer the expectations for justice of the societies in transition from repressive regimes. The concept of ostracism covered an antique Athenian political procedure providing for the temporary banishment, without punishment, of a citizen considered politically dangerous for the City's welfare. This description is strikingly similar to the meaning one could put into the

¹²⁹"A rule-of-law State connected with democratic principles, established after the fall of the totalitarian system, cannot be considered amorphous with reference to values." Ibid.

¹³⁰"[E]ntirely new elements of the renaissance of natural human rights have been introduced into our legal system and a new basis of constitutional law and the rule-of-law State has been created... The restoration of the rule-of-law State cannot be considered a continuity of the constitutional and legal consistency of the totalitarian regime; it must be understood as a transition from formally rational political legitimacy, the criterion of which was formal legality, to materially rational legitimacy. The previous legal positivism made it impossible to make any distinction between an unjust and a just law and to identify those political processes and legal norms the contents of which threatened the very substance of democracy, since they formally remained within the procedures and framework of legality." Ibid.

¹³¹"Even legal certainty cannot be considered in abstract terms; it must be measured by those values of the constitutional and rule-of-law State which are of system-constitutive character... Legal certainty in a rule-of-law State must be the security of its intrinsic values of its contents... Respecting the continuity of the old system of values would not guarantee legal certainty, but rather would cast into doubt the new values and the trust of the citizens in the credibility of the new system and would threaten legal certainty in society." Ibid.

Lustration Law when interpreting the declarations given by both supporters of this law and the Constitutional Court: in order to be ostracised, the citizen did not have to commit a crime, nor any other vile act; it was enough to be considered by the majority of the Athenians as somewhat dangerous to the City. To be screened through the application of the Czechoslovak Lustration Law appears also as a blame-free conflict of interest between “the City” and the citizen.

In the same way in which ostracism was an outwards exile, in Czechoslovakia the Lustration Law appears to regulate an inwards exile, an exile in which the person concerned does not need to leave the City, but the political arena. Similarly to ostracism, Lustration Law appears not to inflict any permanent stigma upon the targeted person; in both cases, neither property nor civil rights nor indeed dignity are lost. However, the term “lustration” is not as blame-free as the term “ostracism.” A screening law, as a real lustration law, is expected to bring about “purification” from “deadly political sins,” and unlike ostracism laws, should not be passed at the mere whim of the majority.

It was shown, however, that the Czech Lustration Law also includes many signs that the law was actually underlined by an un-confessed “lustration” justification, focusing on punishment and deterrence. It is likely that the sanitised justifications which made from the Lustration Law a “copycat” of the ostracism procedure, instead of a real “lustration” one, have been preferred only because of the controversies surrounding the concept of legal collective responsibility, a concept implied by the “lustration” type of justification. Nevertheless, all these hints to responsibility and blame are not sufficient for clarifying

the nature of the legislative intervention; basically, the legal nature of the Lustration Law should not be guessed but clearly stated.

In fact, from the far-reaching character of the law, one gets the impression that the law has a collective retributive substance, which means that the legislature, as well as the Constitutional Court, would be indeed inclined towards formulating a kind of collective political responsibility of the Communist apparatus. At the same time, when one has to decide on the intention behind the Lustration Law, the legislator appears rather to argue not on the basis of collective responsibility but on the more convenient basis of administrative expediency in the labour law domain. The outcome of this inconsistency is that it makes the Lustration Law appear as a kind of legal mythological creature, with the upper body eagle and the lower body snake. No wonder therefore that, though the Lustration Law became the expression of the most far-reaching post-Communist process of political justice,¹³² the law itself was criticised both for being unjust,¹³³ and for being too lenient and ambiguous about the nature of the acts and of the actors referred to in the law.¹³⁴

¹³²Schwartz, pp. 143-144.

¹³³Rzeplinski, p. 34.

¹³⁴Cepl, p. 26.

3.5 The Czech Act on the Illegality of the Communist Regime

In order to silence those who found the Lustration Law too ambiguous, soon after the secession of the two federal republics, the Czech parliament passed another act. Although supported by arguments just as controversial as the ones offered for the Lustration Law, this act took the Czech political justice closer to the implication of a collective responsibility for the Communist regime. This act basically did not change anything with respect to the screening process itself, but it added something to the spectrum of the political justice legislation which seemed to answer strong social expectations.

The Act on the Illegality of the Communist Regime and Resistance to It (Act No. 198/1993) was passed by the Czech Parliament almost three years after the Velvet Revolution.¹³⁵ The act was characterised as being concise and strongly declarative, and at the same time “more of a proclamation than a piece of practical legislation.”¹³⁶ Its significance was claimed to be more in its moral implications rather than in its impact on the way the Communist past was dealt with in courts.¹³⁷ In spite of this view, taken not

¹³⁵ Czech Republic: Act on the Illegality of the Communist Regime and Resistance to It. Act No. 198/1993 (9 July, 1993), in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 366-368. Hereafter referred to as Act No. 198/1993 or the Act on the Illegality of the Communist Regime.

¹³⁶ Jan Obrman, “Czech Parliament Declares Former Communist Regime Illegal,” RFE/RL Research Report 2, no. 32 (13 August 1993): 6-10.

¹³⁷ Article 1, para. (1) provides that “The Communist regime and its active supporters, (a) deprived citizens of any possibility of freely expressing their political will, forced them to conceal their opinion on the situation in the country and society, and forced them openly to express their agreement even with what they considered lies or crimes, and that by means of persecution or threats of persecution against the

only by some analysts but also by the supporters of the law, there is an undeniable link between this law and the Lustration Law, placing the screening law at least partially within a retributive discourse.¹³⁸ Moreover, critics expressed fears that the law could have criminal implications, only part of which were openly acknowledged in the law itself.¹³⁹

Indeed, although it was argued that the new Act No. 198/1993 was meant to have only moral implications, the Act on the Illegality of the Communist Regime stretched into the criminal discourse by allowing what the Hungarian Constitutional Court has denied: the lifting of the statute of limitations for crimes committed between the 25th of February

citizens themselves or their families and friends; (b) systematically and constantly violated human rights, while oppressing certain political, social, and religious groups in a particularly sinister manner; (c) violated the fundamental principles of a democratic State based on the rule of law, international treaties, and its own laws, in practice putting the will and interests of the Communist Party and its representatives above the law; (d) use every means of exerting power to persecute citizens, and in particular: - executed them, murdered them, and imprisoned them in penitentiaries and forced labour camps, used brutal methods against them and exposed them to inhuman suffering - including physical and psychological torture - during investigations and incarceration; - deliberately divested them of their property and violated their rights of ownership; - deprived them of the opportunity to practice their professions or perform their duties, or attain higher education or specialized training; - restricted their freedom to travel freely abroad and return freely; - drafted them into Technical Support Battalions and Technical Battalions for unlimited periods of time; (e) did not hesitate to commit crimes to reach its objectives, facilitated the execution of these crimes with impunity, and provided unfair advantages for those who participated in these crimes and persecutions; (f) joined forces with a foreign power, and from 1968 maintained the aforementioned State by means of occupying troops." Article 1, para. (2) provides that "Those who implemented the Communist regime as officials, organizers, and agitators in the political and ideological sphere, are fully responsible for the crimes specified in paragraph (1)." Act No. 198/1993, pp. 366-368.

¹³⁸The Communist Party of Bohemia and Moravia and the Left Bloc, of which many former Communists are members, sent letters of protest to the Council of Europe, Amnesty International, and the Socialist International, arguing that the law is "discriminatory and based on the principle of collective guilt." Siklova, p. 59.

¹³⁹*Ibid.* The preamble of the law states that "Parliament declares that the Communist Party of Czechoslovakia, its leadership and members, are responsible for the system of government in this country in the years 1948-1989, and particularly for the systematic destruction of the traditional values of European civilization, for the conscious violation of human rights and freedoms, for the moral and economic ruin combined with judicial crimes and terror against advocates of different opinions, the replacement of a prospering market economy with command management, the destruction of the traditional principles of ownership, the abuse of training, education, science and culture for political and ideological purposes, and the careless destruction of nature, and asserts that in its future work, it will use this Act as its point of departure." Act No. 198/1993, p. 366.

1948 and the 29th of December 1989 in cases in which, for political reasons, culprits were not sentenced¹⁴⁰ or victims were not acquitted. Besides these openly stated criminal law implications, the critics of the Act No. 198/1993 also pointed to an “Explanatory Report.”¹⁴¹ This report, which accompanied the Act No. 198/1993 to the Parliament, mentioned an “interpretative function” for the Act “in relation to court decisions.” This function created the potential of the new act to have criminal law consequences. The provisions in Article 5 of the Act No. 198/1993, together with the arguments used in the Explanatory Report, are undeniably linked to the declarative provisions set out in the first articles of the Act. The critics argue therefore that the Act as a whole cannot be declared “innocent” from a criminal law perspective.

The criminal law implications from Article 5, together with the clear references the Act made to a kind of joint responsibility of the Communist regime,¹⁴² were the main issues which led Act No. 198/1993 to be assessed by the Constitutional Court. The Constitutional Court pronounced its decision on the 21st of December 1993. Notwithstanding the “joint responsibility” declared by the Act, and the “interpretative

¹⁴⁰“The period of time from 25 February 1948 until 29 December 1989 shall not be counted as part of the limitation period for criminal acts if, due to political reasons incompatible with the basic principles of the legal order of a democratic State, [a person] was not finally and validly convicted or the charges [against that person] were dismissed.” Article 5, Act No. 198/1993, p. 368.

¹⁴¹“Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime (December 21, 1993),” p. 370 ff.

¹⁴²See Article 1, para (2) supra note 137. Article 2, para. (1) of the Act No. 198/1993 provided: “It is particularly for the details specified in Art. 1, para. 1 of this Act that the regime based on the Communist ideology, which decided on the government of the State and the fate of the citizens of Czechoslovakia from 25 February 1948 to 17 November 1989, was criminal, illegal, and contemptible.” Paragraph (2): “As with other organizations based on the Communist ideology, which oriented their operations toward the suppression of human rights and the democratic system, the Communist Party of Czechoslovakia was a criminal and contemptible organization.” Act No. 198/1993, p. 367.

functions” professed in the Explanatory Report, the Court upheld the law, denying especially its criminal implications.¹⁴³ The Court’s argumentation came in a rather convoluted way, though. First of all, the critique that the Act No. 198/1993 was to serve “an interpretative function in relation to court decisions” was rejected by the Court on the basis that this intention has never been expressed in the text of the Act itself, but only in the Explanatory Report accompanying the Act.¹⁴⁴ On the other hand, according to the Court, even the Report did not show “a clear intention” for giving the Act an interpretative function. Besides, it was added as a final argument that the wording of an Explanatory Report could not be the subject of a constitutional review. However, these arguments prove rather inconsistent, since the playing down of the Explanatory Report came in the Court’s decision only a few paragraphs after the Court had used the same Report as authoritative in interpreting the scope of the law, as intended by the legislature.¹⁴⁵ In conclusion, in the search for a valid justification of an act of political justice which would reflect the intention of the legislature, it appears yet again difficult to find a solid ground.

¹⁴³The Constitutional Court acknowledged the “joint responsibility” of individuals on two levels: the joint responsibility of the members of the Communist Party of Czechoslovakia (KSC) for the manner of rule in the years 1948-1989 (responsibility mentioned only in the Preamble of the Act and seen by the Court as “an effort to instigate reflection”) and the joint responsibility of those who “actively supported the regime” for the crimes committed by the regime. Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime, 21 December, 1993, p. 371.

¹⁴⁴*Ibid*, p. 370.

¹⁴⁵“Contrary to the assertion of the petitioners... neither the Act itself nor the Explanatory Report give any grounds at all for inferring that the first part of Act No. 198/199, regarding the Illegality of the Communist Regime and Resistance to It, might have created, in the area of substantive criminal law or in some other area of the law, a legal duty or a statutory power of the State to prosecute certain persons, or to inflict non-criminal sanctions upon them... The first part of the Act represents the moral-political viewpoint of the Czech Parliament, the purpose of and the grounds for which are explained in the above-mentioned quotation from the Explanatory Report.” *Ibid*.

The last argument used by the Constitutional Court was one of legal terminology. As proof of the law's genuinely non-normative character, the Court argued that - apart from Article 5, suspending the statute of limitations for criminal acts not prosecuted due to political reasons - the legislator "did not make use of customary legal terminology" in its declaratory statements.¹⁴⁶ Nevertheless, looking into the text of the Act No. 198/1993, it appears that Article 1, paragraph (2)¹⁴⁷ declares the Communist officials, organisers, and agitators in the political and ideological sphere, as *fully responsible* for the crimes specified in paragraph (1).¹⁴⁸ This paragraph enumerates to a large extent acts which are easily "convertible" not only into human rights violations, but also in crimes specified even by the Communist criminal code. At the same time, Article 2 defines the Communist regime not only as "criminal" - a term sometimes used with moral connotations - but also as "illegal,"¹⁴⁹ a fact which should leave no ambiguity about exactly what the scope of the Act is. The normative criminal potential of the Act is acknowledged also by scholars who remind us about similar pieces of legislation subsequently used as a legal starting basis for banning certain political organisations of similar inspiration.¹⁵⁰

¹⁴⁶Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime (21 December, 1993)," in Kritz 3: 371.

¹⁴⁷See supra note 137.

¹⁴⁸See supra note 137.

¹⁴⁹See Article 2, para (1), supra note 142.

¹⁵⁰Jan Obrman, "Czech Parliament Declares Former Communist Regime Illegal," RFE/RL Research Report 2, no. 32 (13 August 1993): 8-9

3.6 Preliminary Conclusions

Following this analysis one can understand how, although the Czech (initially Czechoslovak) process of screening is a bold and courageous approach to political justice, as with the criminal law path adopted in Hungary, it builds upon more than one inconsistent claim. In one way or another, each of the claims relates to the central notion of this thesis: the collective responsibility of the Communist structures of power. First of all, there is the claim that the Lustration Law has a “labour law character.” As we have just seen though, under this heading it was difficult to consistently justify the restrictions imposed, the wide range of positions affected, as well as the categories of persons concerned.

Secondly, being argued from the position of a need to protect the constitutional democratic order against sabotage or blackmail, the Lustration Law claims a blame-free, non-criminal character. Indirectly however, it outlaws activities which were previously lawful. By doing this, the screening law casts a shadow of blame over large categories of people, such as StB agents, informers and collaborators, and over part of the Communist bureaucracy. A striking contrast with this “blame-free” claim is also the fact that, as we have just seen, the restrictions imposed on these categories of people are justified by the Constitutional Court through an appeal to the discourse of values and natural rights.

Thirdly, in view of this blame cast - even if involuntarily - over large categories of

persons, the claim that Lustration Law is not built upon the notion of collective responsibility appears in sharp contrast with the fact that the screening law does deal with people collectively, and it does fail to offer the traditional imperative safeguards specific to any attribution of individual blame.

All these inconsistent claims brought the inescapable criticism that the screening law does convey, even if covert, criminal responsibility and collective blame. This became even more evident when another law was introduced into the picture: the Act on the Illegality of the Communist Regime. This law addressed specific categories of persons involved with the Communist regime, and declaratively assimilated those persons with clearly defined crimes. This new law, coming upon the background of a logical gap between the rationale offered for the screening process and the restrictions imposed through the screening do suggest an undeclared link between the Communist regime and the systematic crimes and abuses which occurred under its administration.

This kind of implication is clearly not the type of implication recommended by the Helsinki Committee for Human Rights. The Helsinki Proposal presented earlier, halfheartedly expressed the idea of the necessity of undertaking screening measures for the protection of the fragile post-Communist democracies. Nevertheless, the Helsinki Committee did not allow for any suggestion of blame which should be assigned to the screened Communist apparatus. Theoretically, the Lustration Law serves the same constitutional protective goals conceded by the Helsinki Committee. Yet, there are very few of the Committee's recommendations which have not been practically disregarded

by the Lustration Law. Extended use of StB files, no space for mitigating circumstances and no presumed innocence, the civil courts' competence restricted to a minimum (on procedural matters), a severe restriction of the right to defence, etc., are the most obvious examples.

As to the main demand of the Helsinki Committee - the rejection of any suggestion of collective responsibility of the Communist regime, and of any attempt at decommunisation - it seems all but fulfilled. Although being strongly denied as the intention of the screening law, a decommunisation process, based on the idea of a relationship between the structures of the Communist regime and the crimes committed within these structures, appears as the only consistent explanation of the form taken by the Czech(oslovak) screening process. However, this perspective is seldom invoked in the debate on political justice. Indeed such a perspective was theoretically denied, by the legislative power and the Constitutional Court.

Practically, both institutions contributed to the string of inconsistencies within the Lustration Law which convey criminal responsibility and collective blame. Moreover, both the Czech parliament and the Czech Constitutional Court¹⁵¹ reinforced the discrepancy between the declared rationale of the Lustration Law and the law's actual

¹⁵¹ After the constitutional separation of the two federal republics in January 1993, the new Slovak Constitutional Court declared the Lustration Law unconstitutional. Even before this constitutional reassessment though, the screening prescribed by the Lustration Law was carried out half-heartedly. Siklova, p. 59.

layout, five years later when the Lustration Law was due to cease its activity.¹⁵² Just before this was due to happen, the Czech parliament voted for another five years extension of the Lustration Law. Based on the declared rationale of the law - the need for protection of the democratic constitutional arrangements against sabotage or blackmail - President Havel vetoed the extension. His veto was based on the evidence that Czech society was a stable democracy, and thus no more in need of such protections as the ones offered by the Lustration Law.¹⁵³ In the end, however, with the Constitutional Court backing the legislature and not the President, President Havel had no constitutional choice but to sign the extension.¹⁵⁴

Following the analysis of all the inconsistencies which characterised the Czech approach to political justice, one question becomes inevitable. Should there be any preference between a criminal law approach and the administrative one in dealing with the Communist past? The analysis of the Czech process of screening understandably leaves one in deep confusion as to the true rationale of this process. This confusion is present here in no less a degree than it was present in the criminal law approach to political justice analysed in the previous chapter, and it is due to an overlapping of social discourses. In the previous chapter it was shown how, though solidly grounded in

¹⁵²Article 23 of the Lustration Law stated that the law was to come into effect on the day it was declared - the 4th of October 1991 - and was valid until the 31st of December 1996. Lustration Law, Article 23.

¹⁵³Steve Kettle, "Czech President Vetoes Extension of Screening Law," Daily Digest, 25 October 1995): 3.

¹⁵⁴Ibid. "Czech Republic: Constitution Watch," East European Constitutional Review 4, no. 4 (Fall 1995): 9.

criminal law regulations, the criminal law path taken to political justice still abounded in substantive reasoning. This type of reasoning was used both by the critics of the process of justice, through what it was called “constitutional activism,” and by its supporters through notions such as “political reasons” or even the “reasonable means” concept used in the border guards trials.¹⁵⁵ One would perhaps expect that taking the path of an assumed substantive evaluation of a regime, outside the criminal law discourse, and with the declared scope of protecting an unconsolidated democracy, would prevent the “contamination” of this approach with the criminal law discourse. What one could notice from the Czech case, however, is that the screening process feeds upon the normative criminal discourse in more than one way.

First of all, the Lustration Law borrows to a large extent its scarce procedural protections from the procedural criminal law. Ironically however, this procedural transplant, together with an ambiguity concerning the legal nature of the acts and the (groups of) persons concerned by this law, creates also an ambiguous message about the relation of the process of screening itself with the notion of criminal responsibility. On the one hand, the use of the criminal procedural norms in the Lustration Law offers the safeguards one should find when one’s rights and liberties are affected. On the other hand though, these safeguards, coming from a highly normative and moralising part of the legal discourse, contaminate the whole process with a certain degree of blame. This blame is not always openly argued for, or at least not in the Lustration Law itself. The implied collective responsibility identified and contested in this law by some opponents, is “veiled” by the

¹⁵⁵See *supra* Section 2.3.

supporters of the law with justificatory arguments of administrative expediency addressing a kind of constitutional conflict of interests. On that subject, in the Czech process of political justice, the final word has not yet been said. Though strongly denied by the Czech Constitutional Court, the Act on the Illegality of the Communist Regime came to suggest exactly the denied link between a certain dimension of collective responsibility of a government bureaucracy and the criminal nature of the regime it represented.

These elements show that there are two fundamental similarities between the two analysed approaches to political justice, the criminal law approach and the administrative approach. On the one hand they both come in an amalgamation of procedural criminal norms and substantive normative reasoning. In this sense, in order to find a solution which answered - positively or negatively - the expectations for justice, the Hungarian criminal law approach inevitably included elements which came from outside its strict procedural boundaries. As to the screening process undertaken outside the criminal law, it attempted to draw legal legitimacy from picking and choosing from among the solid procedural structures of the criminal law. It has to be conceded, however, that the Czech process of post-Communist justice appears as a process in which, though hesitantly, and in places inconsistently, the repressive nature of the Communist regime - expressed to a large extent through the nature of the Secret Police as emblematic institution - has been acknowledged far more than in the Hungarian approach.

The Czech process of political justice created new liabilities and acknowledged new

“constitutional” conflicts of interest. To a certain extent, even if symbolically, this process assigned legal responsibility to social actors who, although were polymorphic organisations, appeared as a unit in the social consciousness. On the other hand though, and here we touch upon the second common point of the two approaches, beyond these achievements and the “legislative success” of the Czech approach, in various degrees, both Czech and Hungarian cases manifest hesitation in confronting directly the “tantalizing question,” as McAdams put it, of collective responsibility. The ever present issue of a real legal evaluation of the Communist regime remains openly unaddressed. The next chapter will address the conceptual roots of this failure.

Chapter Four

THEORIES OF COLLECTIVE RESPONSIBILITY:

THE POLITICAL ORGANISATION AS A LEGAL ACTOR

Abstract

In the two previous chapters the main legal approaches to political justice were analysed together with their implications for the concept of collective responsibility. With reference to the difficulty encountered by the two legal approaches in displaying legal consistency, and in offering a satisfactory solution to the legitimate expectations for justice, Chapter Four proposes an explanation based on the analysis of the debate concerning the concept of collective agency and collective responsibility. With this in mind, this chapter starts by looking into what are considered as the core principles of the concept of individual responsibility, and by identifying their metaphysical assumptions. These assumptions are then taken further, into the analysis of various theories of responsibility of formal organisations, establishing the implications each of them could bring to the concept of collective political responsibility. Methodological individualism, structural restraint as well as structural pragmatism and the functional perspective, are examined, emphasising their drawbacks, as well as their merits, for the purpose of the inquiry. In particular, the chapter emphasises the value of those theories which construe the concept of collective agency as a complement and not a replacement of the individual one. The concluding remarks summarise the implications of all these elements for the process of identification of a collective political actor capable of playing a role in Eastern Europe in the distribution of legal responsibility for the violations of human rights.

4.1 Looking Beyond Individual Responsibility

The case studies in the previous chapters underlined the fact that the issue of collective responsibility is ever present in the process of post-totalitarian justice. If this is so, the question is then whether there is a concept of collective responsibility which, when spelled out, could help clarify those “tantalizing” questions and expectations which

remain largely unanswered in Eastern Europe. A legally acknowledged concept of collective responsibility could undoubtedly influence Hungary's criminal law approach to political justice. The Czechoslovak Lustration Law, the "declarative" Czech Act on the Illegality of the Communist Regime, as well as the German sentences passed on the GDR politburo members, would also acquire new dimensions. The possibility of shaping such a concept is therefore something which is worth looking into. Does collective responsibility *exist*? Is collective responsibility at all possible? We shall now hear the social scientists and philosophers replies.

4.2 Political Bureaucracies as Formal Organisations:

From Morality to Metaphysics, and Back

The discrete individual, seen as an autonomous and rational agent, is associated with a series of normative assumptions. These assumptions are incorporated into specific discourses, which then construct and present the individual as an *agent* (or actor) within those discourses. When asking whether a political organisation can be seen as a social agent, and whether it can act as a unit within the legal discourse, one might be tempted to apply the traditional moral theories and principles identifiable in the criminal law discourse. These theories and principles have been developed in order to *create* the discrete individual; as a responsible entity, the individual person is a social construction

which is the result of the interaction of various elements.¹

These elements which interact to construct the individual person might not be transferable to a collective entity. It is likely therefore that copying the constitutive elements of individual moral and criminal responsibility onto a collective structure would be of little help in evaluating the actions of collective entities such as business corporations, organised professional groups or political entities such as the ones which emerged under the Communist totalitarian regime. On the other hand, in order to be able to generate a credible alternative approach to the mere transposition of individual parameters of agency onto collective entities, the concept of collective political agency has first to be grounded in a metaphysical investigation of the issue. Before arriving at this investigation the moral aspects need also to be considered. Only after undertaking such an investigation, one can proceed to concede or to deny the possibility of an alternative approach to normative responsibility, suitable for the collective actor.

In order to proceed with this investigation, I will first start by identifying what are believed to be the core principles underlying the idea of legal, and especially criminal, individual responsibility. Based on this identification, I will argue for the possibility of a homologous set of ideas which could guide the assignment of collective responsibility in differentiated social systems, such as the political discourse. This set of ideas could eventually be instrumental in the acknowledgement of collective responsibility of a

¹Alan Norrie, "A Critique of Criminal Causation," *Modern Law Review* 54 (September, 1991): 685-701.

repressive regime, and thus contribute in evaluating the different approaches to political justice and collective responsibility taken in Eastern Europe. In the last part of this section I will argue for the possibility of differentiated principles of political accountability. This analysis will take us beyond the moral normative discourse and into the metaphysics of agenthood.

Looking for the core principles underlying the idea of responsibility attached to an agency, it should be said that there is a general tendency to attach the concept of agency exclusively to anthropocentric normative assumptions, and to indiscriminately test any social agent against the individual parameters of moral agenthood and responsibility. As we shall see in this chapter, these parameters can be undoubtedly misleading. How could morality prevent acknowledging a concept of collective responsibility when in Chapter Two and Chapter Three we have seen that, in fact, failing to acknowledge collective responsibility is considered by many Eastern Europeans as unjust and immoral?

The root of this problem of competing moralities is rather deep. The anthropocentric assumptions of social agenthood originate from within the moral discourse, but they have also been inherited and are now entrenched in the other fundamental normative discourse, the law. This migration has more than once led to confusion, especially with respect to the way both the legal agents are conceived and their accountability is enforced. It can be said, for instance, that even in the criminal law discourse there subsists a certain

misunderstanding about the way in which law and morality relate to each other.² Saying that criminal law is based on individual moral principles does not imply that one should confuse law and morality, or misunderstand the relationship between the two, since the connection between the moral discourse and the legal discourse has become largely a contingent one.³

Without necessarily denying this contingency, it has been claimed that there exists a set of doctrines of moral inspiration cutting across all crimes.⁴ The relationship between criminal law and these general ideas is, according to some authors, a logical one: the general principles could be revealed starting from a detailed analysis of the substantive criminal law.⁵ In order to emphasise the freedom of these general principles from controversial value-judgements, Moore called the former “topic-neutral moral principles.”⁶ The source of these principles - by which one should understand the set of non-legal ideas that in some sense can be said to underlie criminal law - can also be

²As a typical example of overlapping between these two domains, see P. Devlin, “The Enforcement of Morals,” in *Morality and the Law*, eds. Robert M. Baird and Stuart E. Rosenbaum (Buffalo, New York: Prometheus Books, 1988), pp. 15-35.

³H. L. A. Hart, “The Legal Enforcement of Morality,” in *Morality and the Law*, eds. Robert M. Baird and Stuart E. Rosenbaum (Buffalo, New York: Prometheus Books, 1988), p.38. Michael S. Moore, “The Moral and Metaphysical Sources of the Criminal Law,” in *Criminal Justice*, Nomos 27, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985), p. 14.

⁴Moore, p. 11.

⁵On the coherence of the moral theory governing the attribution of liability in criminal law, see George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), p 393. Mark Kelman, “Interpretive Construction in the Substantive Criminal Law,” *Stanford Law Review* 33 (1981): pp. 591-673. Also, Moore, p. 12.

⁶Moore, p. 12.

identified through a logical inquiry into the moral ideas subsistent in the criminal law.⁷

Undoubtedly, there are moral principles which, in one form or another, appear to be present in all positive criminal systems. The aspect which is of interest here is the way in which moral principles emerge at the foundations of the criminal law. In Moore's view, the topic-neutral moral principles would not consist of saying what is good and what is bad, but of establishing the conditions in which what is good or bad can be decided upon.⁸ This idea, of rationally identifiable procedural principles to be followed whenever one is in doubt about what is acceptable or not, is promising for a process of justice which tries to establish the accountability of a totalitarian regime.

One such procedural, or topic-neutral, principle identified by Moore in the criminal law discourse is the principle of accountability. According to this principle, the moral agency would be identified with the personhood and thus, would exclude entities such as the formal organisation. Following this anthropocentric perspective one would be unable not only to make political structures accountable but also corporations, professional organisations, etc.. As we shall see later though, in many situations the law failed to embrace such a perspective, and sanctioned social expectations for justice which went beyond individual accountability. A second underlying moral principle would be, according to Moore, the fairness of the imposed obligation. As we could see from Chapter Two and Chapter Three, this principle appeared to have a great influence over

⁷Ibid.

⁸Moore, p. 21.

the way a process of political justice is shaped. The third moral principle is what Moore calls the “answerability” principle. It includes three simultaneous requirements: the *mens rea* element, the *actus reus* element and the coincidence of the two in the same person. This again, is a principle with important consequences, especially if one is to address the concept of collective responsibility from an anthropocentric position. Last but not least, a fourth principle, a principle which could be called “the principle of mitigation,” would consist of justifications and excuses referring to the circumstances of both *actus reus* and *mens rea* involved in the production of harmful outcomes.

According to Moore, these topic-neutral moral principles underlie the notion of responsibility within the criminal law.⁹ This position is usually used to give theoretical depth to an individualistic perspective of the notion of responsibility. This perspective has usually been the basis for the legal criticism of the processes of political justice undertaken in societies coming out of repressive regimes when these processes have implied a dimension of collective accountability. It is argued that, using the standard set by these topic-neutral moral principles (individual accountability, fairness of the imposed obligation, answerability, and the principle of mitigation) the concept of responsibility is inapplicable to collective political bodies. This would be so mainly because of what one could consider as the “centre piece” of these principles, the principle of “answerability,” with the notions of *mens rea* and *actus reus*, and their coincidence in the same person.

⁹Moore, p. 12.

If these topic-neutral moral principles seem difficult to accommodate to other social agencies than the individual one, it does not mean that a homologous set of ideas could not be identified for ensuring the accountability of collective social agencies. Indeed, a concept of collective responsibility of a political body would be difficult, if not impossible, to accommodate with the topic-neutral morality as identified by Moore. This does not mean though, that such a concept would be impossible to accommodate within any topic-neutral normative environment. One could imagine even the criminal law based on a different topic-neutral morality. In some traditional societies for instance, the customary rules which fulfilled the role that today is covered by the criminal law, pointed to the community as the primarily accountable agent, and only subsequently to the individual.¹⁰ Accordingly, the topic-neutral morality of these systems were based on other principles than the ones emphasised by Moore. However, it is not a return to this type of society that we are looking for.

At the same time, it is not totally against Moore's line of thinking to consider that the identification of other sets of topic-neutral moral principles can follow similar deductive paths in other differentiated discourses, not least in the political one.¹¹ Topic-neutral or procedural moral principles specific to the political discourse, and at the same time

¹⁰ Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New Haven: HRAF Press, 1974), p. 117. Also, "Papua New Guinea: A Death to Pay For," BBC2 documentary, The Learning Zone Series (7 December 1998).

¹¹ The term "morality" is unavoidable in this context, in spite of the anthropomorphic imagery which it brings. This because the discrete individual is always taken as point of reference, if only contrastive, for the construction of any type of concept of responsibility. The anthropomorphic background suits Moore's approach since he places his analysis within the criminal law discourse.

legally enforceable, could be spelled out through the analysis of the substantive rules of public law as well as the customary rules of politics in action. In order to achieve this, one would have to go beyond the artificial boundaries between the written and the unwritten rules of political action, and look at what should stand as a “positive” rule within the political discourse. In those exceptional circumstances in which the citizens assume the right to revolution as their last resort, this assessment of the boundaries of political action might reveal a necessary bias towards enforcing certain general standards regardless of their informal status. In such situations, the acknowledgement of a topic-neutral political morality - centred around the recognition of basic human rights of every individual - goes beyond the political debate, and becomes (retroactively) enforceable.¹²

Therefore, in extreme cases such as a revolution, one tests the political institutions and their responsibility not only against formal constitutional rules, but also against the substantive principles derived from the role that a particular institution is called to fulfill in society. By combining formal rules and substantive principles it is possible to see whether a specific form of agency and type of responsibility, are compatible with the social role of the political actor.¹³ This is so because, in the case of an unresponsive

¹²For the definition of “gross abuses of human rights” see *supra* Chapter One, note 73.

¹³For the benefits derived from the use of different perspectives in analysing a concept which operates in a specific environment, see the sociological study of the dynamics of labour statutory law and informal disciplinary measures, at the working place by Stuart Henry. Stuart Henry, Private Justice: Towards Integrated Theorising in the Sociology of Law (London: Routledge & Kegan Paul), 1983. The value of combining various perspectives can also be seen in French’s approach to collective action. The concept of legitimacy, one of the pillars of the topic-neutral moral domain of corporate activity as well as politics, prompts French to look beyond the law. He sees law as a constraining factor, but not as a defining one. In shaping collective agencies such as corporations, he looks not only to the legal skeleton but also to the nature of the formal organisation, to its “raison d’être.” His concept of legitimacy rests on the law as well as on extra-legal elements such as general expectations, patterns of action, standards for activity,

regime, the formal rules promoted by the repressive regime itself, might offer no protection against government abuse. The repressive nature of a regime will also be oriented towards preventing those legal reforms which might bring formal constitutional checks upon the governmental power. Hence, relying exclusively upon a topic-neutral morality which promotes solely individual responsibility will not offer the chance of a more comprehensive approach to a totalitarian regime.

This being said, it is important to know that, logically there is the potential to identify some procedural principles specific to the collective political action, principles against which the political action could be legally assessed. The “bias” assumed in this process of assessment represents a conceptual choice of values to be pursued, rather than an ideological choice of the substance of those values. Accordingly, a bias towards certain values and principles of social action does not need to implicate the “normative” concepts of politics that are open-ended and controversial, but only the “descriptive” concepts of the social action, about which “intersubjective agreement can be attained.”¹⁴

These concepts, the concrete substance of which does not constitute the direct object of this chapter, will be at the foundation of the topic-neutral responsibility of a repressive regime. Earlier in this section, however, the idea of individual responsibility was

reasonableness. See Peter A. French, Collective and Corporate Responsibility (New York: Columbia University Press, 1984), p. 57.

¹⁴William E Connolly, The Terms of Political Discourse (Oxford: Martin Robertson, 1974), p. 11 ff. These descriptive concepts are operational, according to Connolly, enabling investigators with divergent ideologies to accept common definitions in determining states of affairs. This makes such concepts pertinent to scientific investigation from outside the area of politics and ideology.

mentioned as a socially *constructed* concept¹⁵ resulting from the interaction of a variety of social factors, and therefore based upon topic-neutral moral principles which are a result of that interaction. Picking up on this idea, it can be imagined that the topic-neutral morality which would underlie a concept of collective responsibility would homologate - in a similarly *constructed* (and constructive) way - the principles of individual responsibility. As we shall see next, the possibility of attaining these “descriptive” concepts and differentiated topic-neutral procedural principles, is confirmed by an analysis which goes beyond the limits of the moral discourse, into the metaphysical ground of the concept of responsibility.

What would metaphysics have to do with the concept of collective responsibility? This question can be answered by looking at the underlying ideas of the moral principles on which the concept of (individual) responsibility is based. Moore’s four procedural moral principles¹⁶ presuppose another assumption which is not merely a moral one. *Persona est naturae rationalis individua substantia*;¹⁷ this is how the Roman philosopher Boethius, under the influence of the Roman legal tradition, expressed this assumption.¹⁸ Embraced

¹⁵Norrie, p. 691.

¹⁶Moore, p. 14.

¹⁷“A person is the individual substance of a rational nature.” Anicius Boethius, *Boecius de consolacione philosophie*, trans. G. Chaucer (Amsterdam: Theatrum Orbis Terrarum, 1974), p. 217. It should be remembered though that in the Roman legal tradition being a legal person was as much a “fiction” or social construction as the collective actor would be today. Between the quality of legal person and the one of autonomous and rational individual person there was no automatic link. Only the privileged had the right to this quality which allowed one to stand in court in ones own name. For the etymological origin of the word “person,” see infra note 39.

¹⁸For details on tracing the metaphysical traits back to the individual person see Lucien Lévy-Bruhl, *L'idée de responsabilité* (Paris: Librairie Hachette, 1884).

also by Moore, this postulate suggests that as long as all the four underlying moral principles are based on concepts such as action, intention, causation, accountability, negligence, compulsion, and alike, persons are conceived as rational and autonomous agents.¹⁹

Moore has deduced the autonomy and rationality of the individual person starting from the topic-neutral moral principles that he had identified as being at the foundation of individual responsibility. Hence, he made a cognitive journey from topic-neutral morality to metaphysics. The ultimate importance of Moore's approach to individual responsibility for our search for collective agenthood lies though in what one could observe while following the path Moore has taken, but in the opposite sense, from metaphysics to morality. In this way, it can be observed that by doing this one cannot be sure to reach Moore's starting point. More precisely, Moore's starting point - a unique set of topic-neutral moral principles - does not appear as the only destination one can reach when starting from the metaphysical concept of autonomy and rationality.

In this sense, one can agree with Moore's excursion from moral to metaphysical sources of criminal responsibility. Nevertheless, within the same legal discourse, if the path to individual criminal responsibility goes necessarily through the metaphysics of autonomy and rationality, the reciprocal journey is not automatically true. It is not necessarily obvious that from the joined metaphysics of autonomy and rationality the only shore of responsibility one could reach is the one of the discrete individual. Moore's conclusion

¹⁹Moore, p.15.

that criminal discourse, with its topic-neutral moral principles, presupposes the metaphysical ideas of autonomy and rationality, does not exclude autonomy and rationality at other “ontological levels.” The same metaphysics of autonomy and rationality might be the foundation for completely different topic-neutral “moralities,” with differently shaped concepts of agent and action, intention and compulsion, causation and accountability.²⁰

This possibility of differentiation in the concepts related to the issue of responsibility is suggested by some of the sentences in the border guards trials in Germany, but denied in the Hungarian trials, and contested by the critics of the Czech Act on the Illegality of the Communist Regime. It can be proven, however, that specific systems, based on different structures and operations, might include very different topic-neutral principles than the ones attached to the individual person. These principles could well be anchored in the same metaphysical ideas of autonomy and rationality of the agents as the criminal law ones. This allows one to acknowledge that the responsibility concept might take a multitude of forms within, as well as outside, the legal discourse.²¹ These forms might present not only alterations, or even the absence, of one or more of the four moral principles mentioned by Moore,²² but also the presence of new features, not identified at

²⁰Moore appears to be aware in his theory of the contingency of the connection between law and morals, acknowledging the possibility for differentiated topic-neutral discourses. Ibid.

²¹For an analysis of the characteristics of both normative and non-normative concepts of responsibility see Karl Jaspers, “Differentiation of German Guilt,” in *Guilt and Shame*, ed. Herbert Morris (Belmont: Wadsworth Publishing Company, Inc., 1971), pp. 40-53. See also, Ingrid Peterson, *Four Theories of Responsibility*, in *Studies in Philosophy* 3 (Lund: Lund University Press, 1990).

²²Moore, p. 14.

the individual level. Criminal and moral responsibility are traditionally placed at this individual level. Nevertheless, one could claim other emerging levels of these two discourses, on which the responsibility of formal organisation could be engendered.

This perspective, suggesting a differentiation of the concept of responsibility is confirmed even inside the criminal law discourse. Fletcher, for instance, speaks about “particular patterns of liability”²³ within the criminal system, and Kelman goes even further, denying the existence of any coherent moral and even metaphysical foundations of criminal law.²⁴ The fact is that there is a possibility that the rationale and “moralities” underlying the process through which responsibility is attributed to other different types of agents than the individual person, could be based on the same metaphysical assumption of autonomy and rationality of the agent. This is why, going from the metaphysics of autonomy and rationality, one does not necessarily need to reach Moore’s topic-neutral morality of individual responsibility.

Therefore, in trying to forge a new dimension of the concept of responsibility one would have to start from the idea of a choice of the path leading from the metaphysics of autonomy and rationality to that of accountability and blame. This systemic potential for choice and differentiated topic-neutral “moralities” is exactly what constitutes the inner source of social expectations for justice which emerged in the societies in transition from

²³Fletcher, p. 393.

²⁴Mark Kelman, “Interpretive Construction in the Substantive Criminal Law,” Stanford Law Review 33 (1981): 591-673.

totalitarianism. In the coming pages we shall look into the possibility of a valid path to be followed from the collective political bodies of the Communist regimes to the core of the concept of agenthood - autonomy and rationality - and therefore responsibility, for the systematic human rights violations in the Communist Eastern Europe.²⁵

4.3 Theories on Collective Agency: Implications for the Concept of Collective Political Responsibility

Building upon this deconstruction of the foundation of social agenthood, this sections will look into the way different theories of collective responsibility have acknowledged the collective social agent, and the impact each of the analysed theories could make upon the recognition of collective responsibility in a process of political justice.

The sociological expressions of the metaphysical dimensions of autonomy and rationality are the concepts of agency, intentionality and action. In the search for an ideal formula of distribution of responsibility for the human rights violations, the processes of political justice in Eastern Europe have been confronted directly with the questions brought by these concepts. The search for a collective political responsibility, which would have the potential to be sanctioned by law, would have to answer the basic, but essential questions related to these three concepts.

²⁵Such a search is far from being outdated, or merely backward-looking. See for instance the present debate taking place in the British society which tries to establish whether British police force should be qualified as "institutionally racist." *Guardian*, 17 October 1998, p. 1.

Could a political organisation be considered as a collective agent? What would amount to acts performed by this collective agent, and what should be considered as its intention? These questions are common to all candidates for the status of a formal organisation, and have been addressed most often with respect to corporate organisations. Other types of collective entities, such as professional bodies or universities, have also been subject to a similar investigation.²⁶ The answer has never been straight forward, however, and in the remaining part of this chapter the main milestones of the debate on collective responsibility will be outlined. The aim of this analysis will be to identify the sociological perspectives from which a process of political justice may include or not, a collective dimension of accountability.

4.3.1 Methodological Individualism or the Theory of the Scapegoat

What makes it possible to condemn officers and political figures for crimes against humanity and war crimes and, at the same time, to deny implicitly that those systematic acts of violence belonged to government policies? Politically, this kind of decision can

²⁶An interesting point of legal creativity in this respect is represented by a decision taken in February 1992 by the Italian Corte di Cassazione. Through this decision lawyers have acknowledged Mafia as a collective criminal. Hence, individuals have been convicted not for direct involvement in specific crimes, but for merely belonging to the informal, and thus invisible for the purpose of criminal law, hierarchy of Cosa Nostra. *La Repubblica* (Italy), 17 February 1992. Also, Gunther Teubner, "The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, eds. Gunther Teubner, Lindsay Farmer and Declan Murphy (John Wiley & Sons Ltd., 1994), p. 17 ff. Nathalie Boucquey, "Hot Spots in the Bubble: Ecological Liability in Markets for Pollution Rights," in *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, eds. Gunther Teubner, Lindsay Farmer and Declan Murphy (John Wiley & Sons Ltd., 1994), pp. 49-51.

be justified in various ways. Sociologically and legally though, such a narrow perspective appears very much as a consequence of reversed anthropocentrism; it is the legal outcome of applying what in the social theory was coined as methodological individualism.²⁷

The theory of methodological individualism denies formal organisations the quality of moral agency. According to this theory, finding a collective organisation of any kind responsible for acts or omissions committed by its members, would mean embarking on an impossible ontological mission. This would be so because of the impossibility of accounting for the qualitative metaphysical differences between humans and organisations. The theory of methodological individualism is constructed upon, and limited to, the framework used by Moore. It promotes the idea of the impossibility to find a topic-neutral normative ground for a plural entity of any kind. This impossibility arises merely because organisations do not - according to methodological individualism - possess a similar type of autonomy as that of the individual person, and because organisations are not “rational” in the same way humans are. By not presenting identical forms of autonomy and rationality as a human, a collective body could not be seen as a unitary agent, with an existence of its own, distinct from the one of its individual members.

This lack of “unity” entails that only individual liabilities of particular members are acknowledged by law, liabilities that are based on the members’ direct and intended

²⁷Michael Keeley, “Organisations as Non-Persons,” *Journal of Value Inquiry* 15, no. 2 (1981): 149-55. Manuel G. Velasquez, *Business Ethics: Concepts and Cases* (Englewood Cliffs, NJ: Prentice Hall, 1982), p. 17 ff.

actions. The individual liabilities, according to this theory, could be aggregated, but this would not change the individual nature of the ascribed responsibility.²⁸ An example of this perspective over the concept of social agency, and therefore responsibility, is the outcome of the first sentence in the border guard trials in Germany, where the Politburo members directly in charge of the border policy were held responsible for the killings.²⁹

Supporters of methodological individualism find that ascribing responsibility to the group as a whole and not to particular individuals based on a fiction creates a confusing and dangerous way of proceeding.³⁰ For instance, in the case of the border guard trials, this atomising view over the organisational responsibility makes it inappropriate to ascribe the responsibility for the border shootings otherwise than by way of individual direct liability, and eventually strict liability. The implication of such a perspective is that it would be inappropriate to hold the government responsible for disastrous or even criminal policies, or for creating and maintaining huge machines of repression.

The reasoning underlying the theory of methodological individualism is rather simple. Devoting the concept of responsibility strictly to the notion of causality, this position defines moral responsibility as being attached only to those actors in which the action

²⁸Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992), p. 58.

²⁹See *supra* Section 2.3.

³⁰Velasquez developed this “fiction theory” with respect to corporations. He also claims its applicability to other types of formal organisations as well. See Manuel G. Velasquez, “Why Corporations Are Not Morally Responsible for Anything They Do?” in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, eds. Larry May and Stacey Hoffmann (Savage, Md.: Rowman & Littlefield Publishers, Inc., 1991), pp. 111-131.

originates.³¹ According to this theory, a homology of nature between the discrete individual and the collective organisation is not enough. In order for a collective entity to be considered a moral agent,³² an *identity of nature* between the discrete individuals and the collective organisation would be required. This coincidence of the two entities is, of course, difficult to argue for. Thus, in the context of methodological individualism, the notion of *origination*³³ conveys the idea of an actor in which the “mental” element would achieve unity with the “bodily” element. Formal organisations would, in any situation, lack the necessary *mens rea* and *actus reus*, elements which are considered the core of the philosophical and legal notion of responsibility. For instance, the rationality exercised by the board of directors of a corporation could not be identified, it is argued, with the rational functions performed by the human brain. As to the *actus reus* of the organisation, both from the perspective of the organisation as a fictitious legal entity and from the one of the organisation as a sociological entity (as a real organisation, comprised of several members), the performance would belong to the individuals and not to the collective entity. The latter would not act, except vicariously, through its members.³⁴

It is from this position of methodological individualism that the Hungarian legislator

³¹ “[An] act is intentional only if it is the carrying out of an intention formed in the mind of the agent whose bodily movements bring about the act.” Velasquez, “Corporations,” p. 120.

³² Again, the term “moral” - far too generalised to replace it - comes often to confuse the issue of responsibility, setting confusing anthropomorphic standards. In fact, often by moral agent it should be understood any social entity with capacity of autonomy and rationality.

³³ Velasquez, “Corporations,” p. 123.

³⁴ Velasquez “Corporations,” p. 118.

chose to respond - through the law modifying the statute of limitations - only to those social expectations for justice to which the condition of *origination* could be met. The law refers to the direct perpetrators of war crimes and crimes against humanity, but does not mention anything about bringing to justice the political structure which generated those crimes. On the other hand, the Hungarian Constitutional Court, while putting its seal of approval on the law, removed even the slightest chance for an interpretation of the law that would make the Communist governmental bureaucracy accountable. In this sense, the Court rejected the amendment of the statute of limitations for crimes of high treason. This rejection made it impossible for the legal debate on the responsibility of the Hungarian Communist Government to be opened.

The position of both the Hungarian legislative body and the Constitutional Court ignored the way in which the “capillary” points of power - as Foucault called the constitutive elements of an entity - are invested and annexed by more global phenomena.³⁵ Foucault pointed to the subtle fashion in which more general powers or economic interests are able to engage with technologies that are at once relatively autonomous of power and act as its infinitesimal elements.³⁶ One could rightly ask then whether the responsibility for large scale or complex actions such as the repression of a mass movement, the organisation of forced labour and extermination camps, or even bringing whole societies to the point of economic, political, social and moral bankruptcy, could be ascribed to discrete

³⁵Michel Foucault, “Disciplinary Power and Subjection,” in *Power*, ed. Steven Lukes (Oxford: Blackwell Publishers, 1992), p. 235.

³⁶Foucault, p. 240.

individuals, or, whether “fictitious” legal entities could perform, beyond their fictitiousness, the role of actor.

According to this perception of the collective organisation as a fictitious legal entity, the collective entity is related to its members “as a legal ‘principle’ is related to those ‘agents’ who are empowered to act on its behalf and whose acts are conventionally attributed to the legal ‘principle.’”³⁷ From here, the methodological individualism conveys the conclusion that it could not be the “principle” which is acting, but the “agents.”³⁸ Thus, from the individualist point of view, making the Government or any other political bureaucracy responsible would actually be a convention, a socio-legal construction meant for the pursuit of some goals and based on some broad rules or principles. It is to these ideas also that we can trace back the reluctance of the Czech(oslovak) legislator and Constitutional Court, of openly promoting what otherwise are conspicuous implications of both the Czechoslovak screening law and, especially, the Czech Act on the Illegality of the Communist Regime: the collective responsibility of the Communist hierarchy for the crimes committed under the Communist regime. As mentioned earlier, the Hungarian case appears also dominated by the same unilateral perspective.

Methodological individualism might be right though: the formal organisations can be seen as socio-legal constructions tailored to match to a certain degree, the sociological reality of corporations, political parties, or other types of collectivities. But, the individual

³⁷Velasquez, “Corporations”, p. 121.

³⁸Velasquez, “Corporations,” p. 129.

person³⁹ can be seen in the same way: just another type of legal construction, another type of fiction.⁴⁰ Similarly it appears to be, to some extent, the case of the individual person's autonomy, as seen by law. In this sense, Larry May speaks about “pseudo-unities” proposed as facts, and which constitute a postmodern challenge for political philosophy.⁴¹ In reality, he argues, these pseudo-unities “set up oppositions that *arbitrarily separate* those who are included and those who are excluded from a shared conceptualisation or practice” (emphasis mine).⁴²

If the formal organisation, as well as the discrete individual, are both fictitious (legal) entities, one has to consider that the social entity which appears as a result of this type of construction represents a complex of structural and operational features which, by the real nature of the system they define, would themselves be “fictitious” constructions. What this actually means is that the information produced by the system, its needs, its risks as

³⁹It would be interesting to notice here the etymology of the word “person,” and the significance of this etymology in law. In antiquity, the characters in a play used to wear a mask specially designed *per sonare* (lat.), for propagating the voice of the actor in the whole amphitheatre. The Latin *persona* originally referred to *dramatis personae*. Concise Oxford Dictionary, s.v. “person” (Oxford: Oxford University Press, 1964), p. 906. A proposed etymology of the word person claims that the Roman law adopted the term to name the actors not in a play but in a legal dispute, that is to express who had, and who had not, voice in front of the law. In this sense see also contemporary legal expressions such as *legal personality* or *personne juridique*, often referring to collective entities. It is also significant that in the Roman law to be a human being was not enough in order to be considered a person and to have voice in front of the law. This suggests once more the artificiality of legal personality as legal construction even when applied to human beings.

⁴⁰Norrie, pp. 685-701. Again, in the Roman legal tradition persons are creations or artifacts of the law itself, and there is no pretence that they would have an existence of any kind outside the legal sphere. In this sense, the concept of person is, to a large extent, ignorant of the biological status of the entities it is attached to.

⁴¹May, *Sharing Responsibility*, p. 171 ff.

⁴²May, *Sharing Responsibility*, p. 173.

well as its responsibilities, are all social constructions, dependent upon the system in which they emerge. From this perspective there would be no reason to expect the concept of responsibility to take the same form when applied to the collective agent, and the collective agent to obey the same rules as (just) another fictitious legal construction such as the individual person.⁴³ One might agree that, in order to be responsible, an entity should prove a certain degree of autonomy and rationality, but there is no logical necessity for accepting a mechanism for the attribution of responsibility which is designed specially for the individual person.

Attributing acts and thus responsibilities to collective actors is an attempt to make the concept of responsibility match the specificity of an autonomous system⁴⁴. The view of the methodological individualism on the concept of agency and responsibility rightly draws our attention towards the role played by the individual members of collective bodies. To a certain extent it is true that collective entities act vicariously. They do attain their objectives only through acts performed by individual members. The decisions on which the violent repression of the 1956 democratic movement in Hungary were based

⁴³Laurence Rosen, "Intentionality and the Concept of the Person," in *Criminal Justice*, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985), p. 252 ff. Peter A. French, "The Corporation as a Moral Person," in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, eds. Larry May and Stacey Hoffmann (Savage, Md.: Rowman & Littlefield Publishers, Inc., 1991), pp. 134-137.

⁴⁴De George's position with respect to the deliberate, and thus "conventional," origins of the corporate responsibility is relevant in this sense. "There is no one correct way of legally assigning responsibility with respect to corporate activity...The question of how many of the freedoms of natural persons corporations should enjoy is a question that many recent court decisions have been concerned with. But the answer is in part one that *must be decided* - decided for good reasons, to be sure - but decided... It is not a matter of seeing, in some arcane sense of seeing, which freedoms the corporation really has." (Emphasis mine). Richard T. De George, *Moral Responsibility and the Corporation*, Paper presented at the 1978 meeting of the Society for Value Inquiry, in conjunction with the American Philosophical Association (27 December 1978), pp. 19-20.

were not taken by the Communist party as a whole, nor by the whole government, and the actions of repression against peaceful demonstrations were not carried out by either of these two groups. The orders were given and the decisions were signed by identifiable individuals, *members* of the Hungarian government and leaders of the Communist party. Hence, it appears that governments act vicariously, through their ministers, officials, civil servants. Without invalidating this dependence of the organisation upon its members, an important question remains still to be answered. If organisations act vicariously through their members, it is not less true that the members of a political, or corporate bureaucracy act themselves “vicariously,” through the structures to which they belong. Without being invested with special powers by the structure in which they function, these individual persons would not have the same capacity to harm and to commit “official crimes.”⁴⁵ To whom then, is the responsibility to go for acts committed in such “vicarious circumstances”?

It might also be true that the members of a formal organisation do not resemble perfectly, and do not act exactly as the limbs of the human body. Nevertheless, relying only on the individual autonomy, in an environment designed to subdue this autonomy and suppress any values other than the systemic ones, does not seem an appropriate response to the sociological reality of organisations.⁴⁶ The legal fiction of collective agency would come

⁴⁵The official crime is the one imputed to individuals or organisations acting within the scope of office or other (legitimate) authority. Dennis F. Thompson, “Criminal Responsibility in Government,” in *Criminal Justice*, Nomos 27, ed. J. Roland Pennock and John W. Chapman (New York and London: New York University Press), p. 201.

⁴⁶Such a pure theory of the individual autonomy does not exist even in the criminal law where mitigating circumstances are often invoked relative to the social background of the individual actor, as well

to answer this sociological reality of the collective organisation, and by doing so it transcends mere “fiction.”

Some formal organisations can represent a huge power potential, which is matched correspondingly by a huge potential for doing harm. Donaldson in fact argues that the main source of the organisational power lies in its *power to organise*.⁴⁷ It is thus important to acknowledge this sociological reality and to look beyond the metaphysics of the discrete individual members, searching for appropriate deontological, procedural principles of collective action. By not doing so, methodological individualism overestimates the individual autonomy and underestimates the organisational complexity. The individual can be easily swallowed, assimilated and, finally transformed by the Gogolian “Moloch.”⁴⁸ The responsibility of a government bureaucracy would have a

as other factors which might have impaired his or her socially constructed autonomy. Related to this, see Norrie, *op. cit.*, p.687 ff on the decline of the objective theory of causation. One should also be aware of the reality of causation, especially of causation in law. We set about locating the causes of harm in order to make operational the notion of control, in order to control states of affairs. Therefore, the causal analysis is usually corrupted by the process of control. “We describe as the causes of an event that practical condition by which we hope to control...” R. B. Perry, General Theory of Value: Its Meaning and Basic Principles Construed in Terms of Interest (Cambridge, Mass., 1954), p. 418. Also, in the moral domain, an ambivalence of the term “responsibility” was pointed out. The term can sometimes be used to highlight a causal connection between an agent and an action (the factual perspective), while in other cases the expression “responsible for” refers simply to the agent’s liability under the rules to be blamed. See H.L.A. Hart and A. M. Honoré, Causation in the Law (Oxford: Clarendon Press, 1959), p. 61. On the same line, Casey argues that both our judgements of causal responsibility and our descriptions of the individual’s actions are shaped by the expectations society attaches to the agent. John Casey, “Actions and Consequences,” in Morality and Moral Reasoning, ed. Casey, John (London: Macmillan, 1971), p. 180.

⁴⁷Thomas Donaldson, Corporations and Morality (Englewood Cliffs, N.J.: Prentice-Hall, 1982), p. 27 ff. Related to this, see also Virginia Held’s attribution of responsibility to random collectivities for “failing to organise.” These theoretical arguments seem to support the position taken by the German courts in the last sentences passed against the GDR Politburo members. See *infra* Section 2.3.

⁴⁸“Organisations are designed and persons within them trained in ways that are intended to lead to organisational decisions that realise [these] goals as efficiently and as far as possible.” Susan Wolf, “The Legal and Moral Responsibility of Organizations,” in Criminal Justice, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985), p. 281. Thompson also, acknowledges the

derivative character only if the actions of the organisation were strictly a function of the actions of the individual members. This inference though, is not as obvious as methodological individualism would like us to believe. Accepting all the thesis of this theory would mean to restrict ourselves to the topic-neutral sources of responsibility as conceived by Moore. As I have argued in the previous section though, there is a place, and a need for differentiated topic-neutral moralities and thus, responsibilities.

The perspective offered by methodological individualism over the concept of collective responsibility presents definite shortcomings for redressing the imbalance of power between the individual person (citizen, employee, customer, etc.) and the organisation. However, in the specific case of collective political responsibility, methodological individualism helps us to a certain extent not to lose sight of the wood for the trees; in other words, a political responsibility which would act like an umbrella, encompassing without differentiating all the members of a complex political organisation, if used alone for answering the social expectations for accountability and justice, would be as incomplete and unjust as the “classical” tendency of limiting the whole process of ascribing responsibility to the criminal trials of some border guards.

The acknowledgement of one type of responsibility, (in this case the collective responsibility of a political body), should not prevent us from considering the use of other

constraints imposed on officials by bureaucratic practices and procedures, constraints which arrive to circumscribe an official's range of choices. These constraints originate both in the hierarchical patterns of authority according to which bureaucracies are structured, as well as in the process of specialisation and routinisation. Thompson, pp. 204-6.

mechanisms of ascribing responsibility, such as criminal or tort law. It should also be stressed that, the collective responsibility should by no means exclude the use, where applicable, of the individual responsibility. In fact, as some evidence shows in the case of the Hungarian law amending the statute of limitation, the process of bringing justice through one mechanism only has practically failed because of the lack of a proper political environment. This environment, it is argued, could have been enhanced in a way which favours the implementation of individual responsibility if a notion of collective responsibility would also have been developed.⁴⁹

Besides being affected by the procedural deficiencies of the law amending the statute of limitations (Law No. 53/1993) described in Chapter Two, the few criminal trials organised on the basis of this law have failed to reach a proper end also because of competing and conflicting political interests. These political interests would need to be curtailed prior to the potential criminal prosecutions. As it was argued in the preceding Zétényi-Takacs law which also aimed at amending the statute of limitations, the prosecution was to be started, and trials were to be organised for crimes which had not been prosecuted *for political reasons*.⁵⁰ As it often happens in post-totalitarian or post-dictatorial societies, the persons in the position to organise such trials are also the ones who, in the previous regime, promoted and even offered the *political reasons* which prevented the prosecution. In conclusion, in order to be consistent, and to respond to the

⁴⁹ Anne Applebaum, "Une mémoire en cache une autre" *Commentaire*, 78 (Summer, 1997). Also *Revista 22* (Bucharest), 14-28 iulie 1998, p. 9 ff.

⁵⁰ See *supra* Section 2.2.1.

complexity of situations in the post-Communist societies, the process of political justice has to follow different paths of assigning responsibility.

4.3.2 Structural Restraint View or the Theory of the Virtuous Circle

Methodological individualism is not the only theoretical position which denies the possibility of making accountable a formal organisation of any kind, and therefore a political organisation as well. The anthropocentric limitations of methodological individualism are surpassed by a more sophisticated theory coined “structural restraint.” The structural restraint theory answered some of the criticism formulated about methodological individualism, trying to accommodate better the formal organisation as a sociological reality. This is done mainly by acknowledging the fact that a collective agent does not have to be defined solely through the inevitably disqualifying comparison with the parameters of the individual legal person.⁵¹

The structural restraint theory denies the capacity of formal organisations to be “morally” responsible. This denial though is based not so much on an analysis of the traditional concepts of action and intention, but on an “ontological” perspective of the organisational structure.⁵² This perspective, developed mainly in relation to the role of corporations,

⁵¹Thomas Donaldson and Patricia Werhane, Ethical Issues in Business: A Philosophical Approach (Englewood Cliffs, N.J.: Prentice-Hall, 1979), p. 33-34.

⁵²Donaldson, Corporations and Morality, p. 2. John Ladd, “Morality and the Ideal of Rationality in Formal Organizations,” The Monist, 54 (1970), p. 498.

claims that corporations are “controlled” by their very structure. Because of this dominion, organisations would be incapable of exercising moral freedom.⁵³ Government bureaucracies, as well as corporations, would belong - according to this view - to the class of “formal organisations.”

By their very nature, formal organisations would be incapable of accommodating moral concerns. The theory allows for the perception of formal organisations as rational agencies, but with only a limited autonomy, an autonomy dependent upon their “specified” or “empirical” set of goals. The difference between the two rationalities - the organisational, and the individual one - would be that organisations act rationally, but only as a player in a game: the rules are set previously, and cannot be changed; at least not without essentially altering the game. Accordingly, formal organisations would not possess those qualities which would enable them to change their own goals; they are conceived as goal-pursuing machines which are not designed to morally evaluate their environment. In other words, they are restrained by their structure. And, it is argued that the structure of a formal organisation cannot be made responsible for reproducing itself. Or can it ?

In the specific case of political justice, when one is dealing with organisations belonging to a totalitarian structure, the structural restraint theory comes short of offering a viable perspective. The Communist “reproduction” was ensured through a large encompassing structure, designed for the purpose of exercising complete political dominance over all

⁵³Donaldson, *Corporations and Morality*, p. 23.

aspects of social life.⁵⁴ This was the “empirical” set of goals of the Communist regime. The aim of total control was reinforced by the fact that the structure through which it pursued this goal had as constitutive elements the key positions in all the important social organisations of the society. More will be said in the next chapter about this structure. For now, one has to retain only that one is dealing with an “umbrella institution” which practically encompasses and transcends all other institutions.⁵⁵

The consequence of this domination was that the Communist regime, through its power structures, had the position not of a player in the game, without any possibility of changing the rules, but of the ruler of the game, with the possibility of changing the rules whenever convenient. Following the structural restraint view, one would have to conclude that the structure of the Communist organisations could not prevent the political game from being taken over simply because its structure was conceived without any meaningful restraints. This reasoning sounds almost like a *reductio ad absurdum* of the structural restraint view. Nevertheless, it is the only logical consequence of the structural restraint theory in those cases when the ruler and the player coincide in the same structure.⁵⁶

⁵⁴Some authors point out the injustice present in the very creation of such an organisation. Walzer, for instance, argues that intra-systemic “monopoly” is the result of a normal mechanism of social development, while the inter-systemic “dominance” is destined to bring about injustice. Michael Walzer, Spheres of Justice: A Defence of Pluralism and Equality (Oxford: Blackwell, 1985), pp. 10-13.

⁵⁵Otfried Höffe, Political Justice: Foundations For a Critical Philosophy of Law and the State (Cambridge, UK; Cambridge, MA: Polity Press, 1995), pp. 27-28.

⁵⁶This consequence was plainly revealed by the debate on the Hungarian laws amending the statute of limitations.

The coincidence between the player and the ruler appears as paramount for the understanding of the process of attribution of responsibility to social agents. We generally view judgements of causal responsibility as purely factual, but the causal responsibility is much more than a mere relationship between cause and effect. It is a relationship between an agent and an external state of affairs as prescribed by an adjudicator. Overlapping the two roles - the agent and the adjudicator - is always doomed to end in a legal vicious circle, and not a virtuous one as the structural restraint might lead us to believe.⁵⁷ The application *ad absurdum* of the structural restraint theory does not take place, of course, for each formal organisation. The organisation is indeed, restrained by its structure, but only to the extent to which it does not become the ruler as well as the player. A business organisation which is allowed and empowered by its structure to lobby the legislative power, is sometimes almost in the same position of “coincidence” as an unlimited government.⁵⁸

⁵⁷William Blizek, “The Concept of Social Responsibility,” Southern Journal of Philosophy 9 (1977): 7-9.

⁵⁸Ball expressed this idea in a rather blunt way: “I see no greater virtue in corporate managements than government bureaucracies - in fact, no inherent virtue in either.” George Ball, Global Companies: The Political Economy of World Business (Englewood Cliffs, N.J.: Prentice-Hall, 1975), p. 3. A similar cynicism surfaces from what Woodhouse characterises as the decline of the reputation of government bureaucracy and Parliament in the UK, a decline reflected by changes “in the system,” as well as outside, in the social attitude manifested towards these institutions. See Diana Woodhouse, Ministers and Parliament: Accountability in the Theory and Practice (Oxford: Oxford University Press, 1994), p. 280 ff. The social mistrust relative even to the supreme representative body is also reflected in the debates generating and generated by the Nolan Committee. This debate appears to situate the supreme legislative body more on the “managerial chair” than on the charismatic sovereign pedestal. See “A Year of the Nolan Committee's Inquiry,” Independent (London), 6 November 1995, p. 5, and “Public 'Anxiety' Will Force MPs to Disclose,” Independent (London), 7 November 1995, p. 4. Tilly also, comes with an original and unflattering comparison between the protection rackets as organised crime and the state making processes. Charles Tilly, “War Making and State Making as Organized Crime,” in Bringing the State Back In, eds. Peter B. Evans, Dietrich Reuschmeyer, and Theda Skocpol (Cambridge: Cambridge University Press: 1985), pp. 169-191.

This overlapping of roles appears as the logical consequence of the structural restraint view if the law embraces this theory and accepts the formal organisation being guided only by its *immediate*, self-centred, specified role, without any reference to the *mediate* role, that is to the social role that a specific organisation is meant to play.⁵⁹ Political, as well as corporate bureaucracies, function in a relatively identical manner, differing only in that they use different mechanisms.⁶⁰ Both have been invested with power for the production of intended social goals for which the immediate goals of the organisation are only instrumental. Agreeing with the structural part of the theory that the immediate goals of an organisation are “structural,”⁶¹ the critics argue then that the organisation should itself be accountable, in its structure, for the way in which it uses powers conferred primarily for the mediate needs of society, in order to attain its own immediate goals.⁶² This accountability can have a chance to be truly achieved not by disabling the

⁵⁹See the social demandingness theory, in Brummer, James J. Brummer, Corporate Responsibility and Legitimacy: An Interdisciplinary Analysis (New York: Greenwood Press, 1991), p. 165 ff. The German *Mauerschützenprozesse* implicating persons beyond the GDR's National Defence Council could be such an example of upholding the mediate (social) goal of an organisation. The distinction between immediate and mediate roles of organisations is rather rough. Nevertheless, it corresponds to a sufficient extent to the dichotomy existing between the internal and external interests relative to an organisation. It suggests though, an inherent necessity for internalising (alongside the immediate goals) some basic external interests. For an analysis of the internal and external interests relative to an organisation, see James S. Coleman, “Responsibility in Corporate Action,” in Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses, eds. Klaus J. Hopt and Gunther Teubner (Berlin, New York: Walter de Gruyter, 1985), pp.77-83. See also Steimann's arguments and proposed solutions for providing *voice* in the corporate governance for both internal and external interests. Horst Steimann, “The Enterprise as a Political System,” in Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses, eds. Klaus J. Hopt and Gunther Teubner (Berlin, New York: Walter de Gruyter, 1985), pp. 401-427

⁶⁰Thompson, p. 202 ff.

⁶¹Thompson, p. 201. The structural crime appears as the one which is more a product of organisational practices than of deliberate decision by individuals.

⁶²See Francis T. Cullen, William J. Maakestad, and Gray Cavender, “The Ford Pinto Case and Beyond: Corporate Crime, Moral Boundaries, and the Criminal Sanction,” in Corporations as Criminals, ed. Ellen Hochstedler (London: Sage Publications, 1984), p. 103-107.

organisational structure from evaluating the environment and pursuing its own immediate goal, but by inducing in that structure new evaluative mechanisms.⁶³ These mechanisms would then incorporate the mediate, socially imposed goals, converting and internalising them.⁶⁴

In spite of its failing to acknowledge the collective responsibility, the theory of structural restraint has made an important step forward from the atomising perspective of methodological individualism. It has moved the analysis of the corporation as moral agency from the moral and criminal discourse, with its stress on intentionality, to the domain of the ontology of the organisational system. It was this essence of the matter that Rawls sought to address when including formal organisations, along with the individual persons, on the list of parties qualified for occupying the “original position.”⁶⁵ According to Rawls, from this position a social agent would be able to opt in the best interest of society, not blinded by immediate selfish goals. In other writings though, reflecting the traditional academic ambiguity about the nature of formal organisations, Rawls backtracks on this position, and states a certain “logical priority” of human individuals.⁶⁶

The same ambiguity of attitude towards organisations appears in Thomas Donaldson’s

⁶³Stone, Christopher D., Where the Law Ends: The Social Control of Corporate Behaviour (Illinois: Waveland Press, Inc., 1991), pp. 123-25.

⁶⁴Stone, Where the Law Ends, pp. 145-49.

⁶⁵Rawls, A Theory of Justice, p. 146. See also, Brummer, p. 165 ff.

⁶⁶John Rawls, “Justice as Reciprocity,” in Utilitarianism, ed. Samuel Gorovitz (Indianapolis: Bobbs-Merrill, 1971), pp. 244-45.

work.⁶⁷ Donaldson argues that a complex organisation such as the General Motors corporation, which is characterised by a very complex structure, could fit under the structural restraint theory while others with a very basic structure and leadership could not. This would be so, Donaldson argues, because it would be quite easy to trace the corporate responsibility down to the individual one. Looking closer at the conceptual novelty brought by theories such as the structural restraint, one can notice that Donaldson's critical approach brings the structural restraint theory back to the anthropocentric representations.

Trying to apply the structural restraint theory to the process of justice in the post-Communist countries, one can notice that Donaldson's view creates the situation that for structurally simple, or clearer political bodies, actors could be individually tracked down and made accountable. To a certain extent this was the case of the border guards in the former GDR and of the Czechoslovak collaborators. At the same time, where complex political structures are involved, the process of justice would be impossible both at the individual and organisational level. First of all, at the individual level, this impossibility would be generated by the difficulty of identifying the necessary degree of action and intention in easily identifiable persons. This impediment in assigning responsibility would come from the structural complexity of the organisation. The structural complexity brings into the decision-making process what is known as "the problem of many hands."⁶⁸

⁶⁷Donaldson, *Corporations and Morality*, p. 25 ff.

⁶⁸Ellen Hochstedler, "Introduction," in *Corporations as Criminals*, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler (London: Sage Publications, 1984), p. 10.

This problem occurs when the map of the decision-structure renders it impossible to concentrate any legally significant amount of responsibility on any single individual person involved in a specific decision-making process. Secondly, at the organisational level, the attribution of responsibility would again be impossible if one would be dealing with complex structures. The physiology of the complex organisation would again rescue it from being made accountable, since the organisation, in its high complexity, would be liable only when acting against its specified empirical set of goals. In the case of the Communist regime these goals have been too loose and general to be able to offer any real and immediate restraint.

However, contrary to Donaldson's point of view, one has to acknowledge the new dimension that the structural restraint theory brings to the identity of a collective agent. From the structural restraint point of view, the complexity or simplicity of the organisational structure should not prevail in the construction of its responsibility, since this is a function of the quality of the system and not a quantitative variable. Therefore, the formal organisation, whatever its complexity, would be unable to incorporate moral views and values. According to the structural restraint theory, this would be so not because mechanisms could not be found or invented in order to make the collective organisation reason and act as discrete individuals do, but because the organisation is not designed or supposed to reason and act as individuals. The dimension of "not being supposed to" would now belong organically to its structure.

This being said, the dimension and complexity of the organisation should have no direct

and immediate relevance upon the question whether the organisation is, or is not a moral agency and thus, morally responsible. As long as the corporation is supposed only to talk the specialised language of its specific goal, searching for the moral responsibility of a one-person-run corporation should be just as superfluous as searching for the moral responsibility of a highly bureaucratised corporation. If the business corporation, for instance, was “invented” for evaluating the environment from the point of view of generating economic profit, one could not expect it to evaluate the environment from a moral perspective, even if the leadership of that corporation is represented by one single person. Therefore, the formal organisation - structurally complex or simple - will accommodate moral questions only to the extent to which they are likely to affect substantially, in one way or another, the attainment of the immediate goal embedded in its structure and pursued through its operations.

As long as those moral questions remain external to the organisation, that is as long as they are not recognised as belonging to the topic-neutral moral domain which should define the organisation's identity, these questions would be addressed as external obstacles, similar to the way that geographic or financial obstacles would be. *Mutatis mutandis*, for a political organisation it becomes necessary to assert the extent to which basic human rights can be seen as part of the mediate goals of the political discourse, compulsory in a democratic society.⁶⁹ Even from the static, structural perspective of the structural restraint view though, a political organisation should appear as incorporating basic human rights standards, maybe even more than an economic organisation should

⁶⁹Orentlicher, pp. 2539-2541.

incorporate for instance the socially desirable goal of environmental protection.

In spite of its static vision, the structural restraint theory has the quality of allowing one to perceive institutional organisations as socially constructed entities which cannot be altered directly, simply by imposing upon the organisation some different *immediate goals* other than its own. Once we have depicted this idea though, we leave the structural restraint theory to observe the possibility that the “empirical” set of goals accommodate the creation of new internal structures. These structures are meant to recognise and to “read” the organisation’s topic-neutral moral domain, construing its mediate goals according to its social role. The organisation can be expected to evaluate “morally” the environment only after developing its own such mechanism, combining its immediate, internal criteria of action (be they profit and efficiency, or acquisition and preservation of power) with the external, social ones. In this way the external criteria can be internalised and assimilated, becoming a part of the internal parameters of the collective agent. If this is true for the economic discourse⁷⁰, as it is actually true for the individual moral and criminal discourses,⁷¹ then there should be no reasons to believe that the political discourse would function any differently. Once the variety of shapes taken by social concepts such as person, agency, autonomy and responsibility has been recognised as system dependent, one should be able to go farther and deliberate upon the mechanisms through which the responsibility of a specific social agent can be spelled out most appropriately.

⁷⁰Stone, Where the Law Ends, pp. 228-29.

⁷¹Rosen, pp. 252-53.

This possibility is denied by both structural restraint and the atomising views of methodological individualism. Velasquez' fiction theory,⁷² as well as the structural restraint view, urges us to believe that the idea of an organisational responsibility based on a institutional morality, and satisfying the requisite intentionality for this morality, is due only to endanger the rationality of the criminal law. Parisi points out with sadness that, in spite of this danger, liability has sometimes been imposed in exceptional circumstances. "On occasion, theories of corporate liability, general criminal law concepts, and the elements of the crime have been violated, and still the corporation was held criminally liable."⁷³ One could easily guess that the same evaluation would be given to a process of political justice which would openly consider collective responsibility as one of its viable options. Why would basic principles of criminal law be betrayed in such a way? In order to find out the weight of these accusations we shall now have to look to some of the theories which argue, directly or indirectly, for the soundness of such decisions.

4.3.3 Structural Pragmatism: Taking the Risk

We have looked so far into theories of collective responsibility which deny organisations the dimension of agenthood. In a limited way, we could still draw from these theories

⁷²Velasquez, "Corporations," p. 129. Also, Velasquez, Business Ethics, pp. 19-20.

⁷³Nicollette Parisi, "Theories of Corporate Liability," in Corporations as Criminals, ed. Ellen Hochstedler, (London: Sage Publications, 1984), pp. 43-44.

some constructive points in our search for collective political agency. We shall now look into theories and ideas which support - in different ways - the idea of collective responsibility as fundamentally different from the responsibility of the individuals who come together in an organisation.

Although the two lines of thought - methodological individualism and structural restraint - analysed so far have highlighted important aspects that societies should take into consideration while engaging in a process of political justice, one could also notice that they do not offer the proper *locus* for a solution. Addressing the question of political justice from the position of a methodological individualist we can understand the necessity of dealing with the “legally traumatic” past at the individual level, on the moral, criminal or political ground. Nevertheless, it is obvious that such an approach, though necessary to some extent, would take into consideration only one aspect of a collective's identity: the dichotomy between the structure and the elements of the collective agent.⁷⁴ There are good reasons though to doubt that this dichotomy can and should always prevail in selecting and patenting the social agencies. Therefore, a theory which would take into consideration not only the anthropomorphic elements of an organisation, but the sociological and systemic ones as well, will offer more chances of success in finding a suitable mechanism of responsibility which would match better the type of collective entity under consideration.

⁷⁴Fisse, Brent, “The Duality of Corporate and Individual Criminal Liability,” in Corporations as Criminals, ed. Ellen Hochstedler (London: Sage Publications, 1984), pp. 71-72.

The potential benefit derived from taking into consideration all the dimensions defining an organisation is also neglected in ossifying structural approaches, such as the structural restraint theory. The combination of the different sources of identity seems attainable only by going beyond the structural approach. This is the type of approach which would allow one to consider not only the eventual homogeneity and unity of a collective actor, but also the operative decision structures and procedures in place at a certain moment in time. These structures and procedures would incorporate the apparently segregated decisions of the discrete members. This approach is the only one which would allow us to put in context acts such as the decision of the German border guards to shoot innocent people, the decision of the Hungarian party leader to use the Soviet army against the Hungarian population, or the activity of the Secret Police services developed practically everywhere in the Communist bloc, including Czechoslovakia. The view that the structure and the charter of a formal organisation, along with its policy and organisational culture, generate something completely different from what otherwise would be a random collective, can put all these decisions into a completely different light.⁷⁵

According to Wolf for instance, who formulates a vision of structural pragmatism over the concept of collective responsibility, formal organisations do have all the necessary apparatus for being able to chose their actions and therefore, the actions of their

⁷⁵Some authors would even disagree with drawing too sharp a distinction between the formal and the informal or random collectivities in the debate on the collective responsibility. Virginia Held, "Can a Random Collection of Individuals Be Morally Responsible?" In *Collective Responsibility*, eds. Larry May and Stacey Hoffmann (Savage, Md.: Rowman & Littlefield Publishers, Inc.: 1991), pp. 89-100.

members.⁷⁶ The Communist political structures, for instance, could have offered to their members the choice to take more ethical decisions. Something close to this reasoning was implied in the trial of the GDR politburo members. In Wolf's opinion, the fact that the organisation *could have* chosen, on moral grounds, to act differently than it actually did, causing harm, means that the organisation *ought to have* so chosen. The distinction between the causal (individual) actor and an agent "of a more responsible sort" is attenuated by Wolf with the claim that they both have in common the intellectual or cognitive capacity to be sensitive and responsive⁷⁷ to complex reasons for and against various actions. This capacity would be a necessary condition for being either morally, or practically a responsible agent.⁷⁸

According to this characterisation, the formal organisation does not appear as a moral agent, or at least not in the common sense of the word "moral."⁷⁹ Although not irreducible moral agents, organisations nevertheless appear as "agents of another sort," as social constructions presenting sufficient distinctive features to make them

⁷⁶Wolf, pp. 274-279. This theory is referred to by a series of different other names. Hay and Gray, for instance, call it "the quality of life management theory," Sethi refers to it as "the social responsibility model," and in Brummer it appears as "the social demandingness theory." Robert Hay and Ed Gray, "Social Responsibilities of Business Managers," Academy of Management Journal, March 1974, pp. 135-145. Prakash S. Sethi, "Dimensions of Corporate Social Performance: An Analytical Framework," in Managing Corporate Social Responsibility, ed. Archie B. Carroll (Boston: Little, Brown and Company, 1977), pp. 69-75. Brummer, pp. 165-184.

⁷⁷This cognitive capacity can be deduced also from Montesquieu's distinction between moderate and immoderate governments. See Montesquieu and Shklar, Chapter Two, note 68.

⁷⁸Wolf, p. 277.

⁷⁹John Ladd, "Morality and the Ideal of Rationality in Formal Organizations," The Monist 54 (1970), pp. 489-490.

“appropriate bearers of important kinds of *legal* responsibility.”⁸⁰ This perspective would allow for the political structures of the Communist regimes to appear as “shareholders” in both criminal and non-criminal legal responsibility.

Wolf argues for the existence of a different perspective on the meaning of responsibility. Besides the causal and the moral sense, a “practical sense” appears as equally important.⁸¹ This meaning, which is not completely unknown in the discourse of liability especially outside the criminal law, is used “when our claim that an agent is responsible for an action is intended to announce that the agent assumes the risks associated with that action, . . . [that] the agent is considered the appropriate bearer of damages, should they result from the action, as well as the appropriate reaper of the action’s possible benefits.”⁸²

Constructed in this way, the notion of “practical responsibility” has implications beyond the limits of criminal law or morality, and it represents an important step forward in our quest for a political responsibility. The important aspect is not that the institutional organisation can, or cannot be brought under the criminal law, but that it is brought under the law as a collective agent, and not as a mere causal factor. Appearing as a collective *persona* may, in some circumstances, lead to the observance by the collective entity of

⁸⁰Wolf, p. 279. Celia Wells, Corporations as Criminals (Oxford: Clarendon Press New York: Oxford University Press, 1993), pp. 39-44.

⁸¹Ladd p. 511.

⁸²Wolf, p. 276. See also Wells, p. 2 ff.

some specific systemic “topic-neutral” moral principles. Although emotional capacities would lack in organisations, the presence of cognitive capacities would make an organisation (be it economic or political), susceptible to an (initially) externally induced moral force. Accordingly, the organisations would assume responsibilities which derive from the topic-neutral principles of the system. The task of identifying concretely these foundational principles belongs to the civil society and to the social science debate. On the other hand, according to Wolf, reevaluations can be built into the very structure of an organisation⁸³ or, the organisations can be prompted to do it themselves.⁸⁴

Looking attentively to the way the practical responsibility is formulated, one can identify a possible parallel with Moore’s system of moral and metaphysical sources of (criminal) responsibility. If in the context of collective responsibility we consider as a systemic procedural moral principle the idea, underlined by Wolf, that an agent taking an action has also to take the risk associated with that action, (in our case such risk could be conceived as the risk of revolution), we soon realise that the metaphysical basis of the concept of responsibility established by Moore is in no way contradicted. This leads us to the idea of contingency of the relationship between the concept of responsibility and a certain form of autonomy and rationality of the agent.

The contingency between the concept of responsibility and its transcendental underlying

⁸³Wolf, p. 281.

⁸⁴See Stone, Where the Law Ends, pp.122-149.

ideas of autonomy and rationality⁸⁵ allows us to consider the idea of a political responsibility based on other topic-neutral elements than the ones offered by the criminal law, and by the concept of individual agency. From this position, one might be able to re-assess the retroactive ban often invoked as an argument against political justice. This ban has roots in the “topic-neutral” moral principles underlined by Moore.⁸⁶ The change in the structures of society brought about by a totalitarian regime, and the specificity of the unique powerful political agent, demand a re-assessment of the way the ban on retroactivity is applied.⁸⁷ At the same time, accepting Wolf’s suggestion of a “practical responsibility” rooted in the risk theory,⁸⁸ and also accepting the possibility of an autonomy and a rationality of a different substance,⁸⁹ opens up for the process of political justice a path which goes beyond Moore’s individual responsibility.

Yet, for the purpose of a process of justice following a repressive regime, one might be prompted to prefer a hierarchical model of attribution of responsibility to the collective one proposed by Wolf. This would be so because of the sterilisation or blamelessness of

⁸⁵See *supra* Moore, Chapter Four, Section 4.2.

⁸⁶*Supra* Section 2.2.1.

⁸⁷The rule of law, of which the ban on retroactivity is an important part, is seen as the theoretical foundation of “the legal system of competitive society.” Cotterrell quoting from Franz Neumann in Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995), 166-7). When social conditions change, with other agents coming into the social arena (or new dimensions of existing agents are acknowledged), this foundation offered by the rule of law is naturally reconsidered.

⁸⁸Robert Baldwin, “Introduction - Risk: The Legal Contribution,” in *Law and Uncertainty: Risks and Legal Processes*, ed. Robert Baldwin and P. Cane (Boston, Mass : Kluwer Law International, 1996), p. 13. Also, François Ewald, *L’etat providence* (Paris : Bernard Grasset, 1986), p. 201 ff.

⁸⁹Moore, pp. 11-14.

actors and actions implied by this theory of practical responsibility. Assuming that responsibility for policy always falls on the official holding the top position in the hierarchy neglects, however, the realities of the political bureaucratic decision-making process; it neglects the problem of many (invisible) hands, present in this process.⁹⁰ This problem would make the hierarchical attribution of responsibility as depleted of blame as the collective attribution appears in Wolf's theory.⁹¹ The collective model from her proposal solves the problem of many hands, although collective accountability remains incompatible with the notion of moral blame, or guilt.⁹²

In conclusion, it can be said that the structural pragmatism theory of collective responsibility proposed by Wolf fully acknowledges the constraints imposed on officials by bureaucratic practices and procedures, and the fact that these constraints circumscribe an official's or civil servant's range of choice. The theory, however, falls short of proposing a model which would acknowledge formal organisations as "moral" agents,

⁹⁰Leonard H. Leigh, Strict and Vicarious Liability: A Study in Administrative Criminal Law (London: Sweet and Maxwell, 1982), p. 18 ff.

⁹¹The contributory fault might appear as equally weakened or eliminated, both hierarchical and collective responsibilities appearing as subspecies of strict liability. See, Joel Feinberg, "Collective Responsibility," in Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics, eds. Larry May and Stacey Hoffmann (Savage, Md.: Rowman & Littlefield Publishers, Inc., 1991), pp. 53-76.

⁹²Wolf's hesitation to qualify organisations as moral agents has deep roots. Usually, the moral guilt has been attached to the inner world of the soul, and moral responsibility was seen only as self-attributable, distinct from social blameworthiness. See for instance Karl Jaspers, "Differentiation of German Guilt," in Guilt and Shame, ed. Herbert Morris (Belmont: Wadsworth Publishing Company, Inc., 1971), p. 45. Other authors, however, have chosen to challenge this distinction, characterising the process through which blame is ascribed as "a conceptual mechanism for internalising judgements of social blameworthiness in the absence of external authority." Marion Smiley, Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View (Chicago: The University of Chicago Press, 1992), p.13. See also, Thompson, pp. 201-240.

brought about in order to fulfil a social role. In an improved theory of collective responsibility, what would count as an expression of autonomy and rationality (action and intention) should necessarily refer back to the organisational social role, with immediate goals, but also internalised social ones. Applied to collectivities, as well as to discrete individuals, such a model could be used to explain the relationship between our particular ends, social expectations and legal consequences.⁹³

4.3.4 Functional Structuralism: Taking the Blame

It is from this type of functional ground that Peter French goes beyond the morally emasculated practical responsibility proposed by Wolf. French argues for what could be called a functional structuralist theory which promotes the idea of an organisational responsibility functionally distinct from the one of discrete corporate managers or associates.⁹⁴

French drew an essential distinction among different collective entities, separating them as aggregate and conglomerate collectivities. An aggregate collectivity, according to French, is merely a “collection of people.”⁹⁵ A change in the membership of such a collectivity always entails a change in the identity of the collection. The aggregate

⁹³Smiley, p.161.

⁹⁴French, Collective and Corporate Responsibility, pp. 3-14.

⁹⁵French, Collective and Corporate Responsibility, pp. 5-7.

collectivity is not compatible with a varying or frequently changing membership. Given this dependency upon its membership, the aggregate is largely under the paradigm of normative responsibility offered by the methodological individualism. French agrees therefore that, with respect to aggregate collectivities, moral responsibility predicates cannot be legitimately ascribed to the collective as such.

French constructs quite differently though the conglomerate collective entity and its potential for responsibility. In his conception, a conglomerate collectivity is an organisation of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organisation.⁹⁶ The existence of a conglomerate is therefore compatible in his view with a varying membership. The membership in a conglomerate is not determined by whether or not associated individuals materially contributed to particular untoward events for which the conglomerate might be blamed, but is determined according to whether a person has or not the “credentials of membership.”⁹⁷

While French develops his theory around the concept of organisational structure, he also underlines its organic qualities. Similar to the structural restraint view, French also compares the organisation with the embodiment of the rules of a game. Nevertheless, the similarity between the two approaches stops here, as French reaches rather different conclusions. The game, he argues, is a language game, or language system provided with

⁹⁶French, *Collective and Corporate Responsibility*, p. 13 ff.

⁹⁷French, *Collective and Corporate Responsibility*, p. 17.

an internal “creativity.” The organisational charter of a corporation would represent the grammar of a corporate decision-making, while the logic of this is given by the internal recognition rules.⁹⁸

A further step aside from the sterilised approach of structural restraint is made by distinguishing, among the internal recognition rules, between the procedural rules of recognition, and the substantive rules of recognition represented by the “basic belief,” or the policy of the organisation.⁹⁹ This two-folded structure, comprising “an organisational or responsibility flow chart that delineates stations and levels within the corporate structure” and also the “corporate decision recognition rules,” would have a decisive impact upon the qualification of the organisation not only as agency but also as moral agency.¹⁰⁰ Through this construction, French takes into account the element of self-determination or internal redefinition of an organisation, stressing its active (autonomous and rational) role. In his view, the minimal requirement for this to be true is to have determined that it makes sense to redescribe some of the organisational behaviour in a way that would make true sentences which say that the collective agent acted intentionally.¹⁰¹ From here, French proposes a different “triangle of responsibility.” The responsibility constructed upon the idea of action and intention originating in the same

⁹⁸French, “The Corporation as a Moral Person,” pp. 146-147.

⁹⁹The procedural rules of recognition are partially embedded in the organisational charter, telling us about the procedural path a decision has to take in order to become an organisational decision. French, “The Corporation as a Moral Person,” p. 147.

¹⁰⁰French, “The Corporation as a Moral Person,” p. 148.

¹⁰¹French, *Collective and Corporate Responsibility*, p. 90.

individual person - as the “classic” formula on responsibility - is homologated or paralleled by French with the concepts of action and *reason for action* originating in the *structure*.

French’s re-description of the concept of person through a reformulation of the concepts of action and intention becomes indispensable in the attempt to surpass those theories of responsibility rooted in Moore’s anthropocentric approach. French avoids the anthropocentric bias potentially present in the concept of intention, by describing the intentionality of a collective agent as something *done for a reason*.¹⁰² Some authors take this reasoning even further in the process of making collective entities responsible, arguing that not only fault, but also blame can be attributed to groups, when action and intention have been attributed to them.¹⁰³

French does not change radically the concepts of intention and action, he rather redefines them, keeping somehow in touch at the same time, with the basic lines offered by Moore. His approach avoids the pitfalls of human intentionality, however, by building upon the domain of organisational structure. This structure, characterised by homogeneity or not, comprises of specific reasons or, as the structural restraint view put it, of “specific goals.” For proving these specific reasons - French argues - the organisational internal recognition rules should be sufficient.¹⁰⁴

¹⁰²French, *Collective and Corporate Responsibility*, pp. 39-40.

¹⁰³Larry May, *The Morality of Groups* (Chicago: Chicago University Press, 1987), p. 72.

¹⁰⁴French, *Collective and Corporate Responsibility*, pp. 93-94.

The importance of the reliance on reasons beyond the organisational charter or the constitutive statute, appears even more important while looking to a political collective agent rather than to a corporate one. Without letting in, as determinants of identity, the “basic beliefs” or the elements of policy which characterise the bureaucratic political structures, their agenthood would be negated, and very complex liabilities would have to be assigned, inappropriately, to individual members. These members might have had limited, or no control at all over the policy which triggered the harm. On the other hand, avoiding this unjust - by individual standards - attribution of fault and guilt could very easily mean to put aside, one by one as non-liaible, all the discrete members of the Communist bureaucracy, and to remain only with a set of abstract relations and structural schemes written in a dusty charter.

Following French’s approach, the responsibility for the violent repression of a democratic movement for instance, could be assigned not only individually, to a few Communist high officials, but also to the political structure itself. This combined accountability is conceivable even when the collective body is organised hierarchically. This approach is consistent even with definitions of official crime formulated by authors who argue against a collective responsibility of collective bodies. Thompson, for instance, sees the official crime as “conduct *authorised or supported* by the organisation, either formally, through instructions and procedures, or *informally* through the norms and practices of the organisation” (emphasis mine).¹⁰⁵

¹⁰⁵Thompson, p. 204.

Though it might appear as an attempt to rescue a non-existent anthropomorphic unity of the concept of responsibility, the theory of the internal decision structure formulated by French makes an important step towards re-establishing an equilibrium between different forms of accountability. This equilibrium is achieved by breaking away from the anthropomorphic parameters in the process of defining the collective agency, and by *moving from the causal attribution of liability, with its requirement of coincidence of intention and action in the same body, to a collective attribution which requires a coincidence of action and “reasons” for action, in the same structure.*

French therefore argues for the capacity of collective “intelligence” and of “actualization of the potentiality of purposiveness”¹⁰⁶ of organisations as sufficient reason for the participation of organisations in the process of distribution of normative social responsibility. This shift in the attribution of responsibility opens the possibility to integrate in a process of political justice both the prosecution of discrete individuals who have directly perpetrated crimes and violations of human rights, and the prosecution of the collective actors who might have authorised or supported, formally or informally, these acts. This perspective largely confirms the outcome of the trials of the German border guards, and the follow-up trials in which the GDR Politburo has been implicated beyond the limits of direct individual participation.¹⁰⁷ The same theory allows one to put into perspective the “political reasons” for which the Hungarian legislator claimed the

¹⁰⁶Ernest Weinrib, “The Intelligibility of the Rule of Law”, in *The Rule of Law: Ideal or Ideology*, eds., Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), p. 82.

¹⁰⁷See *supra* Section 2.3.

suspension of the statute of limitations.¹⁰⁸ The invocation of the “political reasons” becomes part of the process of identification of the topic-neutral morality of the political discourse which, as the Zétényi-Takacs law claimed, the Communist regime had “knowingly” disregarded.

The distinction between the two types of agencies and responsibilities might seem self-evident in the GDR case where the two agents - the discrete individual and the collective entity - had no substantial point of coincidence. The same complementarity is true, however, in the situation in which the former (the individual agent) is simultaneously a constitutive element of the latter (the collective agent), as happened in the Hungarian case. In this sense, the functional structuralism perspective would allow the possible attribution of criminal responsibility to some of the Communist leaders, as the direct, causal actors in the repression of the 1956 events. At the same time, those officials would be, along with the Hungarian Communist government, collectively - both politically and legally - responsible for the crimes committed in the process of repression.¹⁰⁹

This process of differentiation of responsibility brings one major change to a process of political justice. If due to some imperative procedural impediments¹¹⁰ the path of criminal

¹⁰⁸Ibid.

¹⁰⁹Lucas highlighted the distinction between the logic of responsibility and the one of material objects. His distinction supports the idea of distributiveness of responsibility without diminishment, as well as the complementarity of the different forms of responsibility. See J.R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1993), p. 75.

¹¹⁰For example, an applicable statute of limitation, insufficient evidence to build a case against a specific person, evidence found in documents with regime of classified information, etc.

justice cannot be pursued, this should not exclude the political responsibility for those crimes to be assigned to the relevant collective agent. In this sense French made the distinction that the ascription of responsibility to an individual member of a conglomerate cannot be based simply on the justified ascription of responsibility to the conglomerate itself, and vice versa, even if that person was a corporate president. In his opinion the two types of responsibility are conceptually different matters, and each has to be justified on its own merits.¹¹¹ This clear distinction between the conglomerate responsibility and the responsibility of individuals members of the conglomerate comes from the fact that a particular person holding a particular position in the conglomerate organisation is a contingent property of the organisation as an autonomous entity.¹¹² Differentiated forms of autonomous and rational social agencies should allow therefore for differentiated forms of enforcing accountability. This is actually the chance for a political justice process to be just.

The process of differentiation of responsibilities brings us also to another aspect related to the concept of collective responsibility. The difficulty encountered in finding a conceptual framework for the collective responsibility has always been accompanied by the difficulty in finding a practical and effective punishment to be attached to it, a punishment which would act upon the collective agent more directly and more justly than *via* individual members. In spite of adopting a definition of official crime which acknowledges the formal and informal pressure the organisation puts on its members,

¹¹¹French, Collective and Corporate Responsibility, p. 17.

¹¹²French, Collective and Corporate Responsibility, p. 28.

Thompson opposes the idea of a collective political responsibility.¹¹³ Thompson's main argument is that a collective political responsibility would distribute punishment beyond individual moral responsibility and therefore, would affect innocent officials, civil servants, or even blameless citizens. In order to support his argument Thompson uses the example of financial punishments of organisations affecting the employees, an example borrowed from the world of business corporations. This is a mistaken analogy though, based on the idea that if corporate actors have to pay punitive damages for criminal wrongdoing so do political organisations. If so, the deterrent effect in the two cases would be obviously different, and it would certainly have little chances of influencing the actions of a political agent for which economic profit is not the defining goal. Moreover, it is most likely that the punitive fine will be re-distributed "fairly" through the tax system, to the very citizens who have been wronged.

The mistake in this approach consists in the failure to realise that the difference in nature of the two types of collective agency should be matched by a difference in nature of the types of punishment applicable to them.¹¹⁴ The punishment should try to take into consideration the *immediate* goal of the agency. Applying punitive damages to business corporations is more appropriate, since it addresses their profit seeking goals for which

¹¹³Thompson, p. 204 ff.

¹¹⁴Wells, p. 46. Stone referred to this need of adaptability of criminal punishment when he wrote: "Suppose we conceive, as an independent basis of the criminal law's educative function, the denunciation of wrongful conduct in ceremonies of state. . . [assuming that there is no individual agent to denounce], it hardly seems pointless to underscore the gravity of the conduct by denouncing the corporation. Indeed, to denounce the corporation, whose name is more likely to be recognized than that of any of its employees, is a message calculated to travel." Christopher D. Stone, "A Comment on 'Criminal Responsibility in Government,'" in *Criminal Justice*, eds. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985), pp. 248-249.

the societal parameters have been trespassed. The *immediate* goal of the political actor though, is not the profit making, but upholding the political power. Therefore, any attempt to punish a collective political actor - if meant to be successful, that is if it is meant to have as a result some degree of deterrence - should address the organisation's capacity to uphold power. Traditional - democratic, or less democratic - political measures, such as elections, administrative discipline, legislative oversight, impeachment, ostracism or political exile, have addressed this specificity of the political discourse, though usually at the individual level.¹¹⁵ The same is true of the scope of the Lustration Law in the Czech Republic, or of similar screening laws in Eastern Europe, with the difference that, in cases such as the Lustration Law a collective political responsibility emerges from the standards of expected behaviour of political organisations.¹¹⁶

4.4 Preliminary Conclusions

Could one identify in Eastern Europe a viable political agency which could participate, alongside the individual actors, in the post-Communist "moral division of labour"? And, what would a mechanism of enforcing such a division of responsibility be like? These

¹¹⁵The collective level was difficult to be reached also in the case of corporate actors. See Ronald C. Kramer, "Corporate Criminality: The Development of an Idea," in Corporations as Criminals, ed. Ellen Hochstedler (London: Sage Publications, 1984), p.18. Wolf, p. 268 ff. Donaldson, Corporations and Morality, p. 6. Charles B. Schudson, A. P. Onelion, and Ellen Hochstedler, "Nailing an Omelette to the Wall: Prosecuting Nursing Home Homicide," in Corporations as Criminals, ed. Ellen Hochstedler (London: Sage Publications, 1984). John Lynxwiller, et al., "Determinants of Sanction Severity in a Regulatory Bureaucracy," in Corporations as Criminals, ed. Ellen Hochstedler (London: Sage Publications, 1984), p. 147-48.

¹¹⁶Lukas, pp. 208-209.

questions will be answered in detail in Chapter Five, and Chapter Six respectively. For this purpose, one should carry from the analysis of the concept of collective responsibility some essential elements.

Firstly, one should retain the potential of the concepts of agency, intentionality and action to be differently shaped, though starting from the same metaphysics of autonomy and rationality upon which the concept of responsibility - both individual and collective - could be based. In this sense, the topic-neutral principles of political action - principles which remain to be spelled out mostly in the socio-political debate¹¹⁷ - would serve to define the collective political agency as well as the appropriate mechanisms of accountability. Secondly, we have also established that, in the debate on collective responsibility, a nucleus has been formed around the idea that, for certain categories of organisations one can identify homologies of autonomy and rationality. This leaves open for the process of political justice the possibility of identifying a collective political actor. This collective actor could participate in the distribution of responsibilities for the violations of human rights under the Communist regimes. At the same time, from the theories opposing the concept of collective responsibility, one should retain the equally important responsibility of the discrete individual. Nevertheless, the coincidence of the act and intention in the same person should not undermine the importance of the cognitive capacity, and practical responsibility belonging to the organisation to which the person might have belonged (through membership or “sphere of influence”). The potential for the three key concepts of the individual responsibility - action, intention and

¹¹⁷See Connolly, pp. 11-16.

person - to be homologous with the concepts of action, reason for action and structure respectively, should also be acknowledged and preserved.

With the moral and metaphysical parameters insulated from contamination with the topic-neutral morality and the metaphysics of the individual responsibility, the collective political responsibility for human rights violations would give a new dimension to both the political and the criminal law discourse. On the one hand the criminal discourse is enhanced beyond the limitations of an anthropomorphic approach, offering a creative reading of the relationship between topic-neutral principles of accountability and the metaphysics of autonomy and rationality on which these principles are based.¹¹⁸ On the other hand, the collective political responsibility for unlawful or unjust acts, if embodied in an appropriate mechanism, can induce in the political discourse the creation of an *internal morality*.¹¹⁹ This morality is “internal” because, in order to be meaningful it must

¹¹⁸Similar suggestions to this enhancement can be identified in the definitions of corporate crime proposed by some authors. Sutherland for instance, who was the first one to formulate a definition of corporate crime, suggested that civil and administrative decisions against corporations be used as an argument for implying responsibility of the organisation where criminal acts have been committed. His proposal was from the beginning enlarging the traditional definition of criminal responsibility as identified by Moore, arguing indirectly for the contingency of the traditional elements of the concept. Edwin H. Sutherland, White Collar Crime (New York: Dryden, 1949), p. 27 ff. A similar enhancing definition comes from a study by Cleanard and Yeager. “A corporate crime is any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law. This broadens the definition of crime beyond the criminal law, which is the only governmental action for ordinary offence.” M. Clinard and P. Yeager, Corporate Crime (New York: Free Press, 1980), p. 16. In evaluating these definitions it is useful to bear in mind Klockars' position on the definition of crime. According to him, the debate on the definition of crime is essentially “a territorial dispute over the problem of boundaries of the discipline of criminology...As it is with any boundary dispute, political issues are as important as scientific ones” K.B. Klockars, “White Collar Crime,” in Deviants: Voluntary Actors in a Hostile World, E. Sagarin and F. Montanino (Morristown, N.J.: General Learning Press, 1977), p. 236.

¹¹⁹An internal morality is, according to Selznick, the set of standards that must be honoured if the distinctive mission of an institution or practice is to be achieved. Philip Selznick, “Self-Regulation and the Theory of Institutions,” in Environmental Law and Ecological Responsibility: The Concept and Practice of Self-Organization, eds. Gunther Teubner, Lindsay Farmer, and Declan Murphy (Chichester: John Wiley and Sons: 1994), pp.396-402.

be built into the social structure of the political organisation, it must be interwoven into its elements of identity.¹²⁰ As to the word “morality,” it suggests the homology with, and not the identity of, the individual standards. It represents the *genus proximus* which remains to be specified into differentiated elements, corresponding to differentiated social systems. In this sense, “morality” accounts for the ethos of a specific system, and is expressed through a set of rules and principles. These rules and principles fulfil the function of enabling the system to reproduce itself, to survive, in its initial social setting. Conceived in this way, the morality of a differentiated system has to be internal in order to be operational. French’s functional structuralism creates the basis for such an assimilation of mediate social values, by taking into account all the dimensions of an organisation’s identity: the structural element, the relationship with other systems, as well as the role of the organisation as conceived in its initial social setting.

In the process of shaping this “internal morality” specific to the political discourse, it is necessary not only to integrate it under the rule of law,¹²¹ but also to accept its complementarity with other normative systems.¹²² As mentioned when analysing the

¹²⁰Speaking about this integration at the corporate level, Selznick writes that “[a] corporate conscience consists of specific arrangements for making accountability an integral part of corporate decision making.” Selznick, p. 398.

¹²¹The rule of law principle understood either in its formal or substantive meaning. For a comprehensive analysis of these aspects see Peter Craig, “Formal and Substantive Conceptions of the Rule of Law,” in *Diritto Pubblico* (Saggi, 1995), pp. 35-55.

¹²²Different authors underline the fact that society developed, and is simultaneously using, different models of exercising and controlling power. N. Frank and M. Lombness, Controlling Corporate Illegality: The Regulatory Justice System (Cincinnati: Anderson Publishing Co., 1988), p. 5. Celia Wells, Corporations and Criminal Responsibility (Oxford: Clarendon Press; New York: Oxford University Press, 1993), p. 147 ff. For an extended sociological approach of the matter see Stuart Henry, Private Justice (London; Boston: Routledge & Kegan Paul, 1983), p. 179 ff.

methodological individualism, a collective responsibility that would answer the social expectations for making a political body accountable, should not exclude, where applicable, the use of criminal or tort law, for bringing justice to the victims of the Communist regimes. Therefore, the collective responsibility is not to replace either the criminal or civil prosecution of discrete individuals, or the individual moral blame.¹²³ They are all differentiated discourses which address specific aspects of the social relations, and each should be a complement to the others for the realisation of social justice. It is in this way that the legal acknowledgement of the social role and responsibility of political and corporate organisations, besides the one of the discrete individual, achieves the moral division of labour. The distinction between the two types of agencies - the individual and the collective one - could be then reflected in the possibility of using simultaneously, various legal mechanisms of assigning responsibility, according to the specificity of each register of agenthood.

¹²³Karl Jaspers, "Differentiation of German Guilt", in Guilt and Shame, ed. Herbert Morris (Belmont: Wadsworth Publishing Company, Inc., 1971), pp. 40-53.

Chapter Five

NOMENKLATURA AS A POLITICAL AND LEGAL ACTOR

Abstract

After establishing, in Chapter Four the coordinates of the concept of collective responsibility, Chapter Five applies this concept to the socio-political realities of the Eastern European Communist societies. This chapter emphasises two aspects. Firstly, that a specific part of the Eastern European Communist political class can be identified and validly proposed as a collective agent, eligible for a process of accountability addressing human rights violations that occurred under the Communist regime. Secondly, it is argued that neither the criminal law responsibility of a few leading officials in the party-state Communist hierarchy, nor a blanket moral responsibility of whole societies in Eastern Europe should replace the collective political responsibility of the power structures of the repressive totalitarian system. Proposing a clearly defined collective actor - a potential participant in the legal distribution of responsibility for human rights violations - is meant to help in re-defining the process of political justice based on a complementarity of individual and collective responsibilities.

5.1 The Search for a Collective Agent

The analysis of the debate on the concept of collective responsibility allows one to isolate, to a certain extent, the socio-legal discourse on collective agency from other discourses which can compete in the arena of political justice. As the definition elaborated in Chapter One shows, the reality of political justice is much more complicated, with both normative and non-normative discourses competing through relatively equal legitimate social expectations.¹ The isolation of the legal and sociological debate on collective agency is not only possible but also necessary. It allows one to

¹See supra the discussion on the definition of political justice, Section 1.2.1.

establish how far social expectations for justice could be answered through law, that is how far the legal discourse would go, and from what moment the search for justice would reach beyond the realm of legitimate legal answers. This socio-legal perspective determines the domestic choice of constitutional principles - made in processes of justice such as has been seen in Hungary, or in the Czech (and Czechoslovak) Republic - which can be seen as a choice between different theoretical positions within the debate on collective agency.

It is a general normative convention that responsibility has as its foundation the origins of action and intention within the same actor. The actor is often assumed to be the discrete individual. As we have seen from the analysis of the debate on the concept of responsibility, the metaphysics of autonomy and rationality of social agency allows for another type of triangle of responsibility. This responsibility has been identified in the previous chapter in French's theory of collective responsibility in the format of action and reason for action which originates in the same organisational structure. This responsibility format was proposed as a complement, rather than a replacement, for the system of individual responsibility in which the action and intention originate in the same individual person. This perspective of complementing responsibilities allows one to approach the issue of political justice with a set of hypotheses with which one can refer back to the Eastern European solutions for political justice. It also allows one to look forward, using the potential of these hypotheses in order to identify whether a legally viable process of political justice is at all possible.

One idea to take further in our analysis of the role played by the concept of collective responsibility, is the possibility that the individual persons accused of crimes and human rights violations during the Communist regime in Eastern Europe might not be the only actors responsible for those acts. In certain circumstances, it might appear inappropriate to attribute the responsibility only to discrete individuals. This type of rigid attribution would imply neglecting the role of the institutions to which those individuals belonged, or of those organisations which had the capacity to influence their actions in a determinant way. Therefore, acknowledging the role of state and party structures of power would require acknowledging a necessary complementarity between individual and collective responsibility.

A second idea to consider in our analysis is that from this complementarity of responsibilities it can be inferred that the responsibility for the systematic violations of basic rights of the citizens committed under an identifiable political bureaucracy could be placed collectively, with the power structures of the political regime, and not only with its members. It should be mentioned here that, the specificity of collective agency - its non-identity with the individual actor - invites caution with respect to the application of criminal responsibility to a collective body. This would be true especially in circumstances where there is a highly politicised context in which the process of justice takes place. The need for cautiousness brings us to the third point to be made regarding the debate on collective agency. This point also refers back to what we called the need for a legal acknowledgment of the right to revolution. This is the need for an acknowledgement of the specificity of the historical context in which justice through

collective political responsibility is to be considered.

The need for cautiousness in applying criminal law to collective actors, together with the need for recognition of a right to revolution suggests that the criminal law should not be looked at as the only one capable of offering a framework which would ensure accountability in cases of radical political transition. When dealing with systematic human rights violations, in a complex political context in which the individual responsibility is doubled by a collective responsibility, a need for an “in-between” mechanism of accountability should be acknowledged. This middle way to accountability is to be tailored around the specificity of the collective actor. Therefore, there remains to be found a balance between unjustly applying a criminal responsibility for mere membership of an organisation and, on the other hand, totally ignoring the determinant role the organisation might have had in the serious crimes which are to be punished.

From these ideas, and looking back to the cases of political justice analysed in Chapter Two and Chapter Three, it appears that the outcome of the Hungarian debate on the statute of limitations, together with the position taken by the Hungarian Constitutional Court, are incomplete, and therefore unjust. The legitimate social expectations for justice, supported - as it was shown in Chapter Four - by the conceptual possibility of collective agenthood, strongly suggests that the responsibility for the violent repression of the democratic movement in Hungary would not be assigned only to a handful of officials and their subordinates. It is worth mentioning here that the initiators of the statute of limitations law - despite the “political reasons” on which the law was initially argued for -

failed to acknowledge an otherwise strongly suggested dimension of responsibility that could have occupied the middle ground between the individually fashioned criminal responsibility, and no responsibility at all.

This alternative responsibility of collective agents is necessary not only when dealing with specific human rights violations in a repressive regime, but also when addressing the ethos of lawlessness which encouraged and systematically left unpunished many crimes and injustices. The German debate on the responsibility for the border crimes appears more promising in this sense, offering an enhanced understanding of causation in law. On the other side of the political justice spectrum, the Czech screening process resembles, as far as one can identify the justification for such a law, a process in which partially valid measures are taken for the wrong - or at least ambiguous - reasons. In this sense, a certain degree of collective accountability, as suggested both through the Lustration Law and through the Act on the Illegality of the Communist Regime, is poorly supported by the need for protection against sabotage, blackmail and political scandals. In the same tradition of ambiguity as the Lustration Law, the Czech Act on the Illegality of the Communist Regime, stirred up a constitutional debate in which a constitutionally acknowledged illegality and collective responsibility of the Communist regime has been denied any practical legal implications.

In spite of the predominantly individual approach to political responsibility for the human rights violations of a political regime, several dimensions of collective responsibility have been positively identified in the debate on screening, and indirectly in the debate on

criminal responsibility. Following the debate on collective responsibility from the previous chapter, these aspects can now be assessed. The implied “guilt by association” of the collaborators and agents of the Secret Police pointed, of course, to a relatively easily identifiable group. This group appeared as guilty of not always clear and easily identifiable crimes, the violation of the right to privacy being the most evident one. Nevertheless, the entire discussion which took place in all the post-Communist Eastern European countries around the issues of collaboration and Secret Police activities and files shows us that without a coherent internal decision structure the collaborators and Secret Police agents could hardly fit in the model of collective agency outlined in Chapter Four.

Supposing even that one could construct all the acts of collaborators as the actions of the “body of collaborators,” it would still be very difficult to find a reason for action which could be attributed to the collective body, and not to the individual members. This difficulty does not reside in the fact that each individual collaborator might have had his, or her, personal reasons for collaborating - be this blackmail, pecuniary or professional interests, or ideological convictions. Reasons of this kind are present in all organisations which fulfill their goals through individual actions. Instead, the real difficulty comes from the impossibility to identify in the group of collaborators and agents, a decision structure coherent enough to generate its own reason for action, as well as the means for achieving it. All we have in the specific case of the Secret Police collaborators and agents is only a variety of discrete reasons for actions. This multitude of personal interests, and the difficulty in finding a structural element which would override them, leaves us with an

imperfect triangle of collective responsibility.

Another dimension of collective responsibility is considered to include those persons affiliated with certain levels of the Communist party apparatus. It is obvious that in a totalitarian society controlled by a unique party a decision structure in that party would not be lacking. Nevertheless, there is still the important question of correctly mapping the decision structure, or structures, which would best fit the parameters of a collective agent. The complexity of the exercise of totalitarianism determines that some structures of power are only apparent, or incomplete, or overstretched, and therefore represent empty structures.² Thus, it is important to analyse in more detail these structures, in order to identify the real *locus* of responsibility. Enumerating top Party positions - as the Czech Lustration Law did - should therefore be substituted, or at least backed, by the identification and conceptualisation of the decision structure to which they belonged. Firstly, this systematic approach will help emphasise the collective dimension of the responsibility imposed over the occupiers of certain positions in the structures of power. Secondly, to know the structure would help identify whether lists of positions such as the one offered by the Czech Lustration Law, or bodies such as the one identified in the German border trials, are incomplete, or over-inclusive.

The case studies analysed earlier have also shown that in the process of political justice the individual accountability used alone might bring an incomplete justice, and even a

²Carl J. Friedrich, "The Problem of Totalitarianism - An Introduction," in Totalitarianism, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1954), p. 4 ff.

certain degree of injustice. On the other hand, in the previous chapter it has been shown that collective bodies with strong enough decision structures could participate in the division of responsibility entailed by the process of legal justice. Therefore, it is now time to place the “residual responsibility” which cannot correctly be placed with the individual actor. It is time to ask and answer “the tantalising question”:³ Where should this residual responsibility go?

The attempts at re-instating justice analysed in Chapter Two and Chapter Three offered some elements to reflect upon. The Hungarian Constitutional Court, while rejecting the Zétényi-Takacs law amending the statute of limitations, stated that it was “the responsibility of the former regime” for not having prosecuted certain crimes. At the same time, the Czech legislator, confirmed by the Czech Constitutional Court, declared *the Communist regime*, and its active supporters, responsible for countless crimes rooted in political motives. Who is then, “the Communist regime,” and where could one find it? What are its elements, its structure, its goals? And, more importantly, could one identify in it a strong enough decision structure which could give coherence to the triangle of collective responsibility?

³See supra McAdams’s analysis of the German border guards trials, and the questions these trials might raise, Section 2.3.

5.2 A Hybrid: The State - Party Bureaucracy

When asking these questions of agency and responsibility, the government apparatus is bound to emerge as a first candidate to be scrutinised, as it is the one in control of the State policies. By examining this entity in terms of its structure and its ways of formation one can hope to find that structure of power which, following the pattern of a conglomerate organisation, can convey responsibility. In the governmental apparatus, as in any social institution, one can generally find the place of real power by tracing, along the channels of power, those positions which hold - in accordance with the “constitutional charter” of the organisation - the right of appointment and removal of different positions in the scheme. In this sense, the different positions and offices within the Communist government apparatus were categorised very precisely, according to where this power of appointment and removal for each position was residing.⁴

The particularities of the Communist systems of government in Eastern Europe were

⁴This formal aspect is common to all governmental agencies. The difference between totalitarian and democratic structures of power resides mainly in the fact that the democratic structures of power, unlike the totalitarian ones, are checked and supervised by other social agencies, such as the police, revenue control, religious organisations, NGOs, the mass media, etc. Podgorecki puts the essential differences between these types of experts in a more ideological formulation. According to him, (1) the totalitarian structures are used for entirely different goals, and (2) the Communist experts are regarded as politically loyal and appointed as such. Adam Podgorecki, “Polish Communist and Post-Communist *Nomenklaturas*,” in *Totalitarian and Post-Totalitarian Law*, eds. Adam Podgorecki and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), p. 334. Also, see *infra* Voslenkyi, note 92.

designed, and often copied, from the Soviet model.⁵ The lists of posts were generally divided into sections, with each section containing an established number of positions.⁶ The number of positions in each section was in its turn divided into categories according to the procedure through which the competence of appointment and removal was exercised, and according to the agency which held that competence. As a rule, this hierarchical system was directed and watched over by a secretary of the Central Committee (CC) of the party who was receiving his final orders from the Presidium of the CC.⁷

Inside the Soviet bloc there existed, with almost no variations, two types of government

⁵F. J. M. Feldbrugge, "The Status of Law Under Communist Party Rule," in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p.5.

⁶An example taken from the Soviet model contains fourteen such sections: I. Party Section; II. Propaganda and Education Section; III. Trade Union Section; IV. Health and Social Security Section; V. Soviet and Administrative Section; VI. Judicial-Punitive Section; VII. Industry and Production Section; VIII. Finance Section; IX. Cooperative Section; X. Credit Section; XI. Planning and Regulation Section; XII. Commerce Section; XIII. Land Section; XIV. Transport and Communication Section. Within each section there are sub-sections detailing the number of posts for each position, and the part of the Nomenklatura in which the position was included. The Judicial-Punitive Section at the province level for instance, contained ten positions: 1. Procurator of the Province; 2. Deputy Procurator; 3. Procurators of the Region; 4. President, Provincial Court; 5. Deputy Presidents; 6. Presidents, Regional Courts; 7. Plenipotentiary, OGPU (former name of the Soviet Secret Police during 1923-1934, later KGB) and Head, Special Department; 8. Deputy, OGPU and Head, Special Department; 9. Heads, Regional Department, OGPU; 10. Head, Provincial Administrative Department. The selection or appointment of these positions were decided by the Party Committee Bureau of the province. See "List of a Provincial Party Committee in the Soviet Union. In Effect in 1929," Documents reproduced in Dietrich A. Loeber, et al., eds., Ruling Communist parties and their status under law, Law in Eastern Europe series, no. 31 (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), pp. 509-512.

⁷T. H. Rigby and Bohdan Harasymiw, eds., Leadership Selection and Patron - Client Relations in the USSR and Yugoslavia (London: George Allen and Unwin, 1983), pp. 87-88. Lothar Schultz, "The Status of the Communist Party in the Czechoslovak Socialist Republic," in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p. 259. Abdurakhman Avtorkhanov, Stalin and the Soviet Communist Party: A Study in the Technology of Power (London: Atlantic Books for the Institute for the Study of the USSR, 1959), p. 55. M. Hirszowicz, The Bureaucratic Leviathan: A Study in the Sociology of Communism (New York: New York University Press, 1980), p. 17 ff.

positions lists. Firstly, there was the basic list which encompassed all the positions over which the Party held exclusive power of appointment or selection.⁸ Secondly, there was the list of positions of “registration and control.” This category included positions that could be filled by the government agencies themselves, but only following consultation and approval by the Communist party.⁹ Though apparently having different constitutional regimes, with respect to the agency detaining the power of selection, appointment and removal, between these two categories of lists of positions there was practically no difference. In either case the decision was practically residing within the Party. A formal distinction was generally made between the two categories of positions, under the terminology of “competence lists” and, “consultation lists” respectively.¹⁰ Yet, both lists included government positions of leadership and authority.

The competence lists were compiled by the Party leadership, or by the Party apparatus, usually under the direction of a Central Committee department. These were government positions over which, the top Party authority or the mid- and lower level Party

⁸G. Eyal and E. Townsley, “The Social Composition of the Communist Nomenklatura: A Comparison of Russia, Poland, and Hungary,” Theory and Society 24, no. 5 (October 1995): 723-750. Podgorecki, “Polish *Nomenklaturas*,” p. 336. John P. Burns, “Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura,” China Quarterly 138 (June 1994): 488. Hirszowicz, The Bureaucratic Leviathan, p. 24.

⁹Rigby and Harasymiw, p. 94. Eyal and Townsley, p. 729. Alongside these two categories of lists there was also usually a “reserve list” which included candidates for various positions in the first two categories. Rudolf H. W. Theen, “Party and Bureaucracy,” in Public Policy and Administration in the Soviet Union, ed. Gordon B. Smith (New York: Praeger; Washington: American Society for Public Administration, 1980), p. 42.

¹⁰Bohdan Harasymiw, Political Elite Recruitment in the Soviet Union (London: Macmillan, 1984), pp. 167-168. Georg Brunner, “The Legal Status of the Hungarian Socialist Workers’ Party,” in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p. 282.

Committees retained “only” *approval power*. Though in practice the difference wasn’t of any importance, sometimes this approval power was transformed into a straight forward decision power. Therefore, the Party was making a personnel decision of its own initiative.¹¹ Generally speaking though, there was no need for such actions, since the government agencies were hardly taking any decision without first “taking the pulse” of the Party with which it was so entangled.¹²

In the compilation of the consultation lists, the government agencies were supposed to display more autonomy. However, this was only apparently the case. After being compiled by each particular government agency, the list had to be approved by the corresponding Party Committee responsible for “guiding” that agency.¹³ In the case of the consultation lists this approval generally took place at the level of the primary Party organisation, and not at the higher Party committee, but this was the only practical distinction between the two types of lists. Even in those cases in which the primary organisation of the Party had the right only to “listen in” on the process of compilation of the consultation lists, the decision allegedly residing within the government agency itself, the distinction between the approval and consultation was very much blurred. In reality, the right to listen in was often converted into an *informal practice* of personnel decisions taken by the Party organisation itself.

¹¹Harasymiw, Political Elite Recruitment, p. 68.

¹²D. N. Nelson, “Charisma, Control, and Coercion: The Dilemma of Communist Leadership,” Comparative Politics 17, no. 1 (October 1984): 2.

¹³Nelson, “The Dilemma of Communist Leadership,” p. 4. John P. Burns, ed., The Chinese Communist Party’s *Nomenklatura* System: A Documentary Study of Party Control of Leadership Selection, 1979-1984 (London: M.E. Sharpe, Inc., 1989), p. xv.

This informal practice was basically a consequence of a total lack of “constitutional self-confidence” of the governmental agencies. The lack of autonomy of the state apparatus was very much due to its structure. This structure appeared undermined by the not always perfectly constitutional interferences by the Communist party. Though the practices of the Party were most often based upon informal rules, in certain Communist systems, such as Hungary, this practice was actually institutionalised. The right to listen in was converted into a right to veto the eventually unwise choice of a government agency. This gave the primary Party organisation the right to appeal against the government agency’s choice and take it to the next higher Party organ. In the meantime, while the dispute was solved at the higher Party level, the governmental agency was, from a practical point of view, unable to take any further step to pursue its decision regarding its own personnel. Thus, coming through practice or through statutory changes, these measures virtually eliminated the difference between the competence and the consultation lists, and between State controlled and Party controlled positions and offices.

Another relevant aspect in this respect, is to see how the power of selection and de-selection of officials was exercised relative to the modality of filling in the posts: through election or appointment. The central and local government included both elected and appointed officials. In the case of elected officials the candidates were usually recommended by the competent Party organ. Though it was *only* a “recommendation,” the will of the Party was normally binding.¹⁴ As to the appointments, they could be

¹⁴Teresa Pusylewitsch, “The Position of the Polish United Workers’ Party in the Legal System of the People’s Republic of Poland,” in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer

initiated yet again, by the competent Party authority. This initiation was done either as a formal practice or as an informal one. The informal practices were easily “institutionalised” through the stronghold the Party authorities had over the government agencies.¹⁵

The difficulty in separating the government structures from the ones of the unique political organisation in society, and the impossibility of pointing out those government agencies representing the “ultimate” power structure of the regime goes even further. Besides the decisive role played by the Party in the election or appointment of the government officials, even after the moment of appointment or election, State officials - and through them the entire State agencies - failed to increase their autonomy. The Party apparatus continued to exercise its “guiding role” even after the moment of nomination or confirmation.

The leading role of the Party was brought to bear upon the government officials first of all in a direct way, through the loyalty that each official owned as a Party member. This membership was not supposed to end once the appointment was made, for any of the government positions. In fact, it was the main source of accountability and obedience of the State officials towards the Party structures. The fact that all the positions of leadership and authority were under the control of the Communist party does not imply necessarily that all persons filling those positions were occupying important positions within the

Academic Publishers Group, 1986), pp. 323-324.

¹⁵For surviving practices in this sense see Burns, “Leadership Selection,” pp. 458-491.

Party, or even that they were Party members, though Party membership was generally the rule rather than the exception.¹⁶ Nevertheless, the expected obedience towards the Party was still received even in the case of a non-Party nomination. This was usually achieved through the mechanism of de-selection and dismissal.¹⁷ This mechanism usually included the same decision stations as the nomination procedures, with the Party having the last, or only word.

The dual role of the majority, if not all, of the government officials as Party members, and the informal practical position of subordination towards the Party in which even the non-Party members were placed once included in “the list,” put all of them either in a formal, or in a practical, situation of double subordination: towards the Party and towards the government.¹⁸ In fact, this subordination gave the Party a direct stronghold over the entire government structure. The creation of a “system of continual reporting” by the government officials placed in a position of double subordination, to the Party structures, had undoubtedly become the means of acquiring information and maintaining control by an organisation with a unique position in society. This power structure cannot be considered a stranger to any of the major or minor policies implemented in the society. Through the mechanism of double subordination the Communist bureaucracy acquired

¹⁶Nelson, “The Dilemma of Communist Leadership,” p. 3.

¹⁷Harasymiw, “Political Elite Recruitment,” pp. 70-71.

¹⁸Hirszowicz, The Bureaucratic Leviathan, p. 37 ff. Gordon B. Smith, “Guidance by the Communist Party of State Administrative Agencies in the USSR,” in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), pp. 179-180. M. Rybicki, “Le gouvernement et sa position dans le systeme politique de la Republique Populaire de Pologne (1970-1980),” Revue d’Etudes Comparatives Est-West 14, no. 4 (December 1983): 112-13.

the possibility to express and impose its point of view on practically any issue.¹⁹

This double subordination was extended even more through the application of a concept of “mutual representation” between Party and government apparatus. The result of the application of this concept was an extended overlap of personnel,²⁰ and an even greater institutional confusion.²¹ This organisational chemistry was presented by some of the Communist parties in Eastern Europe as an administrative and political innovation.²² In fact, there was nothing new, everything having been done before... in the USSR.²³

As we shall see later in more detail, the concept of mutual representation did not function in one direction only, with the Party members taking office in the administrative agencies.

¹⁹As a rule, the government functionaries tended to follow the Party “recommendations,” not least because any eventual conflict would be resolved on the next-higher Party level. Brunner, “Hungarian Socialist Workers’ Party,” pp. 283-287.

²⁰“Party guidance of Soviet state administration at all levels is facilitated by the multiple roles played by party and state officials. For instance, in 1980 79.3 percent of the Central Committee members, 63.9 percent of candidate members, all members of the Central Committee’s Secretariat, and 34.6 percent of the Central Auditing Commission were deputies of the USSR Supreme Soviet.” Ronald J. Hill and Peter Frank, *The Soviet Communist Party* (Boston; London: Allen & Unwin, 1986), p. 115. See also Smith on “interlocking directorates” of the Communist system. Smith, “Guidance by the Communist Party,” pp. 183-84.

²¹Avtorkhanov, *The Technology of Power*, p. 62. Brunner, “Hungarian Socialist Workers’ Party,” p. 273.

²²D. N. Nelson, “On Political Participation in Communist Systems,” *East European Quarterly* 14, no. 1 (Spring 1980): 110.

²³Eyal and Townsley, p. 728. “[All] the interlocking procedures are either precursors of, or correspond to, earlier or present constitutional forms in the USSR and other Eastern Bloc countries. This is particularly true for the principle of the rotation of specialist management . . . for the mixed party and state bodies . . . and also for the practice of appointing local party secretaries as heads of the corresponding administrative units.” Gunther H. Tontsch, “The Romanian Communist Party in the Romanian Legal System,” in *Ruling Communist Parties and Their Status Under Law*, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p. 253.

The movement in search of authority and power took place in the opposite direction as well. This was achieved in the same way in which Party members occupied leading positions in the government structures, that is to say by creating systematic parallel movements designed to integrate the leading government office-holders into corresponding Party organs.²⁴ The substantial overlap in party organs and state administrative bodies at all levels conveys the view of the Party and the State as a single unit.²⁵ The interlocking mechanism brought by the application of this concept had a very important outcome: it first created, and then shortened the channels for transforming Party acts of will into technically binding legal behaviour.²⁶

5.3 Beyond the List: The Communist *Nomenklatura*

From the elements outlined so far, it becomes clear that the Party influence over the government apparatus makes the identification of the latter with “the regime” problematic. Therefore, the question which arises next is whether “the regime” could be identified with the Communist party which appears to play all the leading parts. It would be difficult to concede a definite, unqualified answer to that question. The answer

²⁴A Council Chairman, who, as a Chairman of the Council Executive Committee, was the head of his governmental territorial entity, was usually a member of the Executive Committee of the Party Committee of the same hierarchical level. Burns, “Leadership Selection,” p. 463. Also, Brunner, “Hungarian Socialist Workers’ Party,” p. 283.

²⁵Mary McAuley, Politics and the Soviet Union (Harmondsworth : Penguin, 1977), p. 186.

²⁶Avtorkhanov, The Technology of Power, p. 23. Smith, “Guidance by the Communist Party.” Tontsch, p. 254.

depends upon what one understands by the Communist party in the specific constitutional arrangements of the Communist regime. Some argue, for instance, against the idea that the party was actually a party. As a unique political organisation, allegedly representing all the citizens, the Communist party could not be a “part” of anything else.²⁷ From this perspective, one would find it difficult to isolate the unique party from its environment. This difficulty comes from an “ideologized” definition of the Party as institution, a definition which incorporates under the same label everything the Party claimed to be standing for. This definition, however, ignores the reality of the totalitarian power.

On the other hand, down-sizing the Party from this enlarged ideologized definition to the sum of its enlisted members, presents almost the same difficulty as identifying the Secret Police collaborators and agents with the structures of power of the Communist regime. Both these latter categories lacked the necessary structures for ensuring their autonomy, and for generating basic beliefs and initiating actions in accordance with these beliefs. In fact, the “foot soldiers” of any Communist party in the Soviet bloc appear to be just as underprivileged and deprived of real power as the non-party members.²⁸ Therefore, the power structure one should look for cannot be identified with the Communist party when understood in this sense. Nevertheless, it has become clear so far that the structure of power we should be looking for includes centres of power from the Party as well as from

²⁷Dietrich A. Loeber, et al., eds., Ruling Communist Parties and Their Status Under Law, in Law in Eastern Europe series, no. 31 (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p. xvii-xx. Adam Podgorecki, “Totalitarian Law: Basic Concepts and Issues,” in Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), p. 13 ff.

²⁸D. Barry, George Ginsburgs, and Peter B. Maggs, eds., Soviet Law After Stalin: The Citizen and the State in Contemporary Soviet Law, Law in Eastern Europe Series, no. 20 (Leyden: Sijthoff, 1977).

the State apparatus.²⁹

This special political entanglement and constitutional confusion of the state with a unique political organisation represents the starting point in the identification of the real structure of power of the Communist regimes in Eastern Europe. This is only the starting point though. It is still necessary to establish sufficient elements which will prove this structure of power as an eligible agent for legal responsibility. In 1966, Abdurakhman Avtorkhanov defined this hybrid constitutional arrangement by the term *partocracy*.³⁰ According to his definition, partocracy is a system of absolute political, economic and ideological power, the “rule of a *party within the party*” (emphasis mine) under which legislative, judicial controlling and distributive proprietary functions are merged together and are concentrated in the central apparatus of the Party.

As for the ruling and distributive organs, according to Avtorkhanov they are “dualistic:” the ruling organs are located in the hierarchy of the party apparatus, while the executive ones - in the hierarchy of the state apparatus. However, this does not mean - as it was shown above in the analysis of the structures of power of the Communist state apparatus - that the administrative functions were any less subordinated to the Party control. Avtorkhanov sees the partocracy also as an absolute dictatorship with a narrow, oligarchic leadership on top and a closed, vertically hierarchical party apparatus. The

²⁹Hirszowicz, The Bureaucratic Leviathan, p. 159.

³⁰Abdurakhman Avtorkhanov, The Communist Party Apparatus (Chicago: University of Chicago Press, 1966), p. 39.

foundation of this pyramid of power is constituted by a multi-million base of “party spongers”³¹ who do not participate in the exercise of power. The very important aspect here is that Avtorkhanov finds the partocracy, as a political system, a unique phenomenon not only in its class organisation, but also in “the depth and width of its influence and control over the whole population and each individual.” It is the implications of this all-embracing control of the “party within the party” that interests us.

When analysing the power structures of this institutional party-state hybrid in the Communist Eastern Europe, the political scientist is bound to come across the term *Nomenklatura*. Common dictionaries and encyclopaedias do not present any such entry in their texts. Nevertheless, dictionaries show that there is a botanical nomenclature, as well as a chemical one, and that the word itself denominates “a system of naming things.”³² One would thus expect the word *nomenklatura*, which is - not surprisingly - of Russian origin, to refer to flowers and mushrooms, moss and conifers. And it might very well have been so. For the people living in the Communist Eastern Europe though, the word acquired a new meaning. It came to signify the Communist political bureaucracy which was filling both party and state positions linked to each other by an entangled web of power relations.

³¹Avtorkhanov, *Communist Party Apparatus*, p. 42.

³²*Longman: Dictionary of Contemporary English*, s.v. “nomenclature” (The Bath Press, Avon, 1987).

The basis of the formation of the *Nomenklatura* was laid by Lenin.³³ It represented a new privileged layer in the party and the state apparatus. Its gradual expansion and isolation from society, and from the Communist party itself, finally resulted in the establishment in Russia first, and then in all the countries from the Communist block, of a state system referred to by analysts as *partocracy*.³⁴ “Inside the house” though, this power system was referred to as “*Nomenklatura*.”³⁵ Thus, the *Nomenklatura* is first of all a political concept. Similarly to the nomenclature in other domains of life, the *Nomenklatura* designates a list, not of plants or chemical elements but of positions arranged in order of seniority, and including a description of the duties of each office. Its political importance comes from the fact that the Communist *Nomenklatura*, and it alone, contained the most important leading positions in all the organised activities of social life, in both party and state apparatus.³⁶

Starting from this aspect of political and constitutional organisation, one faces the challenge of reconstructing the *Nomenklatura* not only as a list of political and

³³Vladimir Ilici Lenin, The Re-Organisation of the Party. Party Organisation and Party Literature (London, 1971).

³⁴Michael Voslensky, “Nomenklatura: Anatomy of the Soviet Ruling Class” (London: The Bodley Head Ltd., 1984), p. 56.

³⁵Alexander Korchak, Contemporary Totalitarianism: A Systems Approach, East European Monographs (Boulder. New York: Columbia University Press, 1994), p. 39.

³⁶Bohdan Harasymiw, “Nomenklatura: The Soviet Communist Party’s Leadership Recruitment System,” Canadian Journal of Political Science 2, no. 4 (December 1969): 494. Also, Rigby and Harasymiw, p. 87. Takayuki Ito, “Controversy over Nomenklatura in Poland: Twilight of a Monopolistic Instrument for Social Control,” in Acta Slavonica Iaponica 1 (1983): 57-103. Thomas Lowit, “Y a-t’il des etats en Europe de l’Est?” Revue Francaise de Sociology 20 (1979): 431-66. Harasymiw, Political Elite Recruitment, pp. 163-5. Albert L. Weeks, ed., The Soviet Nomenklatura: A Comprehensive Roster of Soviet Civilian and Military Officials (Washington D.C.: Washington Institute Press, 1987), p. 6.

government positions, but as a coherent organisation. As such, the *Nomenklatura* had a powerful decision structure and specific goals. At first glance, these features should propose the *Nomenklatura* as an organisation capable of sharing *in law* the responsibility for the violations of the basic rights of the citizens in Eastern Europe. Therefore, one has to establish whether the *Nomenklatura* represents the organisational manifestation of the Communist regime in an entity coherent and monolithic enough to be legally assessed in a process of political justice.

The *Nomenklatura* system was used, in approximately the same format, by all Communist governments in Eastern Europe, and it is still functioning in countries such as China.³⁷ It is interesting to note that one of the most comprehensive pre-1989 monographic approaches to the issues of the relationship between the Eastern European Communist parties and their states, classifies these relationships in two categories: "the Soviet model," and "imitations and variations of the Soviet model."³⁸ The complex hierarchy of ranks was used by the Communist parties as a major instrument of control. This was true not only of political life, but also of economic, social and cultural institutions.

Through these lists of offices and positions the party ensured that the different institutions would not deviate from its imposed line, and that they would exercise only the autonomy

³⁷Burns, "The Chinese *Nomenklatura* System," p. 69.

³⁸Loeber, et al., Ruling Communist Parties, p. v-vi.

granted to them by the party.³⁹ Having total control over the appointment, dismissal or replacement of any person in a key position, the autonomy of any of the local or national institutions was an ad-hoc one, ready to be withdrawn at the slightest sign of non-conformity with the party line.⁴⁰ The job title lists representing the *Nomenklatura* show the party control as much wider than generally imagined.⁴¹ The decision structures of ‘the regime’ we were looking for emerged from all these power stations in society. This structure was formed mainly by parasitising (and finally suffocating) all the State structures with Party default functions, and by entangling the State and Party apparatus into almost complete confusion.

Despite the general Party control, commencing the *Nomenklatura*’s reconstruction from a list of positions, is bound to be problematic, especially when the aim is to demonstrate the *Nomenklatura*’s quality as an autonomous social agent. On the one hand there is the

³⁹Referring to the structure of power in the Communist regimes, Nelson writes that “local power accretion is not likely to go unrecognised in Communist states for Leninist parties are certain to guard against challenges to ‘democratic centralism’. One can, therefore, expect such regimes to use every available means to impose national or federal supremacy.” Nelson, “Political Participation,” p. 33. Also, “there are consistent efforts to rotate (reassign) cadres to avoid local identification, to disrupt localism with territorial-administrative ‘reforms,’ to allocate resources selectively to mitigate unrest, and to avoid participatory involvement for any but the most trusted segments of society.” Nelson, “Political Participation,” p. 159.

⁴⁰It is significant that Mikhail Gorbachev, trying to create the conditions for some basic economic reforms, sought in October 1988 to bring some structural changes at the highest levels of the Soviet *Nomenklatura*, changes which were bound to weaken its total control. Anders Aslund, Gorbachev’s Struggle for Economic Reforms: The Soviet Reform Process, 1985-1988 (London: Pinter, 1989), p. 37 ff. Also, Bohdan Harasymiw, “Political Patronage and Perestroika - Changes in Communist Party Leadership in Ukraine under Gorbachev and Shcherbytsky,” in Echoes of Glasnost in Soviet Ukraine, ed. Romana M. Bahry (North York, Ontario: Captus University Publications, 1990), pp. 28-39.

⁴¹Besides the lists of high and low profile positions, the party was also keeping a tight control over the personnel files of renowned scientists, artists, writers and athletes, though they did not belong to the *Nomenklatura*. See Burns, The Chinese Nomenklatura System, p. xi. Nelson, “Political Participation,” p. 56. Hirszowicz, The Bureaucratic Leviathan. Smith, “Guidance by the Communist Party.”

problem of referring the question of responsibility back to the Party itself, that is back to the sum of the Party members. This would be counterproductive and especially inaccurate, given the Party-State entanglement. On the other hand, there is also the risk of placing an important part of responsibility in an empty list of office schemes, a list which was the expression of this party-state hybridisation. This, again would be far from the ideal solution since we are looking for the solid structure of a social actor and not for a list of positions, even when these positions share between themselves all, or almost all, the real political power existing in a society.

It becomes therefore necessary to go beyond the understanding of the *Nomenklatura* as a mere list of positions on an office scheme. In this process we are bound to face at least one major difficulty though: the a-constitutional nature of the *Nomenklatura*'s identity. In other words, one is facing the informality of the *Nomenklatura*'s institutional existence. This informality makes very difficult the *Nomenklatura*'s presentation as a classical example of a conglomerate organisation, and therefore as a coherent collective agent.

According to numerous studies, this Party, or rather following Avtorkhanov's definition, the "party within the party" enjoyed a status within the legal system which was not comparable to any other formal institution within or outside the Communist bloc. The Party always operated as a *regnum inter regnum*, with a *sui generis* status within the

legal system.⁴² Surprisingly, many of the Communist constitutions hardly specified a constitutional role for the Party, stating only its vaguely defined “guiding” role with respect to the government agencies.⁴³ This allows the Party organs to be, in many cases, outside or above the law.⁴⁴ Very often, the Party’s acts of will fell within “constitutional gaps,” where the Party then created informal institutional structures. A good example of this is the expanding powers of nomination and consultation of the Party, which were mentioned earlier. As it could be expected, in the exercise of an unchecked political power, these informal structures go, sooner or later, from being a-constitutional, to unconstitutional.⁴⁵

To give only one example of such a stretch of constitutional authority, it could be mentioned that many actions by Party organisations which directly affected the legal process, and as such could be construed as influencing legal relationships, were not regulated by the norms of the Constitution, or in fact by rules of any other branch of law.⁴⁶ Referring to the Soviet Communist party, Christopher Osakwe writes, for example,

⁴²See in William B. Simons, and Stephen White, eds., The Party Statutes of the Communist World, Law in Eastern Europe Series, no. 27 (Dordrecht, Boston MA: Martinus Nijhoff Publishers, 1984).

⁴³Ibid.

⁴⁴F. J. M. Feldbrugge, ed., The Distinctiveness of Soviet Law, Law in Eastern Europe Series, no. 34 (Dordrecht; Boston MA: Martinus Nijhoff Publishers, 1988), pp. 5-6.

⁴⁵The Communist bureaucracy brought in this way entire societies under discretionary political ruling and outside the shield of law. Daniel N. Nelson, Elite - Mass Relations in Communist Systems (London: Macmillan, 1988), pp. 78. Also, Hannah Arendt, The Origins of Totalitarianism (Cleveland: Meridian, 1958), pp. 46-465. Vaclav Havel and John Keane, eds., The Power of the Powerless: Citizens Against the State in Central-Eastern Europe (London: Hutchinson, 1985), p. 52. Daniel Lefort, Un homme en trop: Réflexions sur “l’Archipel du Goulag” (Paris: Éditions du Seuil, 1986), p. 25.

⁴⁶Avtorkhanov, 1959, p. 68.

that when Party groups met to nominate persons for appointive offices within the state system under the *Nomenklatura* system they (the Party groups) were acting outside the law. When Party groups in effect vetoed the dismissal of a *Nomenklatura* appointee within the state system the Party groups were acting above the law. Each time Party caucuses manipulated legitimate governmental processes from behind the scene (for example, when the Politburo of the Central Committee of the Party met in advance of the Supreme Soviet of the USSR to make decisions on legislative bills which would later be presented to the parliament for its *ex post facto* ratification) the Party groups were acting both outside as well as above the law “because such Party activities [converted] the legislative process into a sham.”⁴⁷

In another example, this time taken from an analysis of the Polish Communist realities, we find out that the guiding role of the Polish United Workers’ Party (PUWP) with respect to Government had been interpreted very broadly and that this relationship has never been closely defined insofar as institutional forms and methods of its realisation were concerned.⁴⁸ This institutional ambiguity facilitated the growing role of the Party, with the *Nomenklatura* becoming a kind of “super-government.”⁴⁹ The lack of rules in this respect led to a situation in which legal and constitutional relationships were shaped

⁴⁷Christopher Osakwe, “The Status of the CPSU Under Soviet Civil Law and of its Members Under Soviet Criminal Law and Procedure,” in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), p. 150. Pusylewitsch, p. 319. Feldbrugge, “Status of Law,” p. 14. Friedrich, p. 7.

⁴⁸Pusylewitsch, p. 322.

⁴⁹Korchak, p. 70. Hirszowicz, The Bureaucratic Leviathan, p. 173-174. Friedrich, p. 5.

over the course of many years by arbitrariness and an ever-increasing control and even omnipotence exercised by the party factor.⁵⁰

That the power structure to which one could assign responsibility is called “Party groups,” or “party within party,” or indeed “*Nomenklatura*,” is of less importance. What becomes evident is the fact that the differentiated decision structure we were searching for would function at the state level, but at the same time outside the state, outside the constitutional framework of a state. Therefore, the actions of the *Nomenklatura* as a party-state hybrid appear more as a matter of practices, introduced through different mechanisms, (political more than legal), rather than as a matter of constitutional arrangements. This state of affairs, together with the fact that the Party has always avoided becoming a legal *persona* (a fact which could have entailed legal accountability for its actions) determines that from a legal institutional perspective the *Nomenklatura* be declared a non-existent organisation.

5.4 The *Nomenklatura*’s Sources of Collective Identity

The semi-vicarious exercise of power by the *Nomenklatura*, although practically all-encompassing, served as a justification for the latter to decline to carry both political and legal responsibility. The negligible formal detachment of the Party from the

⁵⁰John Lövenhardt, “*Nomenklatura* and the Soviet Constitution,” Review of Socialist Law 10 (1984): 35-55. Rybicki, p. 109-110.

administrative matters of the government was always used by the Party as its alibi.⁵¹ This alibi offered the Party an easy defence against any accusation of having taken wrong decisions, or of having given wrong orders. In time though, the Party's need for total control over all the state mechanisms - in the absence of other less intrusive tools of legitimization - proved to be stronger than its need for this out of date alibi of an alleged institutional separation of party and state power structures.⁵² Nevertheless, the Party never gave up the pretence of being beyond all the administrative, economic, social chaos it created. In practice, this "beyond" meant not only beyond the state, but beyond the law as well.

Undoubtedly a proof of this position with respect to the law is the fact that, over half a century or more of Communist history, the Party has never acquired, in any country of the Soviet bloc, the quality of a fully-fledged legal person.⁵³ Of course, all kinds of legal artifices have been used in order for the Party to be able to enter all sorts of normal civil law relationships in which any institution is bound to enter in the real world. Nevertheless, the Party did not go as far as to allow, at any point and in any country, to be sued as an organisation, either on civil or on criminal grounds.⁵⁴ This "irrelevance" in law of the Party, together with the informality of the *Nomenklatura*'s institutional existence, challenge the attempt of presenting the Communist bureaucracy as a

⁵¹Smith, "Guidance by the Communist Party," p.183-184. Pusylewitsch, p. 327.

⁵²Tontsch, p. 253.

⁵³Barry, Ginsburgs, and Maggs, p. VIII.

⁵⁴Hirszowicz, The Bureaucratic Leviathan, p. 146. Barry, Ginsburgs, and Maggs, p. ix.

conglomerate organisation. Therefore, it appears that acknowledging the *Nomenklatura* as a true self-reproducing institution requires a look into all elements which could shape its identity. It is not only the formal constitutional elements that need to be looked at.

Generally speaking, in the case of self-organised bodies, the documents of the organisation should spell out the essential elements about the way in which the power can be exercised in that specific area. The internal decision structure of the *Nomenklatura* though, cannot be analysed only by looking into its documents of organisation and making abstraction of its specificity as a collective body.⁵⁵ The difficulty with the analysis of the decision structures of the Communist *Nomenklatura* comes from the fact that this structure details the way in which the *Nomenklatura* detains the monopoly of power in the realm of power, therefore in a domain in which the *Nomenklatura* is both the player and the ruler of the game. It is important to retain this point in mind both when inquiring into the way the *Nomenklatura* delimitates itself from its environment, and when establishing which should be the internalised limitations of this power, and the standards against which its responsibility is to be measured.

The reality of the *Nomenklatura* - as the Marxist manifestation of a socio-political phenomenon and not as a mere “list of positions on an office scheme” - has been documented and researched almost from its emergence. It is only its legal status that

⁵⁵In practice, formal and informal elements can be intertwined. Stuart Henry analysed in this sense the formal and informal structures of justice in the working place. However, generally in the working place the informal structures do not take over the formal structures, but complement them. The same cannot be said about the Communist *Nomenklatura* system. See Henry, *supra* note 13, in Chapter Four.

needs more clarification. Given the informality of the *Nomenklatura* as a structure of power, this legal status is inevitably based more upon a sociological analysis of this political entity than upon legal constitutional provisions.

The attempt to prove the sociological existence of an organised oppressive entity in a society allegedly built following the Marxist model, that is to say in a classless society, was approached by Donald C. Hodges from a rather unexpected perspective: the Marxist theory. In a way, it is possible to say that his explanation was based on a somewhat inner perspective, Marxism being the theoretical basis of the so-called post-capitalist, or Communist, ideologies. Applying to Communist societies the concepts used by the Marxist political economy in analysing capitalism allowed Hodges first of all to acknowledge and then to attempt an explanation of the social conflicts in this society.⁵⁶ Expanding the Marxist theory, Hodges' explanation was based on the identification of a new factor of production which he called *organisation*.

This identification proves rather valuable for our re-construction of the *Nomenklatura*. The implication of the expanded Marxist theory was the logical imposition of the idea of emergence, "from the rabble of capitalism," of a class defined by *the ownership of expertise*. This expertise was to be derived from the direct contact with the domain of management and leadership. Spelling out Marxism to its full implications, Hodges concluded that this class was bound to become the source of the social conflict and

⁵⁶Hodges adopted this unusual perspective because, according to him, it was the only way in which the conflicts of the post-capitalist society could be explained. Donald C. Hodges, The Bureaucratisation of Socialism (Amherst, Mass.: University of Massachusetts Press, 1981), p. 17 ff.

oppression within the post-capitalist world.

Should one then speak about making a social class accountable? One cannot deny that similar such conclusions were offered as justification for the “classcid” committed by practically all Communist governments in the Soviet bloc.⁵⁷ However, accountability for class action is not what we are looking for. Without denying the *Nomenklatura*’s importance, some authors disagreed with presenting it as a social class. The disagreement wasn’t always sparked by the intention to deny the *Nomenklatura*’s dominance in society. The *Nomenklatura* was less, and at the same time more than a social class.

In another definition for instance, the *Nomenklatura* was defined as “the ruling bureaucratic *estate*,”⁵⁸ suggesting precisely the fact that the Communist bureaucracy was not a class. The suggestion was made based especially on the fact that the *Nomenklatura* ruled over a social formation that had not yet attained the status of a class society. Even more important than these sociological distinctions, however, is the fact that, through the term “estate” the definition captures the *Nomenklatura*’s isolation from a “disorganised and ineffectual civil society” in which the *Nomenklatura* existed *as an organisation*.⁵⁹ Given the need for constructing the *Nomenklatura* as legal entity from sources beyond the constitutional framework, acknowledging this gap between the bureaucratic elite and

⁵⁷Orascu, Serban “[On Communism and Its Victims]” *Revista 22*, Bucharest, 23-29 September 1997, p.1.

⁵⁸Konrad, George and Ivan Szelenyi, *The Intellectuals on the Road to Class Power* (Brighton: Harvester Press, 1979), pp. 184-219.

⁵⁹Eyal and Townsley, p. 726.

the rest of society is important for the full understanding of the *Nomenklatura* as a structure of power.

The analysis of the complex stratification of ranks, status and prestige of an organisation has to be accompanied by an inspection of the organisation as a self-reproducing institution, by an analysis of its relationship with its environment, and of their view of each other and of themselves.⁶⁰ In this sense, an important source for understanding the *Nomenklatura*'s identity is the relationship between this informal organisation and the outside world. Speaking about the mechanism through which collective action can be ascribed to an unorganised group Sartre, for instance, underlines the importance of the way in which the group is acknowledged by the outside world.⁶¹ The group can come to have an identity through the way the collection of people is treated by other groups in a given society.⁶² Of course, this identity is not enough to confer on a group the quality of legal agent. Nevertheless, it is an significant aspect.

The fact that the *Nomenklatura* as a political organism would go beyond this informal identity, acquiring - through the law or through other normative structures - a formal status, does not mean that the social dimension ceases to play an important role in its institutional definition. An example in this sense would be the blending of the formal

⁶⁰Doak A. Barnett, "Social Stratification and Aspects of Personnel Management in the Chinese Communist Bureaucracy," *China Quarterly* 28 (October-December 1966), pp. 8-39.

⁶¹Jean-Paul Sartre, *Critique of Dialectical Reason* (London: Verso, 1982), p. 353 ff.

⁶²Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Indiana: University of Notre Dame Press, 1987), p. 35.

legal identity of an agent with its informal “sociological” identity as illustrated by the use in courts of the concept of *apparent authority*.⁶³ The recognition of this concept plays an important role for instance, in ascribing responsibility to professional associations which, though without being formally invested with authority in their domain, enjoy and make use of an informal authority. This authority is not created through the constitutive acts of the agent, and is not matched by a formal mechanism of accountability.

The concept of apparent authority - which in the specific case of the *Nomenklatura* could be seen as “practical authority” backed up by the threat of force - is an important aspect for distinguishing between the responsibility of individual persons and the one of conglomerate collectivities such as the *Nomenklatura*. The pressure under which members of an organisation commit crimes or injustices often comes from the informal authority of the organisation. It is therefore, important to acknowledge both dimensions of power: on the one hand the formal power which was defined by law and, on the other hand the practical power, which was derived from the special position occupied by a specific political body in society.⁶⁴

The environment though is not the only element which contributes to shaping the image of a certain ambiguous and formally undefined organisation. The identity of a political

⁶³Larry May broadly defines the concept of “apparent authority” as referring to an authority that has not been earned through the normal process of explicit assent on the part of the individuals who compose a given group. May, *The Morality of Groups*, p. 48 ff.

⁶⁴Charles E. Lindblom, *Politics and Markets: The World’s Political-Economic Systems* (New York: Basic Books, 1977), p. 197.

agency is also tailored by the image the formal organisation creates of itself. This does not necessarily mean that each member of the *Nomenklatura* had to have a self-declared awareness that he or she belonged organically to a formal organisation called “*Nomenklatura*.” Though this aspect can be important from the sociological point of view and, to some extent, even from the legal one, it is not this individual perception that constitutes the internal source of collective identity. The more important aspect is the way in which the collective agent perceives itself and defines itself in relation to *the Other*, in relation to everything which is not itself: the outside world.

The self-consciousness with which the *Nomenklatura* perceived itself can be illustrated with many practical examples. In this sense, the Hungarian debate on the statute of limitations offers a relevant aspect. As it was shown at the time, the justification for the Zétényi-Takacs law was based exactly on elements of the *Nomenklatura*’s self-perception. The segregation of the Hungarian Communist *Nomenklatura* from “the Other” - which in this case meant from the rest of the society - was mirrored by the Party directives instructing all public prosecutors to seek the Party’s permission prior to any criminal investigation or prosecution of any member of its *Nomenklatura*.⁶⁵ A similar example of organisational segregation can be identified in the Czech argumentation of the Lustration Law.⁶⁶ In this sense the Czech Constitutional Court referred to the State

⁶⁵See supra Podgorecki, and also Pataki, in Chapter Two, note 28, and discussion.

⁶⁶Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, no. Pl. US 1/92 (26 November 1992).

Security directives⁶⁷ (issued only days after the beginning of the “Velvet Revolution”) aiming to preserve to a maximum extent the mutually integrated Party-state apparatus in order to influence the democratic development and eventually to overthrow it. In both these cases, the Communist partocracy - using its privileged position within the social complex - placed itself against the society, and placed its members outside the reach of law by conceiving itself as an entity above society and above the law itself.⁶⁸

5.5 The Conglomerate Identity: The *Knots* and Bolts of Real Power

The fact that the *Nomenklatura* had very few external limitations in its way of exercising power brings a third contributive source as to its identity into the discussion. This element refers not to the perception of itself or of the environment, but to the structural reality of the *Nomenklatura* as political agent, and to the implications this structure might have over its own existence and its legal *persona*. Analysing the political entity from this

⁶⁷See supra Chapter Three, note 127 and discussion. Also, Directive No. CB-002040/03-89 (November 28, 1989) quoted in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 349.

⁶⁸It is not necessary to embrace a specific ideology in order to share this opinion. The relationship between the political bureaucracy and the law follows, to some extent, the same pattern proposed by some theories on corporate responsibility: the system (corporate or political) conforms to signals from the environment (e.g. the law) only to the extent to which the answer can be accommodated within the internal, pre-established set of organisational goals: profit making, in the case of a corporate business, or power preservation, in the case of a political agent. Otherwise, the system tends to expand its dominance as far as its internal limitations (its specific set of goals) and external ones (temporal, geographical, legal, of resources, etc. - depending upon the nature of the system) allow for it. An important aspect here though, is the fact that a totalitarian political bureaucracy - unlike an economic one for instance, has very few such limitations to take into consideration. See Dietrich A. Loeber, “Legal Rules ‘For Internal Use Only,’” International and Comparative Law Quarterly 19 (1970), p. 70.

structural perspective Höffe defined it as *a union of persons* with elements of cooperation and conflict.⁶⁹ The members of this type of union generally belong to several generations, its social network is a *community of generations* and its internal structure is the one of a *social institution*. A political entity appears to be a “second order” social institution,⁷⁰ a kind of umbrella institution which encompasses and transcends other formal organisations. This could be another way of explaining the informality of a political organisation such as the *Nomenklatura*: its identity was largely occulted by the more clearly defined formality of the incorporated institutions.⁷¹ Having taken over all the structures of the society, the a-constitutional nature of the Communist bureaucracy still prompts one to wonder whether the *Nomenklatura* had a strong enough conglomerate structure for part of the responsibility for the violations of basic rights to be attributed to it.

Höffe’s definition is to a large extent echoing the distinction between aggregate and conglomerate collectivities identified in the previous chapter.⁷² Having underlined its complex sources of identity, the complex power structure which existed in Eastern Europe under the name of *Nomenklatura* has now to be measured against the parameters

⁶⁹Otfried Höffe, Political Justice: Foundations for a Critical Philosophy of Law and the State (Cambridge: Polity Press, 1995), p. 35.

⁷⁰Höffe, p. 38.

⁷¹As we have seen when discussing the a-constitutional character of the *Nomenklatura*, the Party played upon this ambiguity, avoiding a clear legal standing of its own and in this way avoiding also political accountability for policies it has imposed.

⁷²For the distinction between aggregate and conglomerate collectivities, see *supra* the discussion in Section 4.3.3.

that define a conglomerate collectivity.⁷³

From Peter French's theory on collective agency analysed in Chapter Four, we remember that a conglomerate organisation was one which was construed on the basis of an organisational charter, and on its procedural as well as substantive internal recognition rules. It has already been shown how, given the nature of the *Nomenklatura*, the place of its organisational charter is substituted by a set of complex factors. From a sociological, though not a constitutional, point of view these factors come to supplement the lack of formal (legal) basis of the Communist bureaucratic organs.

The difficulty in analysing the *Nomenklatura* as a political phenomenon which emerged from a unique and relatively static set of documents derives also from the fact that the *Nomenklatura* was the result of a historical evolution. During this evolution it underwent periodical spouts of redefinition and restructuring, reinforcing continuously its strong power position over society. This evolution was also to a large extent informal, a matter of entrenched practices more than of constitutional development.⁷⁴ Thus, through the organisational charter one should understand a complex of both constitutional but mostly

⁷³French, *Collective and Corporate Responsibility*, pp. 5-13. Also, May, *Morality of Groups*, pp. 21-24.

⁷⁴Of course, in the case of *Nomenklatura* another aspect is that in this case one is dealing with a political and social phenomena which was present in all the countries of the Soviet bloc, each one - though essentially the same - with its own evolution. The lack of systematic complementary data on each of the domestic embodiments of the Communist *Nomenklatura* influenced the choice rather for an impressionistic account than for a statistical one. The Soviet *Nomenklatura* will often be referred to, as the one which has, not only for chronological reasons, the prototype the other socialist countries have endeavoured to duplicate. Maria Hirtzowicz, *Coercion and Control in Communist Society: The Visible Hand of Bureaucracy* (Brighton: Wheatsheaf, 1986), p. 79. Friedrich, pp. 3-14.

non-constitutional acts of power which constituted the mile-stones of the Communist bureaucratisation process. As we have seen, these acts were complemented by other sources of institutional identity. These are sources which play a role in the definition of almost any organisation, although maybe not to such an extent as in the case of the Communist bureaucracy.

Related to the same practice-based, informal, nature of the *Nomenklatura*, there are also difficulties in identifying the rules of recognition, that is in mapping those rules which are to be followed in order for the decisions to be considered as belonging to the collective agent. Elements of ideology and policy, more than statutory rules come into play. Ideology offered the *Nomenklatura* an important set of procedural criteria which guided all selection and promotion within its ranks. The procedural rules of recognition were laid on the basis of ideology, everything being organised and decided by “borrowing” from its authority.⁷⁵

While it is an undeniable fact that ideology cemented the organisational and functional structures of the ruling class, the relationship between the *Nomenklatura* as a conglomerate organisation and its procedural rules of recognition is often misunderstood. The importance given to ideology in the analysis of a totalitarian regime risks obscuring the fact that ideology, as source of recognition rules, has often been placed “secondary”

⁷⁵ Antonio La Spina, “Modes of Legal Intervention and Totalitarian Effectiveness,” in Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki, and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), esp. p. 45.

to the organisation.⁷⁶ Though ideology played an important role in the definition of the procedural rules of recognition, and in structuring the different centres of power, in the Communist bureaucratic context ideology always meant what the *Nomenklatura* needed it to mean.⁷⁷ Besides, the procedural rules of recognition are not always the formal, constitutional or ideological ones. In the case of the *Nomenklatura* one often deals with informal practices which have been institutionalized through the different points of pressure and conflict within the political discourse. Needless to say, one of these points of pressure was the use of force, or the manipulation of the potential of using force by the Communist regime.⁷⁸

From the reality of ideology as source of institutional parameters of action it is possible to derive two points. Firstly, the *Nomenklatura* was characterised by a “fluidity” of its

⁷⁶For a particularly interesting insight into the “ideological make-up” of the Communist regimes see Alex Inkeles, “The Totalitarian Mystique: Some Impressions of the Dynamics of Totalitarian Society,” in *Totalitarianism*, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1954), esp. pp. 88-89. For the profound similarities of nature between the Nazism and Communism - in spite of overemphasised ideological differences - see Waldemar Gurian, “Totalitarianism as Political Religion,” in *Totalitarianism*, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1954), pp. 119-129, p. 122. Gurian sees both Nazism and the Soviet-style Communism as “politico-social secularized religions,” characteristic of our epoch. Also, Courtois, pp. 27-28. Arendt, *The Origins of Totalitarianism*, p. 463.

⁷⁷Apart from the meaning of a set of ideas and beliefs forming the basis of an economic or political system, a second meaning of the word “ideology” seems also appropriate here: the one of “unproductive thought.” Oxford Dictionary. London: Oxford University Press, 1963. The relevance of this definition for the totalitarian ideologies is revealed in Hannah Arendt who comments: “In the totalitarian use of these ideologies, a peculiar shift of emphasis took place. Ideologies became strictly the *logic of an idea*: the idea was no longer applied to a given reality, but a logical process was developed from the chief “idea,” which became a kind of logical premise. This premise, to be sure, was not self-evident; but totalitarianism in power could change reality to such an extent that the premise could practically achieve the dignity of the self-evident. Hitler’s ice-cold reasoning, Stalin’s strictly logical argumentation, became more important than the original content [...] There is no longer any rule of an “idea,” no matter how perverted it may be, but of the logical process itself which is deduced from the “idea” as its logical premise.” Hannah Arendt, [Contribution to the conference held at the American Academy of Arts and Sciences, March 1953], in *Totalitarianism*, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1954), pp. 133-134.

⁷⁸Hirtzowicz, *Coercion and Control*, p. 23.

procedural rules of recognition.⁷⁹ The direct cause of this fluidity was, yet again, the relatively informal and a-constitutional character of the *Nomenklatura* as political organisation. The *Nomenklatura* had at its disposal practically unlimited power, unchallengeable by any other state or civil society institution. Secondly, given the nature of ideology, the procedural rules of recognition inspired from ideological sources were, as a rule, overridden by the *Nomenklatura*'s substantive recognition rules. This set of rules was generally to be found by looking into the policy of the organisation.

The prevalence of the substantive rules of recognition over the procedural ones, of policy over ideology, actually confirms French's emphasis on the rationality of the organisation. According to him, the basis of the substantive rules of recognition, e.g. the rules expressed through the policy of the Communist bureaucracy, emerged from the specific reasons for action of the organisation. As argued by French, these reasons for action come to homologate inside the triangle of collective responsibility the concept of intentionality which is assumed when speaking about individual responsibility.

In the case of the Communist *Nomenklatura*, given its nature as a "total" political body, aspiring (or conspiring) to the domination of the entire society, these reasons for action were undeniably the pursuit of unlimited political power.⁸⁰ The pressure created on the specific functions and operations of the organisation by the pursuit of these goals ended

⁷⁹Korchak, p. 116.

⁸⁰Friedrich, p. 7. Nelson, "Dilemma of Communist Leadership," p. 8. Hirsztowicz, The Bureaucratic Leviathan.

by inducing changes within the substantive rules of recognition (as the most easy to manipulate). These changes inevitably antagonised the ideological basis (the procedural rules of recognition) of the organisation.⁸¹ When such changes occur, an organisation's unity and survival risks to be threatened. The threat is posed by the external pressures put on the organisation to comply with its socially accepted (or simply "acceptable") procedural rules of recognition and internal decision structure as a whole.⁸² Under threat, the organisation is likely to do two things.⁸³ Firstly, it is likely to override at least partially the ideological foundation of its procedural rules of recognition. Secondly, if possible, it will retain these same overridden rules at the forefront, as a procedural facade. This was exactly what happened in the case of the Communist *Nomenklatura*.⁸⁴ For this reason, when analysing its structure one has to give particular attention to the practices and policies of the organisation more than to the ideological façade.

This dominant role of the substantive rules of recognition corresponds to French's idea that the "basic belief" of the organisation is based in these rules. Therefore, the "basic belief" is identified with the policy lead by the *Nomenklatura*, rather than with its ideology. The policy does not always coincide or agree with the ideological reasoning,

⁸¹Nelson, "Dilemma of Communist Leadership," p. 9.

⁸²Nelson, "Dilemma of Communist Leadership," p. 11.

⁸³Nelson, "Dilemma of Communist Leadership," p. 10.

⁸⁴Korchak, p. 94. Olgiati, Vittorio, "Law As an Instrument of "Organizational Totalitarianism": Fascist Rule over Italian Lawyers," in Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), pp. 123-124.

not even when this reasoning itself becomes adaptable.⁸⁵ The subordinate position of the ideologically inspired rules of recognition spares the social scientist the task of attempting a non-ideological analysis of the Communist ideology. This analysis is left to the political scientists. This split between ideology and policy, between an important part of its internal rules of recognition and its basic belief, was possible because the *Nomenklatura* had no agreed and functional mechanism of external control, and because the repressive policy it led prevented the inducement, under some kind of social incentive (pressure), of structures of self-control.⁸⁶

For the purpose of this thesis it is necessary to trace the systematic crimes and violations of human rights back to the *Nomenklatura*'s internal decision structure. Hence, is necessary to demonstrate that in these crimes and systematic human rights violations the policies led by the *Nomenklatura* - as an expression of the *Nomenklatura*'s "basic beliefs" - represented a major defining element. Assigning collective responsibility for those crimes and violations starts therefore not from a

⁸⁵Stalin's dogmatic interpretation of Lenin's ideas, and its implication that Marxism speaks through the Leader's mouth. Johannes Witt-Hansen, "Marxism, Leninism, Maoism," in Politiske ideologier fra Platon til Mao, Politikens Forlag (Copenhagen, 1972), pp. 214-215. Korchak, p. 225. "The totalitarian movements and their power replace God and religious institutions such as the Church; the leaders are deified; the public mass-meetings are regarded and celebrated as sacred actions; the history of the movement becomes a holy history of the advance of salvation, which the enemies and betrayers try to prevent in the same way as the devil tries to undermine and destroy the work of those who are in the service of the City of God. There are not only sacred formulas and rituals, there are also dogmatic beliefs, claims to absolute obedience and damnation of heretics in the name of absolute truth which is authoritatively determined by those leading the movement. *The doctrine may impose certain slogans and formulas - racism for the Nazis; class war, anti-capitalism for the Bolsheviks - but just the unlimited and uncontrollable right of interpretation and re-interpretation by the leadership gives to totalitarian politics its flexibility*" (emphasis mine.). Gurian, pp. 122-23.

⁸⁶Korchak, p. 174. This is an expression of the constitutional paradox of the watchman. In this case, the paradox occurs because in the larger social system there are no other structures of power which could exercise constitutional authority and impose a mechanism of control over the *Nomenklatura*.

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critique of the *Nomenklatura*'s ideology,⁸⁷ but from an analysis of its policy,⁸⁸ concentrating not on alleged goals,⁸⁹ but on concrete means which are easily identifiable in legal terms.⁹⁰

The predominant role of the *Nomenklatura*'s rules of recognition is further enhanced by the way in which its internal decision structure was generated. The internal decision structure is the one which in the end offers the complete decision procedures to be followed in order for a course of action to be considered as belonging to the organisation. However, it appears from the analysis above that the *Nomenklatura*'s decision structure consisted mostly of informal (non/a-constitutional and non-statutory) sources, dominated all by discretionary rules of recognition reflected in the policy. An important aspect to be mentioned here is that the standards of conduct derived from this decision structure and

⁸⁷The *Nomenklatura*'s use of ideology is seen by many analysts as a mere facade. In Korchak's view the Communist bureaucracy - significantly and severely characterized as being a "gangocracy" - does not appear as a real party, that is as a party based on an ideology with pretences of representing a certain group of the population. The *Nomenklatura* in his view does not represent anybody apart from itself, and it represents nobody's interests apart from its own; it exists by itself separately from the society, "parasitising" it. Korchak, p. 103.

⁸⁸Korchak, for instance, considers it a mistaken approach to analyse the ideology in isolation from other facets of the Communist regime, such as its organisation, strategy, and tactics. "Without taking all this into account ideology will appear as meaningless, disorderly pile of laws, orders, dogmas, and consequences." Many of them, he says, are constantly changed and often contradict each other. "Due to the ambiguity of terminology one constantly encounters double meanings...Further, if we accept ideology as a dominant factor of totalitarianism, then how can an evident similarity between the "practices" of Hitlerism and Stalinism be explained, in spite of their very different ideologies." Korchak, p. 112.

⁸⁹Even at the level of ideology it becomes difficult to argue for the *Nomenklatura*'s candour. Monica Lovinescu, commenting on Stephane Courtois' *Livre noir du communisme*, argues for instance, that the Marxist ideology has never been a generous one. Lovinescu, Monica, ["Forgetfulness and the Illnesses of Transition"], *Revista 22*, Bucharest, 24-30 March 1998, pp. 8-9. See also Anne Applebaum, "Une mémoire en cache une autre," *Commentaire* 78 (Eté 1997).

⁹⁰For such an attempted identification, see the discussion on the Czech Act on the Illegality of the Communist Regime, *supra* Section 3.5.

expected from the members of the *Nomenklatura*, were different from the ones governing the party membership. Also, these standards were (self-) imposed in a more fundamental way than in the larger group of the Party membership and State agencies.⁹¹

The predominantly informal nature of this decision structure did not prevent the “knots” of this structure to be formed at all levels: State, Party and civil society. The *Nomenklatura* caught in its structure the leadership positions of all key party *and* state institutions, and, when not annihilated completely, it “colonised” the top positions of all the remaining bodies of the civil society. In other constitutional arrangements this network of top positions would mean no more than an “Institute of Directors,” or “The Royal Association of Homoeopaths:” collective bodies established in order to ensure certain concerted policies, and a medium for dissemination of information for the members. For a system based on partocracy, however, the segregation of such a slice of the political elite had deep implications with respect to the constitution and role of such an organisation, and implicitly with respect to the society in which such an organisation emerges.

The implications of this structure appear as relevant basically because of two reasons. First of all, its members possessed among themselves *all* the active political power in the society. Secondly, through the type of institution into which their positions (if not themselves) were incorporated, all the power and control the members’ positions might entail over their particular domains were practically passed over to the incorporating

⁹¹Harasymiw, *Political Elite Recruitment*, p. 46. Burns, *The Chinese Nomenklatura System*, p xii.

organisation: the *Nomenklatura*.⁹²

In this context, the *Nomenklatura* acted both as a filter and a catalyst. On the one hand it provided the internal criteria for the selection of its positions - the knots of power - as well as its members - the candidates filling those positions - controlling access into its own ranks from the outside.⁹³ On the other hand, the *Nomenklatura* also generated all the channels of power, *organising* these centres of power into an original structure. This structure allowed the *Nomenklatura* to exercise *its* control over all the domains it has depleted of the real power by depleting top positions of these domains of their relative independence.⁹⁴ The power exercised in this way by the *Nomenklatura* was not a constitutionally delegated power, but an auto-generated power. By practically emasculating all State and civil society organisations of their real power, the *Nomenklatura* became a network of channels through which its acts of will were converted into technically binding legal behaviour.⁹⁵

⁹²Comparing the *Nomenklatura* to the power structures of a democratic country Voslensky writes: "Officially there is no such thing as a civil service in the socialist countries, but the nomenklatura would very much like outside observers to take it for a civil service. It carefully camouflages itself as an administrative machine and accepts being regarded as such - the vital objective being never to let it be seen to be a class. Actually, the nomenklatura has nothing in common with a civil service. A civil service carries out government orders, while the nomenklatura gives the orders, in the form of resolutions, recommendations, or advice by leading echelons of the party. Civil servants are privileged servants of the state; nomenklaturists are masters." Voslensky, p. 81. See also Podgorecki, *supra* note 4.

⁹³Eyal and Townsley, pp. 723-750. From Digby Baltzell's *Philadelphia Gentlemen* one can deduce two dimensions of group-formation which could be applicable to *Nomenklatura*: firstly, its monopoly or near monopoly over the access into elite positions; secondly, the practice of closure is based on social network ties. This includes the so-called "social capital" - bureaucratic patronage, friendship ties, as well as family and marriage ties - and *excludes* "impersonal" forms of closure, such as those based on credentialism or the market (emphasis mine). See Digby Baltzell, *The Philadelphia Gentlemen: The Making of a National Upper Class* (New York: The Free Press, 1958), pp. 63.

⁹⁴Korchak, p. 44 and 39.

⁹⁵Tontsch, p. 253.

This actual technical structure was only partly a formal structure. Its formality was based mainly upon generalised recognition *within* the organisation itself, and upon the duress exercised over its disorganised social environment⁹⁶. As for the rest, the *Nomenklatura* was largely an informal organisation. As it was mentioned earlier in this chapter, the all-enhancing power structure of the Communist bureaucracy hardly had any type of constitutional basis. This lack of legal acknowledgement was largely the cause of the *Nomenklatura*'s mistaken characterisation as a mere list of positions on an office scheme.

In reality, due to its composition and powerful though informal structure, it was from the *Nomenklatura* that the channels of power were derived, that the major goals were established, and that the connections between constituent organs were established.⁹⁷ Studies of the totalitarian regimes in Eastern Europe show in this respect that, ironically, in the republics of people the direct representatives of the people had no real power, that in the Soviet Union the Soviets had only formal, but no real power.⁹⁸ At the same time, though the concept had been coined by Lenin,⁹⁹ no Communist constitution has ever instituted a formal organisation with a structure resembling the one of the *Nomenklatura*. In spite of this lack of constitutional basis, the self-organising hybrid structure of

⁹⁶This type of "recognition," of course, could hardly be considered a "valid domination," or a "rightful possession of power." Max Weber, "The Types of Legitimate Domination" in *Economy and Society* vol. 1 (New York: Bedminster Press, 1968), p. 212 ff. Also, Peter Berger, "New Attack on the Legitimacy of Business," *Harvard Business Review* 54 (1976), pp. 82-89.

⁹⁷Smith, "Guidance by the Communist Party," p. 182.

⁹⁸M. Ferro, *Des soviets au communisme bureaucratique: les mecanismes d'une subversion* (Paris: Gallimard, 1980), p. 24. Also, B. Finger, "Was Russia a Workers' State?" *New Politics* 4, no. 2 (Winter 1995): 168-179.

⁹⁹Vladimir Ilici Lenin, *On the Soviet State Apparatus: Articles and Speeches*, compiled by L. A. Kashnitskaya and N. N. Surovtseva (Moscow: Progress Publishers, 1975), p. 185 ff.

partocracy guaranteed that the real power resided within this bureaucratic body.

The predominantly informal nature of the *Nomenklatura* is related to another characteristic of the Communist bureaucracy. Being formed mainly outside the legal discourse, its decision structure was the result of an equilibrium formed between “the elements of collaboration and conflict”¹⁰⁰ of its constituent organs. This power-bargaining determined that in partocracy, there was no definite localised ruling body. Neither the Government, nor the Central Committee, nor indeed any other kind of “directive organs,” were prevailing. The ruling body was constituted from the whole “technical structure” of the party and state apparatus, rather than a person or a group. This technical structure, filtered and organised by the party ideology but based on its own idiosyncratic policy, was the place of the real power, the place from where the real decisions flowed. Its policy was minimally dependent upon the discrete individuals filling the centres of power of this bureaucratic conglomerate. This prevalence of the organisation over the individual members remained true even with respect to the highest positions within this power structure.¹⁰¹ Of course, for the substantiation of this state of (political) affairs one would have again to resort to informal, non-constitutional, yet irrefutable evidence provided abundantly by constitutional and social analysts.¹⁰²

¹⁰⁰Höffe, pp. 34-37.

¹⁰¹Korchak, p. 112. Voslensky, pp. 249-250.

¹⁰²Nelson puts forward arguments related to the formalism of the debates in the elected bodies, the unanimity of the votes, the elimination of any sign of dissent, etc. Nelson, “Political Participation,” p. 114. R. Taras, ed., Handbook of Political Science Research on the USSR and Eastern Europe: Trends from the 1950 to the 1990 (Westport, Conn.: Greenwood Press, 1992), p. iv.

To a rigid constitutional analysis, this distribution of the real power among all the state agencies might appear - from a strictly formal point of view - democratic. This appears so only because of the obscured, non-constitutional nature of the *Nomenklatura* which makes the analysis more difficult. This non-constitutional nature hinders the acknowledgement in the legal debate of the *Nomenklatura* as a structure of power. Nevertheless, the systemic analysis of the real power in action, together with an inquiry into the substantive rules of recognition of this idiosyncratic social agent, reveals its unique key role in the monopoly-like management of power in all areas of social life.

The appearance of a democratic distribution of power derives also from the impression that a Communist partocracy had no one location for the exercise of the real power, that the real power was spread throughout the whole party organisation. The reality though, was quite the opposite. The organisation itself was very limited and exclusive, and it encompassed only a small proportion not only of the population, but of the Communist party itself. Accordingly, the distribution of power in society was extremely uneven, being concentrated in the *Nomenklatura*. In reality the Communist bureaucracy *was* the Party. Once emerged from the Party, the *Nomenklatura* became its own source, its own creation and reason of being.¹⁰³ This could seem a paradox if a closer analysis would not reveal it as just the result of the totalitarian demagogy. The claims of a democratic distribution of power, and of the homogeneity of the Party and society are easily discarded when they are faced with the Communist reality. Therefore, they cannot be used in order to call for a wider distribution of responsibility among all the party

¹⁰³ Avtorkhanov, *The Technology of Power*, p. 35.

members, or even society. The well known claim “we are all guilty” is unsustainable on legal grounds, and difficult to defend when faced with a rigorous normative assessment within the moral discourse.

It is important to point out that these elements of the relationship of the *Nomenklatura* with the rest of the society are relevant in the context of this thesis not by the fact that they would ideologically underline the lack of democracy in the totalitarian Communist societies (indeed, this is not the objective of this thesis) but that they would make evident the total control which was a characteristic of the Communist rule.

If this was the *Nomenklatura*’s relationship with “the Other,” that is with its social environment, one might wonder what might be its relationship with itself. As any social system, the *Nomenklatura* had a temporal existence. This temporal dimension brings in the question whether, when trying to assign collective responsibility, one should distinguish between the different generations of the *Nomenklatura* membership. Different generations inhabited the *Nomenklatura* structure in epochs characterised by different degrees of repression and anti-democratic behaviour, and differentiating among them might seem natural. This distinction though stops being “natural” if one looks upon the *Nomenklatura* as a unitary, autonomous entity, and not as a collection of its individual members.

According to French, the members of a conglomerate organisation for instance, fill differing defined roles or stations by virtue of which they exercise certain powers over

other members. A varying membership, that is a change in the identity of the persons filling those roles, does not necessarily entail a change in the identity of the collectivity.¹⁰⁴ Unlike an aggregate collectivity, the existence of which depends on the stability of its membership, the political entity, as an amalgam of persons and institutions, takes the format of a self-reproducing *mereological sum*.¹⁰⁵ According to Copp, this sum is a sum not of its persons, but of stages of persons. And, indeed, the *Nomenklatura*'s identity was not affected by changes in the persons associated with it, its existence of conglomerate organisation being compatible with a varying membership even at its highest level.¹⁰⁶

Accordingly, by the *Nomenklatura* one does not understand the persons in the governmental offices and occupying the Communist party hierarchy at the time when, for instance, the Gulag was set up in the Soviet Union, or the Soviet army occupied Czechoslovakia, or Romania went through an extremely damaging austerity period. All these, though moments of sad importance in the history of the Communist oppression, are only snapshots of the activity of an organisation whose continuity is derived neither from its membership nor from its leadership. Rather, its continuity comes from the identity of its internal recognition rules and its structure at any given time of its existence, from its "basic belief" reflected through its policies, and from the way in which all these elements are creatively interacting. Thus, since the identity of a conglomerate agent is not

¹⁰⁴French, *Collective and Corporate Responsibility*, p. 13. May, *The Morality of Groups*, pp. 41-43.

¹⁰⁵Copp defines the formal organisation as a "mereological sum," as a sum not of its persons but of stages of persons. David Copp, "What Collectives Are: Agency, Individualism and Legal Theory," *Dialogue* 23 (1984): 253 and 258.

¹⁰⁶Voslensky, p. 249 ff.

exhausted by the conjunction of the identities of its individual members, one could possibly argue that, in spite of the changes in the *Nomenklatura*'s membership, in each of the Communist countries we deal with one and only *Nomenklatura*, with one and only structure of power, from the beginning of the Communist regime to the end.

Although this element from its temporal identity makes the task of identifying the social agent relatively easier, it also has certain inherent limitations. These limitations derive from the necessity to distinguish between, on the one hand the individual criminal responsibility and, on the other hand the collective political responsibility for criminal and human rights violations. From the statement that a conglomerate collectivity is responsible for a certain act one could not infer for instance, that each individual who belongs or belonged to that organisation is *personally* responsible for that act. As we shall see in more detail in the last chapter, collective political responsibility allows for certain types of attribution of responsibility and punishment but not for others. Thus, the *organisational* responsibility for the Communist oppression cannot be distributed among the members of the Communist hierarchy, it can only be shared,¹⁰⁷ and the proportion of each share can only be estimated roughly and unofficially. Accordingly, these estimates have no implication at the level of punishment. This feature of non-distributiveness¹⁰⁸ of responsibility of the conglomerate agency implicitly limits the choice of punishment

¹⁰⁷May, *The Morality of Groups*, p. 17. In a thorough analysis of the concept of collective responsibility, Feinberg defines group responsibility as "distributive" when it "is simply the sum of all the individual responsibility," and "non-distributive" when it "is more than the sum of the responsibility of its members." See Joel Feinberg, "Collective Responsibility," in *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 243 and 248 respectively. Also, May, *The Morality of Groups*, p. 17.

¹⁰⁸French, *Collective and Corporate Responsibility*, p. 10 ff.

which can be applied.

The difficulty in applying a (traditional) criminal punishment to a collective criminal relates to another inference one can make from the “perpetuity” of the conglomerate *Nomenklatura*. The organisation might be legitimately found responsible for an act which some of its members had nothing to do with in the material way in which the criminal law requires. This doesn’t make them less part of the collectivity which is responsible, as long as they had, or have, the “credentials of membership.”¹⁰⁹ The non-distributiveness of the collective responsibility does not mean that the question of individual responsibility for the same actions should be excluded.¹¹⁰ Nevertheless, this is a different matter which, from the legal perspective, has to be dealt with separately. From the case-studies in Chapter Two and Chapter Three though, we have seen the importance and necessity of adopting a comprehensive approach to the subject of responsibility for the crimes of a totalitarian system. This approach should create space for complementary concepts of responsibility in the legal discourse, and therefore for complementary types of punishment.

¹⁰⁹Related to these credentials, Held writes that the non-distributive responsibility is to the individuals constituting the group, not for acts they perform in their group roles, but for their acts of choosing to become members or to remain members once they become fully aware of the group’s objectives. Held, p. 93.

¹¹⁰“Although a group’s responsibility for an occurrence may not be ‘distributive’ to each of its members for their actions in bringing about that occurrence, it does not follow that responsibility for that occurrence is not assignable to particular individuals, including members of the group.” Stephen J. Massey, “Individual Responsibility for Assisting the Nazis in Persecuting Civilians,” *Minnesota Law Review* 71 (1986): 139. French also, writes that “a finding of non-distributive collective responsibility for an occurrence does not exonerate all the individuals in the collective of responsibility for their actions in bringing about the occurrence.” French, *Collective and Corporate Responsibility*, pp. 112-113.

5.6 Preliminary Conclusions: Structure, Control, and Responsibility

The role played by the Communist bureaucracy was often argued from the position that the *Nomenklatura* represented a *tool* for implementing the Party's policy¹¹¹, that it simply offered the *means* the Party needed in order to fulfill its supervisory function¹¹², or, that it represented a *super-agency* of the State.¹¹³ In reality, it appears that the *Nomenklatura* was the Party, and that the *Nomenklatura* practically owned the State. From this perspective one can see, beyond the "mere" list of positions and functions in the party and state agencies - a social entity with all the characteristics of a conglomerate organisation,¹¹⁴ and with both reasons for action and the capacity for action residing in its structure. Based on this, a legal approach to political justice can develop an operational concept of collective responsibility for the serious human rights violations that occurred under the Communist regimes. As unusual as it might seem at the beginning, it is exactly in the list of positions and functions that the cohesion laid, since the list was not a list of names, and only apparently was a *mere* list of positions. In fact the *Nomenklatura* represented a shortcut leading to an important web of relationships among all the centres

¹¹¹Brunner, Georg - "The Essence of Stalinism." Problems of Communism 30, no. 3 (May - June 1981), pp. 87-90.

¹¹²Pusylewitsch, p. 325.

¹¹³John N. Hazard, "The Status of Communist Parties under Law: Uniformity and Diversity," in Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, eds. Dietrich A. Loeber, et al. (Dordrecht/ Boston/ Lancaster: Kluwer Academic Publishers Group, 1986), pp. 483-497.

¹¹⁴See supra Chapter Three, note the discussion on French's distinction between conglomerate and aggregate collectivities.

of real power.

Speaking about the relationship between the structure and the discrete individuals belonging to it, some remarks should be made. Firstly, this structure of power resembles an oligarchy in many substantial ways, oligarchy being defined as the control of government by a faction that acts in its own interest to the exclusion of the welfare of the people it is governing.¹¹⁵ The difference between oligarchy and partocracy would be that in the case of the *Nomenklatura* we are dealing with a list of key offices and functions from all areas of life, all placed under the control of one single structure. The power in the *Nomenklatura*'s case was vested in offices, not in persons as it would be in an oligarchic system where the responsibility would perhaps be easier to divide into individual shares.

The second remark regards the possibility that the real power was detained in the hands of one single person - the Secretary General of the Communist Party. This oft-used argument against collective responsibility is refutable in front of the extent and complexity of the domination. No single person could gather and exercise so much power without the continuous tacit consent and active collaboration of a whole apparatus of power. The concept of dictatorship otherwise cannot explain the fact that the most important features of the Communist policy have remained unchanged in spite of the changes in leadership. On the contrary, it is often argued that the Secretary General was

¹¹⁵Microsoft Encarta 97 Encyclopaedia, s.v. "oligarchy."

only one of the wheels of the machinery and not always the main one.¹¹⁶ This position makes irrelevant another extremist attitude in this debate. This attitude does not spread the blame over whole societies, as we saw that some argue, but rather piles all responsibility on the person who happened to be in the apparently highest position, e.g. the President.

Thirdly, the elected representative bodies have been depleted of the real power, the *Nomenklatura* having direct control over the apparently “democratic process of selection of the candidates.” This fact transformed them into mere machines of voting decisions already formulated in the more occult structures of real power. Although it is not mentioned by the Constitution, the real government are the “directing organs,” the *Nomenklatura* stations of power.¹¹⁷ Last but not least, the lower boundary of the real power did not coincide with the lower level of the Communist party. In practice, the Communist party members were just as far from the exercise of the real power as the non-member citizens.

All these aspects of the *in*-division of power among the social agencies of the Communist

¹¹⁶“They [the Soviet Secretary Generals] unquestionably exercised paternal authority over a ruling class that was not yet firmly in the saddle, but...at the same time they were dependent on it. On the other hand, Khrushchev and, to an even greater extent, Brezhnev and Andropov, were never anything else but supreme executants of the *nomenklatura* will. . .He [the Secretary General] is the head both of the Politburo and of the Secretariat, but his relations with the directive organs of the *nomenklaturist* class are not those of a commander and his subordinates.”And again, put in an ideological political terminology but based on sociological systemic evidence: “The dictatorship of the Secretary-General is the dictatorship not of an individual but of a class that needs consensus at the top level. The collective dictatorship of the Politburo and the Secretariat and the apparently personal dictatorship of the Secretary-General are merely *two faces of the dictatorship of the nomenklatura*” (emphasis mine). Voslensky, p. 249, and p. 261.

¹¹⁷Voslensky, p. 247-248.

societies, together with the analysis of the *Nomenklatura*'s structure, functions and operation, convey the idea that the Communist bureaucracy attained its practical goal of controlling all important (and even unimportant) aspects of social life. This control was possible because of its highly structured organisation, characterised by a pervasive *esprit de corp*¹¹⁸, and by the (practical more than constitutional) potential of converting its acts of will into normative parameters. The *Nomenklatura*'s reason for action was therefore matched with practically unlimited capacity for action. This monopoly of power was based as much on informal rules internally institutionalised, as on selectively and creatively interpreted constitutional ones. Together, they formed the core of the internal rules of recognition.

On the basis of this power structure and internal rules of recognition it can be identified whether decisions resulting in violations of basic rights derived or not from the place where the real power was vested, i.e. from the *Nomenklatura*. Given the *Nomenklatura*'s quality of collective agent, its capacity of acting "knowingly," tracing these crimes and violations back to it inevitably entails its participation in the distribution of responsibility implied by a process of political justice.

This attribution of responsibility should be understood not only in terms of "practical

¹¹⁸Speaking about *group-making practices*, Eyal and Townsley argue that the representation of the Communist bureaucracy as a "non-group" is precisely the sort of "ideological call" that *could* produce a "practical group," whose *esprit de corps* is constituted by recognition of the ideological call. Eyal and Townsley, p. 726. Related to the idea of a "practical group," see also *supra* the discussion on the *Nomenklatura*'s a-constitutional character, Section 5.3.

responsibility” as we have seen in Wolf,¹¹⁹ but also in terms of a normative responsibility, based on the autonomy and rationality of the Communist bureaucracy as collective social agent. Posing over the “logic of the game,” as Peter French calls the substantive rules of recognition of a conglomerate organisation, one can identify the same two elements of practical and “socially induced” normative responsibility as recognised at the individual level. The practical responsibility of the *Nomenklatura*, resulting from a scrutiny of its policy, would have to do with a widespread and long term systematic infringement of basic human rights. Its policy though, as part of its substantive rules of recognition, may reveal also a deeper meaning of responsibility, an organisational “moral” responsibility, homologous, though not identical to the individual one. This dimension of the organisational responsibility would be (just as the individual one) socially defined, and would derive from the capacity of the collective actor to act “knowingly.”

¹¹⁹See supra the discussion on the idea of the practical responsibility of organisations, Section 4.3.3.

Chapter Six

COLLECTIVE POLITICAL RESPONSIBILITY: *QUO VADIS?*

Abstract

In the previous chapters the conceptual possibility of a collective social agent was established. In addition, the Communist regime was identified as being that part of the party-state bureaucracy which during the Communist regime was referred to as the *Nomenklatura*. Should these findings have any practical legal implications for a process of political justice? This final chapter will give an affirmative answer to this question, by pointing out some of the doors to political justice opened by the acknowledgement of collective responsibility. Firstly, based on the specificity of the social actors involved, and of the historical circumstances to which the process of justice refers, the chapter argues for a differentiated application of the principles of the rule of law. Secondly, the same elements give weight to those quasi-legal actions - such as the establishment of a commission of truth and the constitutional endorsement of the report following the function of such a commission - which specifically address the human rights violations as actions of the Communist regime itself. Finally, the chapter also underlines the necessity of making this acknowledgement of the major role of the structures of power in the violations of human rights the starting point and the foundation for all other legal measures aiming to restore and maintain justice after a repressive regime. All these elements offer a clearer perspective over the different approaches to political justice which were introduced in Chapter Two and Chapter Three. The perspective proposed in this final chapter will help avoid some of the shortcomings encountered in these latter approaches. The chapter underlines that, to a large extent, these shortcomings spring from a mistaken or incoherent perspective over the concepts of collective agency and collective responsibility, and that legally acknowledging these concepts should not prevent the preservation at the same time of the fundamental dimensions of the rule of law.

6.1 Acknowledging the *Nomenklatura*

After reconstructing the *Nomenklatura* as an autonomous social agent, and as the repository of the most important share of power in the Communist societies, it seems that in post-Communist Eastern Europe a process of political justice would require not so much a process of decommunisation, but rather one of de-nomenklaturisation. Such a

process would imply ensuring that the most important structures of the emerging democratic societies do not inherit elements, and with them practices, of the criminal structures of the totalitarian regime.

The analysis of the structures of power in the Communist societies underlined the need for acknowledging the Communist “regime” as a coherent collective agent. Becoming aware of the *Nomenklatura*’s collective “intelligence,” and of its “actualization of the potentiality of purposiveness,”¹ changes the perspective over the process of political justice in Eastern Europe. Emphasising the amount of power it maintained over society, the *Nomenklatura* was presented as a self-reproducing organisation. Its embedded qualities as a social agent, and its actual power capacity, suggested that the *Nomenklatura* should occupy an important place on the map of responsibilities relative to the human rights violations which took place during the Communist regimes.

To a process of screening such as the Czech one, for example, the reconstruction of *Nomenklatura* as a coherent legal actor could offer a systematic definition of the “Communist regime” as a structure of power. As it was pointed out at the time, the Czech Act on the Illegality of the Communist Regime left the “regime” as an undefined concept. This fact made the Act on the Illegality of the Communist Regime merely a vague and confusing declaration.²

¹Weinrib, p. 82. See also *supra* Section 4.3.4 and 5.5.

²See *supra* the discussion on this law, Section 3.5.

Defining the Communist regime through the parameters of the *Nomenklatura* could also bring coherence to the selection of the categories of offices and positions to be screened. In this way, the inconsistency of the different screening measures with respect to the categories included in the process of screening could be avoided. Moreover, the construction of the *Nomenklatura* as a legal actor could offer the Czechoslovak “lustration” the chance for a coherent justification of the measures taken against the Communist officials, StB collaborators and agents. As detailed in Chapter Three, the justifications given by both the supporters of the Lustration Law and by the Constitutional Court were rather contradictory. Besides, none of the justifications offered could account for the extent of the restrictions the Lustration Law imposed.

These contradictions stemmed to a large extent from the hesitation in addressing the Communist regime in its collective expression. As it was shown in Chapter Four, this hesitation resides within the position of the legal discourse itself with respect to the concept of collective agency and responsibility. Reconstructing the *Nomenklatura* as a social actor helps therefore in challenging the hesitation of the legal discourse with respect to the potential role played by the collective structures of power in the violations of human rights. Addressing the issue of collective agency and responsibility contributes to the prevention of an over-inclusive screening law such as was the case with the Lustration Law. At the same time, it can help the screening process gain an overall coherence when it is undertaken either as a protective measure (against sabotage or

blackmail), or as a normative measure, and forms part of a process of deterrence³ from systematic human rights violations.

Introducing the *Nomenklatura* as a coherent agent in the debate on political justice goes beyond implicating it only in measures of “preventive screening.” The introduction of the “triangle” of collective responsibility - with action and reasons for action residing within the same organisational structure - alongside the triangle of individual responsibility, underlines the necessity to go beyond the punctilious procedural perspective which was designed to fit primarily the individual actor. Taking into consideration the *Nomenklatura*’s qualities of conglomerate organisation, and the immense practical power it detained, the question of responsibility for human rights violations will obviously not be satisfactorily answered only by selectively prosecuting a few soldiers and even fewer officials. Therefore, proposing the *Nomenklatura* as a collective social agent implies also proposing it as candidate to the moral and legal division of responsibility for the human rights violations. Otherwise, addressing the crimes of the Communist regime solely through individual accountability, and ignoring the issues of collective responsibility, would mean trying to find answers to questions of responsibility that one does not dare ask.

By introducing the *Nomenklatura* into the discourse of political justice, McAdams’

³I.e. the deterrent function of punishment. See M. Clinard and P. Yeager, Corporate Crime, (New York: Free Press), p. 8.

“tantalising question”⁴ regarding the substantive “residual responsibility”⁵ gets a chance not only to be asked, but also to receive an answer. If individual responsibility on its own does not satisfy the sense of moral and legal justice, then acknowledging the concept of collective social agency appears to advance a viable candidate for this residual responsibility. Evidently, acknowledging the concept of collective agency is not enough for solving the problems of legal responsibility. The unsatisfactory unilateral approach through individual responsibility, and the need to allocate the residual responsibility, brings with it the challenge of matching the sociological concept of collective agency (as developed in Chapter Four, and substantiated in Chapter Five) with compatible legal concepts and positive legal rules that can contribute to a fairer distribution of responsibility.

As the Hungarian statute of limitations case shows, the criminal law discourse alone is not functional in the case of a revolution; the criminality of a totalitarian regime cannot be addressed only through the criminal law.⁶ Collective criminal responsibility of certain carefully identified agencies of the Communist regime cannot be totally excluded. Nevertheless, given the specificity of the Communist power structures,⁷ a collective *political* responsibility for crimes constituting gross human rights violations should be

⁴See supra McAdams’ comments on the German border trials, Section 2.3.

⁵This would be the responsibility remained unassigned after the allocation of individual responsibility for governmentally induced human rights violations. See also, supra Section 2.3.

⁶Nino, “When Just Punishment is Impossible,” pp. 71-72.

⁷See supra the discussion on the *Nomenklatura*’s complex and predominantly informal structure, Section 5.2 and 5.3.

legally acknowledged as more appropriate for this particular type of social actor. Through this collective political responsibility for human rights violations, a minimal but necessary legal accountability of the Communist regime for instituting and promoting a climate of crime and lawlessness can take shape. At the same time, as part of a process of political justice, this type of responsibility would be an acknowledgement of the legitimate implications of the right to revolution, and of the shortcomings of the rule of law when faced with the totalitarian state.

The reconstruction of the Communist regime as a coherent, relatively easily identifiable, collective agent also highlights the path of political justice beyond administrative screening and criminal prosecution; it helps to create a more solid foundation for the process of political justice in all its dimensions. This foundation is laid by allowing for a possible legal statement to be issued about the Communist regime as a whole, defining it in an unambiguous way, and making clear who “the regime” was. As it has been pointed out in Chapter Three, in some cases the insufficiency of the criminal law in dealing with the legitimate expectations of a revolution has been addressed by issuing such an unambiguous statement about the nature of the Communist regime.

This was the case of the Czech Act on the Illegality of the Communist Regime (Act No. 198/1993). The Act No. 198/1993 included important *declarations* about the illegal and criminal nature of the Czechoslovak Communist regime. Though not openly suggested, the Act appeared to re-enforce the arguments supporting the screening measures, and especially the Lustration Law; it retroactively justified imposing screening measures to

protect the newly emerging democracy, or even to punish gross abuses of human rights. At the same time, the officially declared criminal nature of the Czechoslovak Communist regime appeared to offer the justification for the selective retroactive changes in the statute of limitations for crimes committed under the Communist regime. These changes were brought by the same Act No. 198/1993. Had this Act identified more precisely the Communist regime, its statement about the regime would have avoided an otherwise inevitable vagueness brought about by the use of the undefined expression “Communist regime.” A more precise identification of the regime would have increased the impact of the Act No. 198/1993 upon the process of justice after Communism. It would also have offered a clearer ground for the criminal law implications (the retroactive suspension of the statute of limitations) brought by the same Act.

The importance of a legal act acknowledging the *Nomenklatura* among the viable candidates for the attribution of responsibility for human rights violations, makes it desirable to substantiate the authority of such a legal acknowledgement with the authority of a non-ideological cognitive account of the regime. Such an account is necessary since to acknowledge the illegality of a past regime directly by the new legislator is not sufficient to ensure the authority needed by a declarative legal act with such important potential legal implications. As democratic as the majority rule might appear to be most of the time for a democratic legislative process, in some situations it can only express the despotism of the majority.⁸ The controversial nature of the position of the government

⁸Jon Elster, “On Majoritarianism and Rights,” East European Constitutional Review 1, no. 3 (Fall 1992): 19-20.

and other political agencies among the legal actors of a process of political justice, requires the issues of the collective agenthood of the *Nomenklatura*, and of its legal and political responsibility, to be addressed in a more systematic and impartial manner than through an immediate act of the legislative body.

A cognitive approach, relative to the repressive regime, coming from outside the legal discourse might seem superfluous. Nevertheless, in the context of an inherently controversial political justice process, the backup received from an as apolitical as possible environment is essential. This cognitive backup will strengthen the authority of the declarative act assessing the Communist regime, and the authority of its eventual further legal implications. Therefore, the reconstruction of a more coherent and better defined process of political justice should start from this type of evaluation of the Communist regime. An official evaluation would come to identify the regime within its most representative agency, e.g. the *Nomenklatura*, granting the latter the status of collective actor, and facilitating its acknowledgement through a legal formula.

Given the importance of this quasi-legal cognitive process for all the aspects of political justice, it becomes important to try to identify at the end of this thesis the concrete mechanisms through which this process takes place and through which its outcome can acquire legal relevance. The main result of such a cognitive process is the eventual identification of the Communist regime with its structures of real power, and the legal implications of this identification is the recognition of these structures as a potential collective actor responsible for human rights violations. This outcome would ultimately

have to come under the scrutiny of the rule of law. Given this scrutiny, the rapport between the mechanisms of political justice and the fundamental principles of the rule of law is essential. Hence, in the next pages we shall first look into the true values behind the principles of the rule of law, and the way they could support the search for a coherent process of political justice. Only then, will the possible mechanisms of political justice and collective political responsibility become clear.

6.2 The Rule of Law in Post-Communist Eastern European Context

There is no dispute that the demands put by the process of political justice in Eastern Europe upon the principle of the rule of law are predominantly substantive demands; the (legitimate) expectations for political justice often go against the formal legal parameters usually associated with this principle. Consequently, looking into the relationship between the parameters of the rule of law and the demands of political justice requires an approach which would emphasise the possible coincidence of these demands with the ultimate values embedded in the rule of law. For this purpose, the first part of this section will identify the values residing behind the formal parameters of the rule of law; it will underline the conflicts which exist within the rule of law with respect to the realisation of these values, and the limited efficacy - especially in the context of a totalitarian regime - of the formal concept of the rule of law in defending these values. Then, in the second part of the section, it will be shown how the approach taken by the critics of the process of political justice and collective political responsibility of the Communist structures of

power (an approach usually based upon the strictly formal parameters of the rule of law), goes against a true realisation of these values. In this discussion, the specificity of one of the social actors involved in the process of political justice in Eastern Europe - the *Nomenklatura*, the political agency identified in Chapter Five as representing the Communist regime - will play a predominant role.

At the beginning of the thesis it was argued that, if it is to be properly recognised, the right to revolution of the Eastern European countries implies a necessarily retroactive assessment of the Communist regime, and therefore of the political agencies which stood for that regime.⁹ The nature of this inference, as well as - following the findings from Chapter Four - the nature of the *Nomenklatura*'s position in the society it ruled, reveals the process of political justice to be one of those "points of tension" within the rule of law where substantive claims demand to be acknowledged within the formal procedural framework of this principle. On the other hand, the analysis of the *Nomenklatura* in the previous chapter has shown that it is exactly within the specificity of the revolutionary process, and within the specificity of the collective political agent, that the release of tension in these points lies. Both practical solutions to expectations of post-revolutionary justice, and the answers to related theoretical issues (such as the conformity to the parameters set by the rule of law principle), depend upon the realisation that in the Eastern European processes of political justice one is dealing with a totalitarian collective actor.

⁹See *supra* the discussion on the right to revolution and its implications for a process of political justice, Section 1.5.

By taking into consideration this specificity of the revolutionary process, and the specificity of the collective actor (as analysed in Chapter Four) a complex and dynamic legal discourse could offer a procedurally enriched principle of the rule of law. Such a principle could help in the process of translating the revolutionary demands into normative statements. At the same time though, one has to keep in mind that an important part of the objections to political justice were built - as seen in the case studies from Chapter Two and Chapter Three - upon the very concept of the rule of law. Therefore, in order to translate coherently the revolutionary demands into legal sentences, one has to identify and confront the ultimate values pursued by those who, on the ground of the principles of the rule of law, reject the idea of political justice, and especially the idea of political justice incorporating a dimension of collective political responsibility of the Communist hierarchy.

6.2.1 The *Nomenklatura*, Collective Responsibility, and the *Values* of the Rule of Law

When one is concerned with the preservation of the rule of law one is not ultimately concerned with fixed and previously announced rules, with general and universal norms, or with procedurally bound justice courts.¹⁰ What one is ultimately concerned with is a

¹⁰ Hayek wrote that “stripped off of all technicalities [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.” Friedrich A. Hayek, The Road to Serfdom (Chicago: University of Chicago Press, 1944), p. 54.

set of transcendental values for which the universality and generality of norms, their prospectiveness and consistency, etc., are only means of achieving these values. The real concern of those, such as the critics of political justice and collective responsibility, preoccupied with the preservation of the rule of law (be it in its formal or substantive conception)¹¹ are the values of equality, individual autonomy and security. ¹² The preservation of these three values must therefore be also the ultimate concern of those critics who - invoking the parameters of the rule of law - reject the idea of assessing the *Nomenklatura*'s responsibility for the human rights violations associated with the Communist regime.

The best way to achieve these values is through generality, universality, prospectiveness, etc.,¹³ of norms. But this way does not say everything about the protection of these values.¹⁴ What remains unsaid is the very important fact that generality, universality, prospectiveness etc., are not absolute and unique ways of achieving equality, autonomy

¹¹Craig, pp. 35-37.

¹²Cotterrell, "The Rule of Law in Transition," p. 459 ff. Also, Sunstein, "Problems with Rules," p. 978 ff. Sunstein, for instance, characterises Hayek's position towards the rule of law as an example of "extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law." Sunstein, "Problems with Rules," p. 957.

¹³A more detailed list of principles included in the rule of law is given by Sunstein inspired by Fuller and Raz: "A system committed to the rule of law seems to require (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity and a ban on retroactivity; (3) a measure of conformity between law in the books and law in the world; (4) hearing rights and availability of review by independent adjudicative officials; (5) separation between law-making and law-implementation; (6) no rapid changes in the content of law; and (7) no contradictions or inconsistency in the law. These are the customary characteristics of a system committed to the rule of law. *Of course, no legal system is likely to comply with these seven goals; failures of the rule of law, understood in such terms, are commonplace*" (emphasis mine). Sunstein, "Problems with Rules," pp. 956-957.

¹⁴Sunstein, "Problems with Rules," pp. 956-968.

and security. Though generally valid, exceptionally we might decide that these procedural parameters of the rule of law can be legitimately amended in the pursuit of these desired values. This position towards the rule of law, demanding a place in the legal discourse for “legitimate rule revision,”¹⁵ conveys the ultimate claim made in the Eastern European processes of political justice. As one could see in Chapter Two and Chapter Three, in the Hungarian debate on the statute of limitations, or in the Czechoslovak screening laws, this claim was sometimes spelt out, and other times was only suggested. The right to revolution also boils down to the same claim for recognising exceptional circumstances beyond the limits of a formal conception of the rule of law, and for the possibility to assess legally *Nomenklatura*’s role in the Communist history.¹⁶

Acknowledging “exceptional circumstances” within a legal system based upon the rule of law is often claimed to undermine the whole coherence of a legal system.¹⁷ Nevertheless, an acknowledgement of exceptional circumstances does not mean that the gates must be left wide opened to substantive evaluations, without any procedural control over the latter. It would be a legally counterproductive and even paralysing conclusion to consider that “all the horses are now Trojan.” In many domains, the regulator has long

¹⁵Sunstein, “Problems with Rules,” pp. 1008-1012.

¹⁶See *supra* the discussion on the right to revolution, Section 1.5.

¹⁷Stephen Holmes, “Precommitment and the Paradox of Democracy,” in Constitutionalism and Democracy, eds. John Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), p. 195 ff. Richard H. Piles and Cass R. Sunstein, “Reinventing the Regulatory State,” University of Chicago Law Review 1 (1995): 66-71. Raz also, writes that, “[more] importantly, the practice [of proceedings through law] allows the creation of a pluralistic culture. For it enables people to unite in support of some ‘low or medium level’ generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or Liberalism, etc.” Joseph Raz, The Morality of Freedom (Oxford: Clarendon, 1988), p. 58.

since given up this ossifying approach.¹⁸

Legitimate acknowledgement of exceptional circumstances, derived from the nature of the *Nomenklatura* as collective agent, is not a process impossible to conceive. It can take place by carefully isolating those situations in which the principle of the rule of law in its formal conception does not fulfil its reason of being - it does not serve the values of equality, autonomy and security - and by proposing alternative mechanisms to fulfil those values. It is from this perspective of rationally differentiated application of the legal principles that one should assess the right to revolution and the legitimacy of the expectations for political justice. This right and these expectations include both a dimension of collective responsibility, and a dimension of retroactive assessment of the Communist regime. It is exactly by *not* including these dimensions, and by rejecting under all circumstances any process of justice which is not based on all the formal parameters of the rule of law, that the long lasting damage to the underlying values of equality, autonomy and security is done.

This relativisation of the rule of law with respect to its capacity to protect citizens, is not something unheard of in the legal debate. The Hungarian proposals on the statute of limitations are not the only ones invoking "exceptional circumstances" against the principle of absolute security, and the Czechoslovak screening processes are not the only ones circumstantiating the principle of individual autonomy and equality. The difficulty

¹⁸Morton J. Horowitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal* 86 (1977): 563. Sunstein, "Problems with Rules," p. 981 ff. Friedrich A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960), pp. 220-233.

to safeguard the three transcendent values does not belong only to the domain of radical political changes. Proposed generally as a “procedural kit,” the rule of law often revealed itself inadequate as a safeguard for the citizens against arbitrary power.¹⁹

One line of defeat in the preservation of the three values, for example, is a persistent neglect of the problems brought by the emergence of the private power.²⁰ The rule of law ignores to a considerable extent the fact that the power of the corporate capital over the lives of the individual consumers or employees, just like the power of the government over its citizens, can fundamentally and negatively affect the realisation of the three transcendent values entrenched in the rule of law.²¹ In a similar theoretical confrontation - albeit full of practical consequences - between individual and collective agency, a formalistic perspective over the rule of law fails to ensure the protection of the citizens in those rare, but very important, moments of radical re-negotiation of the social contract.²² These moments include the revolutionary periods, and, most importantly, those

¹⁹Speaking about the hold that rule-formalism has on the public imagination, Hutchinson comments that this hold “is not only a feature of the legal mentality.” Allan C. Hutchinson, Dwelling on the Threshold: Critical Essays in Modern Legal Thought (London: Sweet & Maxwell Limited, 1988), p. 23. On the same line see also Judith N. Shklar, Legalism (Oxford: Oxford University Press, 1964), p. 37 ff. Also Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory (New York: Free Press; London: Collier Macmillan, 1977), pp. 176-181. See also *supra* Cotterrell, Chapter Two, note 68.

²⁰“Individual life is dominated and permeated by large and complex bureaucracies, principally the state and the business corporation... Yet, while bureaucracy represents one of the greatest threats to genuine democratic values, there is little reason to suppose that the Rule of Law offers any refuge from the dangers of unbridled bureaucracy.” Allan C. Hutchinson and Patrick Monahan, “Democracy and the Rule of Law,” in The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), p. 115. Also Unger, pp. 192-223.

²¹Hutchinson and Monahan, pp. 119- 120.

²²G. Werle, “‘We asked for Justice and Got the Rule of Law:’ German Courts and the Totalitarian Past,” South African Journal on Human Rights 11, no. 1 (1995): 70-83.

very difficult times preceding and leading to a revolution.

Emphasising the incapacity of the principle of the rule of law to protect the individual in these circumstances is not meant to deny the importance of the rule of law, and its usefulness in imposing limits on a government's power, *especially* with respect to controversial issues. Montesquieu underlined, in this sense, the value of a formal principle of the rule of law as the only principle capable to protect the ruled against the aggression of the rulers.²³ Moreover, one should note here the importance of the rule of law in limiting the powers of the rulers not only before, but also *after* a revolution. Embracing all people, the principle fulfils, according to Montesquieu, only one fundamental aim: the protection of the citizens from the discretionary exercise of power.²⁴ Though this position has its uncontested value for the protection of collaborators, border guards, etc., from being transformed into political scapegoats, contemporary legal scholars have also pointed out undesirable consequences of the formal concept of the rule of law.

Hutchinson and Monahan, for instance, argue that the individual life is dominated and permeated by large and complex bureaucracies, principally the state and the business

²³ Montesquieu, The Spirit of Laws (Cambridge: Cambridge University Press, 1989), Book Two, p. 253. Also, Shklar, Montesquieu, p. 15.

²⁴ "Montesquieu's [concept of the rule of law] really has only one aim, to protect the ruled against the aggression of those who rule. While it embraces all people, it fulfils only one fundamental aim, freedom from fear, which, to be sure was for Montesquieu supremely important." Shklar, Montesquieu, p. 4.

corporation.²⁵ According to them, while bureaucracy represents one of the greatest threats to genuine democratic values, there is little reason to suppose that the rule of law offers any refuge from “the dangers of unbridled bureaucracy.”²⁶ Hence, according to this view, the rule of law in its formal conception presents limited efficacy in defending the values of the autonomy, equality and security of the citizens not only in the case of an unlimited totalitarian government, but also in the conditions of a more limited, democratic, government.

Let us see more concretely what the result of the confrontation between citizens devoid - as shown in the previous chapter - of any practical power, and the Communist totalitarian regime would be when this confrontation is assessed through a rigid approach to the rule of law and to the realisation of its intrinsic values of equality, autonomy and security. In the case of the Communist bureaucracy the generality of rules designed to promote the protection of the value of equality, creates not fairness but unfairness and harm. This takes place by actually “discriminating” against that part of the population which presented a very general but distinct characteristic: it was totally excluded from the exercise of power of the Communist *Nomenklatura*.

Ignoring the distinction between the individual citizen and the “unbridled bureaucracy”

²⁵Hutchinson and Monahan, p. 115. Also, Unger, p. 192 ff.

²⁶Hutchinson and Monahan, pp. 115-117.

would result otherwise in an undeclared bias²⁷ towards repressive totalitarian methods of government. These methods were characterised exactly by a notorious lack of equality. Hence, by promoting generality, and by applying to a powerful organisation, such as the Communist partocracy, the same parameters set for the individual person, one inevitably becomes biased towards social contexts generating inequality. The conclusion would be that, in the particular case of justice after a totalitarian rule, the principle of generality of legal rules generates inequality. The implicit result of this approach is that, when promoting a rigid principle of generality, the rule of law actually protects less the citizens against oppression, than it protects the oppressive Communist bureaucracy against the consequences of the revolution.

A good example of bias towards a rigid understanding of the value of equality is the decision of the Hungarian Constitutional Court to reject the argument that the statute of limitations should be selectively suspended based on the compelling political circumstances in which the country was for almost half a century. In rejecting these exceptional circumstances the Court relied upon the general rules governing the activity of the laws in Hungary. Nevertheless, by doing so the Court, far from strengthening the value of equality, produced inequality. This inequality derived from the fact that the Constitutional Court did not allow for the legal acknowledgement of relevant differences²⁸ which existed between the citizens and the *unlimited* government of the

²⁷About bias as “solution” to the dilemma faced when choosing between the duty to obey and the right to civil disobedience see *supra* Section 1.5.

²⁸Sunstein, “Problems with Rules,” p. 994.

Hungarian Communist bureaucracy.²⁹

The same lack of distinction in the application of the rule of law principle accounts for the hesitations to accommodate the collective organisation as an autonomous actor, as opposed, or complementary, to the individual autonomous actor. In its anthropomorphic formulation, the principle of (individual) autonomy refers to the treatment of the individual person as an independent, freely reasoning being, responsible personally for, but only for, his or her own chosen actions and inactions.³⁰ It is in this particular formulation of the concept of autonomy that the idea of normative responsibility is overwhelmingly based. This way of defining autonomy, however, ignores the potential of the concepts of agency, intentionality and action - and therefore autonomy - to be differently shaped. No wonder then that one finds it difficult to accommodate a conglomerate organisation, such as the *Nomenklatura*, as an autonomous agent which is collectively responsible.

The value of autonomy suffered in two ways because of this permanent measuring of the collective agency against the standards devised for the individual agency. On the one hand, there is the obvious inadequacy of fitting a collective organisation, such as the *Nomenklatura*, under the same definition of an autonomous legal agent as the individual

²⁹These differences were proven, among others, by documents designed to place the Hungarian Communist partocracy beyond the reach of the law. See *supra* Podgorecki, and also Pataki, in Chapter Two, note 28 and discussion.

³⁰Davis, Michael, "How To Make the Punishment Fit the Crime," in *Criminal Justice*, eds. J. Roland Pennock and John W. Chapman (New York and London: New York University Press, 1985), p. 119 ff. Edmund L. Pincoffs, *The Rationale of Legal Punishment* (New York: Humanities Press, 1966), pp. 2-16.

person.³¹ On the other hand, ironically, difficulties surface also from the fact that, in many respects, the collective agent has mistakenly been assimilated in many respects with the individual agent.³² The legal status of the collective organisation has been assimilated to a great extent to the one of the individual citizen. This extension of the legal individualism to accommodate the economic importance of the business corporation (or indeed the political weight of the government bureaucracies), has gradually undermined the legal significance of the autonomy of the individual citizen, and turned this value against itself.³³

These aspects of the “physiology” of the value of autonomy have as consequence the tendency towards discarding the legal implications of accountability for the collective agent almost whenever it is impossible to make the latter emulate the individual actor.³⁴ One could say therefore that the ethos of the legal discourse allows that, under the condonation of the rule of law, the individual autonomy carries with it two problems. Firstly, not recognising the qualitative differences between the individual and the collective agency leaves the individual person in a disadvantaged power position, as compared to the collective agency. This is true with respect to the relationship between the individual person and the corporate organisation, but it becomes even more evident -

³¹Donaldson and Werhane, p. 24.

³²Even at the individual level, the value of (individual) autonomy as a legally promoted value proves to be “elusive.” Cotterrell, “The Rule of Law in Transition,” p. 462.

³³Cotterrell, “The Rule of Law in Transition,” p. 461. Also, Roger Cotterrell, The Sociology of Law: An Introduction, 2nd edition (London: Butterworth, 1992), pp. 123-130.

³⁴See *supra* Donaldson’s position on the concept of collective responsibility, Section 4.3.2.

as emphasised in the previous chapter through the analysis of the *Nomenklatura* - with respect to the relationship between citizens and their government. Secondly, not conferring the collective organisations the status of a fully-fledged autonomous agent in its own right unwisely excludes (totally, or partially) the collective agent from the division of legal responsibility. Both these shortcomings of the value of autonomy as protected by the rule of law stem from the theoretical position analysed in Chapter Four under the name of methodological individualism. In the concrete case of the processes of political justice in Eastern Europe, these shortcomings have as result a large discrepancy between the responsibility to be assigned for the human rights violations, and the actual potential of accountability -as perceived by the law - of the different social (individual and collective) agents.

Among the three values inherent in the principle of the rule of law, the most problematic for a process of political justice appears to be the value of security. Professing a rigid principle of security seems to protect the “unreasonable and unresponsive government” against the legitimate expectations for justice of the society,³⁵ more than it usually protects the citizens against the rather common *ex post facto* judgment pronounced by the courts,³⁶ or against the “multiform tactics” usually used by governments in order to assure the flexibility of certain domains of law.³⁷ In the specific case of the post-Communist

³⁵See *supra* Cotterrell and also Montesquieu, Chapter Two, note 68 and discussion.

³⁶Sunstein, *Problems with Rules*, p. 998 ff. Also Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 1989), pp. 3-10.

³⁷Foucault, “Governmentality,” quoted by Cotterrell, in Cotterrell, “The Rule of Law Transition,” p. 462.

processes of political justice, the prospective dimension of the rule of law is, of course, a logical impossibility. This impossibility is due to the theoretical and practical confusion, identified in the previous chapter, between the ruler and the player of the constitutional and legal game. This fundamental confusion of roles makes it impossible to assess the Communist regime using rules which have been carefully crafted by the latter exactly with the aim of not being assessed and made accountable, and with the aim of exercising unlimited power over all domains of the social life. In this kind of situations, although not only, the citizens remain unprotected by the principle of the rule of law.

It appears therefore, that pursuing the transcendent value of security would require differentiating between domains of social action in order to avoid this type of gap in which the individual person remains unprotected.³⁸ Among these domains, the revolutionary action is definitely a special breed which is very difficult to pin-point constitutionally with respect to the principle of legal security.³⁹ From this point of view, any revolution brings with it a certain degree of “*ex post facto*.”

Not any *ex post facto*, however, should be considered at odds with the hard core of the principle of security. Differentiating, for instance, between the various domains of the legal discourse one finds that the imperative ban on *ex post facto* legislation, as a basic

³⁸The most painful sacrifice that formal law has to make at the altar of responsiveness, argues Gunther Teubner, is “the diminution of internal consistency.” According to Teubner, modern responsive law “develops legal categories in dealing *ad hoc* with the various social subspheres. And these, of their nature, can no longer claim universal legal consistency.” Gunther Teubner, Law as Autopoietic System (London: Blackwells, 1992), p. 147. Also, Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law (New York: Harper and Row, 1978), p. 112.

³⁹Eekelaar, pp. 22-24. Finnis, pp. 44-46. Kelsen, Problems of Legal Theory.

expression of the value of security, is an absolute dimension of only the substantive criminal law domain.⁴⁰ Certainly, this does not mean that the other domains of law are free of such restrictions on retroactivity; it only means that the ban does not have the same imperative character which makes it impossible to override regardless circumstances. As shown when discussing *Nomenklatura* as an organisation, with its idiosyncratic exercise of power, the confusion of roles between the ruler and the player in the legal constitutional game makes a rather compelling argument *against* a rigid use of the principle of legal security. Nevertheless, the argument was not considered compelling by the Hungarian Constitutional Court who rejected the Zétényi-Takacs which tried to amend retroactively the statute of limitations. On the other hand, the Czech Act on the Illegality of the Communist Regime made another, more successful, application of the same argument.⁴¹

The potential of differentiation within the legal discourse between the various domains of legal action entice to a reconsideration of the way in which the value of security is pursued through the basic principles of the rule of law. Rigidly rejecting the idea of such a reconsideration would mean giving the wrong signal to all present or future oppressive regimes. It has been said that the value of equality should be re-defined when dealing

⁴⁰Related to this, Shklar characterised the whole concept of the rule of law in its formal spelling given by Montesquieu as being “not the reign of reason, but... the spirit of the criminal law of a free people...[Montesquieu’s] view of limited government could be called the rule to control criminal law.” Shklar, *Montesquieu*, p. 2.

⁴¹See *supra* Chapter Two, notes 79 and 80, and discussion.

within the dichotomy of corporate and individual actor.⁴² This redefinition is proposed specifically for the protection of a substantive dimension of the value of equality. Likewise, inspired by the political and especially legal reality of an oppressive regime, one can argue that, when dealing within the dichotomy of citizen and (totalitarian) state, the value of security should also be re-assessed. This re-assessment should aim, in this case, towards a substantive dimension of the value of security. This new dimension would have to offer better prospects for the protection of citizens faced with unresponsive and irresponsible governments. For the re-assessment of the value of security though, the acknowledgement of the difference of nature of the two types of agency - the individual and the collective governmental one - becomes essential.

One question, of course, would be to identify those elements which “make a difference,” and which therefore justify a re-assessment of a formal legal principle such as the one of security. The potential of the legal discourse for accommodating the re-assessment of the value of security can be identified by considering the context in which a certain law is promoted. A useful argument in this sense can be deduced from Raz’s analysis of the functions of law.⁴³ Raz argued that the central normative function of the law is determined by its normative nature, and it is represented by the fact that laws are designed to guide human behaviour. According to Raz, the law also fulfils a subsidiary, *but independent* normative function. This function is the one of providing “a standard for

⁴²Cotterrell, “The Rule of Law in Transition,” pp. 460–461, and 465–466. Also, Ellen Hochstedler, “Corporations: The Twentieth-Century Criminal - Introduction,” p. 9 ff.

⁴³Joseph Raz, “On the Functions of Law,” in Oxford Essays in Jurisprudence, Second Series, ed. A. W. B. Simpson (Oxford: Clarendon Press, 1978).

evaluating human behaviour.” A retroactive law only evaluates the behaviour, it does not guide it.⁴⁴ In the case of retroactive laws, this subsidiary function becomes the central, if not the only function. Unless it is deduced from some factors which count as elements of indeterminate guidance, it cannot be said that a retroactive law can actually guide behaviour.

The value of security is meant to be ensured exactly through the guiding dimension of law. Nevertheless, this guidance should not be seen rigidly, as being offered exclusively through a normative act. The enactment of a retroactive law cannot be analysed in a temporal vacuum, without taking into consideration those factors which, though not legally sanctioned, may preempt the normative function of guiding human behaviour. Raz’s analysis of the functions of law goes along this idea when arguing that the retroactive law does not conflict with the rule of law if it is known for certain that such a law will be enacted.⁴⁵ In this case, the rule of law’s demand for a “fair notice” to the citizens about the norms introduced would be fulfilled, according to Raz. Of course, it is debatable as to what one should understand by “fair notice,” and what could make up for the lack of formal legal warning.⁴⁶

Notwithstanding this uncertainty, there is no doubt that the Communist bureaucracy was

⁴⁴Raz, “On the Functions of Law,” p. 281.

⁴⁵Joseph Raz, “The Rule of Law and Its Virtue,” The Law Quarterly Review 93 (April 1977), p. 198.

⁴⁶Richardson and Mandell, pp. 11-15. Teitel, “Dilemmas of Justice,” p. 19.

more than aware of the extent to which its legitimacy was contested, and its restrictions on civil and political liberties resented by the society it ruled. Obviously, one cannot speak here about an awareness that a very precise law, suspending the statute of limitations, for instance, would be passed. Such a more specific warning, however, has missed only because of an impediment created by the regime itself: an elaborated repressive machine using violent means in order to prevent the social disapproval to surface into potential legal forms. This is an aspect which “makes a difference” in the process of the realisation of justice. Accordingly, it should be considered as a sound argument in the debate over the weight of the formal principle of security.

The presence of an extra-legal “fair notice” is not the only aspect which, in a process of transition, might soften the mutual exclusiveness of retroactivity and the principle of security embedded in the rule of law. In some cases, retroactivity might surface from the courts rather than from the legislator. A court’s perception of a certain normative act can change in time, and this change does not always give a fair warning. In spite of this, a fairly innovative application of a law is not always seen as incompatible with the rule of law. Hart, for instance, suggested that what the population in general and the law-enforcing officials in particular take the intention of the law to be should be taken into account.⁴⁷ Raz also regards as convenient to refer to the “intention of the law” as “a theoretical construct logically connected to the attitudes of the population and particularly of the law-making and law-applying organs as expressed in the legislature and its

⁴⁷Hart, *The Concept of Law*, p. 39.

committees, court opinions, etc.”⁴⁸

After looking into each of the three transcendental values of equality, autonomy and security, it can be argued that none of them can find a devoted guarantor in the formal principle of the rule of law generally, and especially not in the context of a totalitarian regime and its aftermath. Challenging this principle - at least under certain aspects - becomes inevitable in the process of re-instating justice after a totalitarian regime. It should be emphasised, however, that challenging the formal interpretation of the rule of law for a more substantive realisation of values which are underlying, yet beyond, the legal discourse, is far from being the monopoly of the revolutionary contexts. The need to ensure fairness or operational flexibility of the law creates permanent points of pressure within the rule of law, and in different legal domains. The formal performance of this principle is faced more often than ever with substantive goals.⁴⁹ This tension brought by the social expectations from the discourse of law is explained by the ever growing complexity and dynamism of social life.

Of course, the complexity and dynamism of social life have not brought the same extended changes to the demands of political justice as they have brought to the demands addressing other domains of law. However, two more notable aspects could be mentioned with respect to the conditions for the realisation of the demands for justice for past human rights violations. Firstly, with the development of the principle of legality, the way of

⁴⁸ Raz, “On the Functions of Law,” p. 285.

⁴⁹ Frederick Schauer, Playing by the Rules (Oxford: Clarendon Press, 1991), pp. 196-206.

answering these expectations for justice has concentrated predominantly on deterrence, excluding revenge, and accepting the idea of retribution only as a means to deter. This was a move destined to ensure an easier integration within the legal discourse of the demands for justice. Secondly, the development of the doctrine of human rights has to a certain extent energised the legitimate expectations for political justice, based on the violations of the basic rights of the citizens by their governments.

The Hungarian final version of the act amending the statute of limitations is a good example of bringing international law into the debate on political justice. As detailed in Chapter Two, this integration was done by using international treaties as legal foundation for domestic normative acts. Nevertheless, here it should not be assumed that similar expectations for retrospective justice were less legitimate prior to the Geneva Conventions; or that suspending retroactively the statute of limitations for very serious crimes was less of a legitimate expectation before the New York Convention established the non-applicability of statutory limitations to war crimes and crimes against humanity. The right to revolution, and thus to political justice, goes, for the time being, beyond the international conventions protecting basic human rights. As Kirchheimer put it, it originates in the popular consciousness.⁵⁰ This does not mean though that the expectations answered by a process of political justice are not legitimate; they are only “politically inconvenient.” Besides, it has to be acknowledged that even if sometimes domestic legislation does not protect against state-sponsored human rights violations, these acts, making the object of a process of political justice, are recognised as crimes by

⁵⁰Kirchheimer, “Legality and Legitimacy,” p. 143.

the international human rights law.

A step forward in the theory of political accountability and justice, and therefore, an improved protection of the individual and of the values of equality, autonomy and security, could be achieved by legally acknowledging sociological realities such as the *Nomenklatura* within the framework of the rule of law. It is very important, however, that this acknowledgement negotiates its way through the Scylla and Charybdis of the rule of law. It is from this negotiation that the necessary “safety structures” - for the protection of the individual members of organisations, and of the organisations themselves - of the mechanisms of collective political accountability emerge. At the same time, internally generated procedural standards - a result of the “negotiation” between the expectations for justice and the parameters of the rule of law - are indispensable for achieving the aim of the process of political justice: the protection of citizens against state-sponsored human rights violations.

It has become clear by now that not only reparation of past injustice, but also deterrence from future human rights violations, is not achieved by following the Helsinki Committee’s advice to reject any idea of political justice implying collective responsibility of the regime.⁵¹ On the contrary, justice should be achieved by using and procedurally taming this idea. This would mean operating an opening of the rule of law to the substantive demands of the revolution, while at the same time enclosing the legal

⁵¹See supra the discussion on the Helsinki Proposal for a process of screening, Chapter Three, Section 3.4.3.

potential to answer these demands into adequate safety structures or “procedural shells.” Acknowledging the right to revolution under the rule of law is meant to induce within the legal discourse the creation of those structures which will be activated in exceptional circumstances, when the advantages brought in by the procedural dimension of the rule of law are outweighed by the disadvantages.⁵² These safety structures are therefore to come into action when the rule of law transforms into a legal tool which reminds one more of an armour protecting “the power that is” than of a shield protecting - such as Montesquieu wished - the individual citizen.⁵³

6.3 Justice by Truth: The Truth Commission and the Acknowledgement of Collective Responsibility

At the beginning of this thesis it was shown that the recognition of the right to revolution, with its implied dimension of collective political responsibility, belongs to those means of inducing accountability into the most discretionary, unreasonable and unresponsive structures of power. In the remaining part of the thesis we shall identify those legal parameters within which the expectations for political justice, derived from this right to

⁵²Lawrence Lessing, “The Path of Ciberlaw,” Yale Law Journal 104 (1995): 1743.

⁵³The relative nature of the rule of law seems, again, implied in Raz’s vision of this principle. Raz sees the rule of law as a concept internally generated by the law as a solution to the evil brought by the law itself. This ontology of the rule of law underlines the important aspect that the rule of law is part of the legal system and therefore part of the problem. This means that the rule of law potentially generates some evil itself, as a specialised part of the legal discourse. Therefore, it is just normal for the legal discourse, yet again, to try to accommodate expectations that the evil generated by this principle will be addressed. Raz, “The Rule of Law and Its Virtue,” pp. 209-211.

revolution, can be accommodated.

In spelling out these structures for integrating the *Nomenklatura*'s responsibility within the legal discourse, its specificity, such as it was presented in the previous chapter, plays an important role. First of all, there should be identified ways of acknowledging the collective actor as opposed to the individual one. This will be realised here by emphasising one particular path to be taken. This path, which is an expression of a legal hybrid, will later prove to have a direct impact on all the other aspects of the integration of collective responsibility under the rule of law. Secondly, we shall look into the possibilities for legally acknowledging the *Nomenklatura*'s central place in the Communist regime and therefore, its responsibility for the human rights violations and the repression of democratic structures. Thirdly, the aspects of the legal acknowledgement of *Nomenklatura* will inevitably bring up the question of implementing the *Nomenklatura*'s responsibility, and making it accountable. We shall therefore finally look into the legal possibilities opened up for implementing this responsibility.

The first element on the road to integrating the *Nomenklatura*'s nature and responsibility into the process of political justice is actually represented by a legal hybrid; a mechanism which begins as a cognitive process outside the legal discourse but which can become a legislative landmark. This mechanism needs the legislative input in order to become part of the legal debate on political justice. At the same time, it lends the process of legal justice undertaken in times of transition almost all the authority this process of justice can ever hope to get; it lends the process of political justice the authoritative truth it produces.

In chapter one, political justice was defined as an attempt to offer an authoritative interpretation of the past. This definition can be perceived as derisive, the imposed interpretation always being the victors' version.⁵⁴ However, the actual nature of the process depends upon the way the object of the process of political justice was established. Although falsifying the truth in such an inherently controversial process is not impossible, taking the gross violations of rights which occurred under the Communist regime as object of the process of political justice should protect the process against blunt ideologisation.⁵⁵ As emphasised in the first chapter, the protection against accusations of using the law for persecuting the political foes can be ensured by addressing those crimes only which could not be justified by the pursuit of any ideology, however altruistic that ideology might appear to be.⁵⁶

The concept of political justice - with its competing discourses - is a sword with two edges, it can be both used and abused. It is understood that a government engaging in a process of political justice is inevitably assuming the "historical risk" of being proven wrong, of being proven itself an abuser of justice and law.⁵⁷ Therefore, the "victors" should not worry about being victors, but about getting their justice right so that history

⁵⁴Kirchheimer, Political Justice, p. 17.

⁵⁵R. J. Holt, "The Grammar of Human Rights: A Wittgensteinian Analysis," Ph.D. thesis, London School of Economics, 1994, p. 5 ff.

⁵⁶Appelbaum.

⁵⁷See *supra* Kirchheimer, Chapter One, note 74, and discussion.

does not judge them too severely.⁵⁸ Taken as the object of the process of political justice, the systematic state-sponsored violations of human rights cannot be seen as unrelated individual violations, which do not entail the responsibility of the Communist hierarchy.⁵⁹ Besides, no valid justification can be offered for the practically total suppression of fundamental rights and freedoms of entire populations. On the other hand, handled carefully, a process of political justice including the *Nomenklatura* among the accountable actors for the crimes of the regime has all the chances to withstand the test of history.

From the debate surrounding the different approaches to political justice in Eastern Europe it became obvious that one of the main difficulties with this process relates to the fact that neither legal, nor political discourses have a fixed point of reference regarding the interpretation of the past.⁶⁰ What for one side means systematic violence, for the other side means unavoidable political lapses of the emerging Communist societies; what for one side represents state-sponsored violations of fundamental human rights, for the other side represents isolated individual instances of “mistakes.” It becomes therefore unavoidable to try to address the issue of the truth about the Communist regime, and the mechanism available for establishing an authoritative truth which could help the

⁵⁸See Richard Wasserstrom, “The Relevance of Nuremberg,” *Philosophy and Public Affairs* I, no. 1 (1971): 27. Though very critical towards the use of courts for upholding other values than the one of strict legality, even Kirchheimer agreed with the inherent justice of the Nuremberg trials. Kirchheimer, *Political Justice*, p. 423.

⁵⁹See *supra* the discussion in Chapter One, Section 1.4.

⁶⁰André Du Toit, “Introduction” to *Towards Democracy: Building a Culture of Accountability in South Africa*, ed. André Du Toit (Cape Town: IDASA, 1991), p. 9.

processes of justice and reconciliation.

Finding and exposing the truth about the past belongs to the nature of any process of justice, and the process of political justice is no different in this respect. Accordingly, the legal discourse is bound to face expectations for accommodating an official, “authoritative” attitude towards the past.⁶¹ The fact that, as shown in the previous chapter, the Communist regime can be pinned down to the collective body of the Communist *Nomenklatura* undoubtedly adds both substance and suspense to such an enterprise. At the same time, as we shall see later on, the idiosyncrasy of the political actor itself adds specific features to the legal cognitive process through which *Nomenklatura*’s responsibility could be acknowledged and assessed.

A cognitive process which upgrades the truth about the Communist regime from individual level to system dependent phenomena, and which leads in this way to a complex social agent such as the *Nomenklatura*, is inevitably surrounded by a certain ambiguity as to the social discourse (political and/or legal) this process will inform. This ambiguity is especially encouraged by the a-typical character of the *Nomenklatura* as a formal organisation.⁶² The ambiguity and a-constitutionalism of *Nomenklatura*’s formal structure, its “undercover” competencies, the length of time over which its activity expanded, add to the difficulty of the cognitive exercise taking place both within and outside the legal discourse relative to the *Nomenklatura*. From this point of view, finding

⁶¹H. Adam, “Trading Justice for Truth,” *World Today* 54, no. 1 (1998): 11-13.

⁶²See *supra* the discussion on the a-constitutional character of the *Nomenklatura*, Section 5.3.

and telling the truth functions much more easily when dealing with a military dictatorship where, after a relatively short undemocratic period, a relatively restrained and easily identifiable military elite is made accountable.⁶³

The specificity of the *Nomenklatura*, with its hidden structures of power and its vicarious existence, is not the only aspect which hinders the cognitive exercise for the purpose of a process of political justice. As revealed by the analysis of the debate on collective responsibility, the ambiguity of the legal discourse towards the concept of collective agency is definitely one other reason why there have been so few comprehensive attempts in Eastern Europe to present an authoritative perspective over the Communist regime.⁶⁴ With one exception only,⁶⁵ the truth about the collective dimension of the human rights violations under the Communist regime has been left more or less to itself.

In acknowledging the collective responsibility of the *Nomenklatura* as a collective social actor, it is important to choose carefully the concrete way in which this acknowledgement is practically taking place. One such strategy has been already discussed when addressing

⁶³Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law and Social Inquiry* 20, no. 1 (Winter 1995), reproduced in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, *General Considerations*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 105. Also, Albon, "Justice in Times of Transition," p. 50.

⁶⁴Huyse, "Justice after Transition," p. 338.

⁶⁵In May 1992, the German *Bundestag* passed the "Law Creating the Commission of Inquiry on 'Working through the History and the Consequences of the SED Dictatorship'." Act No. 12/2597 (May 14, 1992), reproduced in *Laws, Rulings, and Reports*, vol. 3 of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 216-219. See also James A. McAdams, "The Honecker Trial: The East German Past and the German Future," *The Review of Politics* 58, no. 1 (Winter 1996): 53.

the Czech approach to political justice. This approach took the form of the Act proclaiming the illegality of the Czechoslovak Communist regime (Act No. 198/1993). As it was pointed out at the time, the Act No. 198/1993 offered a rather unambiguous statement about Czechoslovakia's Communist past.⁶⁶ The Act declared the Communist regime and its active supporters fully responsible for systematic violations of human rights through murder, illegal imprisonment and torture, disregard for the freedom of movement, etc.⁶⁷ In spite of this legally and politically courageous statement which was bound to create controversy, it was recognised that the authoritativeness of the Act No. 198/1993 relied more on the political authority of the legislative body than upon authority of impartial knowledge resulting from a fact-finding process.⁶⁸

The law was also shown to be too schematic, and even vague, with respect to key concepts requiring a far more precise delimitation; the law used terms such as "Communist regime" and "responsibility" without defining these terms, and therefore without precisising the discourse - legal or non-legal - in which these terms should be understood.⁶⁹ Hence, it would be difficult for the legal process of political justice to draw its legitimacy from this type of legislative statement acknowledging the responsibility of

⁶⁶See supra Chapter Three, note 137, 139, and 142, and discussion.

⁶⁷See supra Chapter Three, note 142, and discussion.

⁶⁸"Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime," 12 December 1993, reproduced in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 369-374. Also, Siklova, pp. 59-60.

⁶⁹See supra Article 1 and Article 2 of the Czech Act on the Illegality of the Communist Regime, Chapter Three, note 137 and 139.

some undefined structures of the Communist power.

The Czech Act No. 198/1993 has indeed its own merits since it tried to address the Communist regime as a whole, making an open statement about the repressive nature and the responsibility of the regime. This statement, however, was made in an incomplete and unilateral manner, mainly due to the fact that the Czech parliament did not base the Act upon a document with a clearer formal basis of impartiality. An act declaring the *illegality* of the Communist regime cannot be based exclusively upon a common perception of the nature of the regime. For a legitimating acknowledgement of the real nature of the regime the legislator should rely not upon mere social perception, but upon objective social knowledge.⁷⁰ This objective knowledge can be sanctioned by the legislator, but it cannot originate in the legislator's will. In other words, that dimension of political justice which concentrates on revealing the truth about the past regime as a whole has to combine the authority of the law with the one derived from an impartial approach to history.⁷¹

Answering this need for an impartial authoritative account of a regime, the practice of transition from undemocratic regimes has developed a hybrid institution which could be seen as essential in integrating the collective responsibility of political bodies in a legal

⁷⁰G. Simpson and P. Vanzyl, "La commission pour la verité et la reconciliation sera-t-elle le meilleur desinfectant?" *Temps modernes* 50, no. 585 (September-December 1995): 394.

⁷¹Carlos S. Nino, "When Just Punishment is Impossible," in *Truth and Justice: The Delicate Balance*, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), p. 67 ff. Teitel, "Truth and Justice," pp. 5-6.

approach to political justice.⁷² In this sense, it has become common practice to provide the official truth about a government or a political regime through a “truth commission.” Such a commission is supposed to embody the highest possible degree of impartiality.⁷³ In this sense, it is considered of the essence of a “truth commission” to address the nature of a political regime with respect to the gross violations of rights which occurred under that regime’s sponsorship.

The nature of the *Nomenklatura* as political agent representative of the Communist regime, the time span over which this regime stretched, the seriousness and complexity of the crimes to be unravelled, all make necessary this meta-legal foundational stage of a process of political justice. The core of this analysis becomes therefore to underline the role and importance a truth commission can play in integrating the concept of collective responsibility and the *Nomenklatura* in the process of political justice.

The function fulfilled by a commission of truth belongs to the foundations of a process of political justice, in the sense that, as we shall see in more detail later, all other measures of political justice such as screening laws, changes in the application of the statute of limitations, redefining the concept of legal agency, etc., should all be grounded in the truth-finding process initiated by a truth commission.⁷⁴ Since it attempts to build

⁷²Margaret Popkin and Naomi Roht-Arriaza, “Truth As Justice: Investigatory Commissions in Latin America,” *Law & Social Inquiry* 20, no.1 (Winter 1995), reproduced in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, *General Considerations*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 262-263.

⁷³*Ibid.*

⁷⁴Du Toit, p. 7.

a bridge between society's substantive expectations for justice, and the aspirations of the same society for the rule of law, this process is also "meta-legal."

How could a truth commission help in the specific task of integrating the Communist *Nomenklatura*, as totalitarian political body, in the process of political justice? And how could it bring the collective responsibility, as an expression of the *Nomenklatura*'s attribute of autonomous social actor, under the law? To answer these questions one would have to look into the functions and goals of a truth commission, and into its potential implications for both criminal law, as well as non-criminal law approaches to political justice. For these implications, both the mandate and the setting up formula of the truth commission will also have to be looked into.

6.3.1 Collective Responsibility and the Functions of the Truth Commission

A truth commission shares with a process of political justice the same object, e.g. the gross violations of human rights by an oppressive regime. Its functions are therefore shaped with a view to addressing this object.⁷⁵ This fact makes a truth commission from the start an appropriate tool for initiating a process of political justice. The primary function of a truth commission is to establish an accurate record of a country's violent

⁷⁵Priscilla B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994): 599.

past.⁷⁶ The ultimate goal pursued through this function of exposing the truth is to contribute to a clear signal that, during a democratic transition, past human rights violations cannot go ignored, and unaccounted for.⁷⁷ Therefore, a process of establishing an accurate record of a regime through a truth commission has to offer the ground for an official and legal statement about the repressive past.⁷⁸ This process of revealing the truth, together with the work put into embedding the democratic principles into the weakened civil societies, can play an important role in diminishing the likelihood of human rights violations in the future.⁷⁹

As it was shown in Chapter Four and Chapter Five, the acts of a regime can be something more than the mere sum of the individual acts and crimes committed by the discrete individuals with or without the “credentials of membership.” In this respect, establishing the systematic nature of the crimes and the link between these crimes and the political regime which committed them belongs intimately to the main function of a truth

⁷⁶Popkin and Roht-Arriaza p. 287. The fact that through its activity the commission would help in providing a fair record of the country’s history, preventing it from being lost or re-written (with all the preventive aspects of this preservation), belongs to the secondary or mediate functions of the commission. Eisenberg, p. 148 ff. The German Commission of Inquiry on “Working through the History and the Consequences of the SED Dictatorship,” was assigned, as part of its mandate, to make contributions to political-historical analysis and to political-moral assessment (Article II), without at the same time aiming to forestall or replace the necessary historical research (Article I). Germany: Law Creating the Commission of Inquiry on “Working Through the History and the Consequences of the SED Dictatorship,” Act No. 12/2597 (14 May 1992), reproduced in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 216-219.

⁷⁷Orentlicher, “Settling Accounts,” pp. 2613-2615.

⁷⁸Hayner, p. 604.

⁷⁹The healthy re-building of civil society itself relies to a large extent upon the acknowledgement of truth. Assuming the past creates a more knowledgeable citizenry, capable of recognising and resisting any sign of return to a repressive regime. Orentlicher, pp. 2610-2614.

commission.⁸⁰ This dimension of a truth commission's activity proves its important implication in the integration of a collective responsibility dimension in the political justice debate. In this sense, the truth commission is expected to present an evaluation not of certain crimes or individuals, but of a government or political regime as a whole. Establishing and disclosing the truth about the systematic human rights violations committed under the Communist regime's sponsorship, for example, would entail an acknowledgement of the role played by the Communist structures of power in committing those crimes.⁸¹ Hence, the fact-finding function of a truth commission acquires a very important, even essential, declarative nature. This function goes beyond the declarative dimension of the Czechoslovak Lustration Law, or even of the Czech Act on the Illegality of the Communist Regime. The formal recognition of the responsibility of the Communist structures of power coming through a truth commission is expected to be clearer and more openly stated than the Lustration Law was, and to have more authority in expressing the nature of the Communist regime than the law declaring the regime's illegality.

Speaking about the fact-finding function of a truth commission it should be noted that the complex nature of a totalitarian regime make this function go beyond merely "finding"

⁸⁰Nino, "When Just Punishment is Impossible," p. 73.

⁸¹"The Commission believes that it must state clearly its opinion on the individual and institutional responsibility that may stem from the human rights violations it has had to examine. More explicitly it must state what responsibility - if any - *should fall on the armed forces and security forces for human rights violations committed by individuals on active duty in their respective institutions*" (emphasis mine). Chile. Comisión Nacional de Verdad y Reconciliación, Report of the Chilean National Commission on Truth and Reconciliation, trans. Phillip E. Berryman, vol. 1 (Notre Dame: University of Notre Dame Press, 1993), p. 115.

the truth. It is unlikely that a truth commission would be expected to “discover” essential elements which are not already, at least potentially, within the public domain.⁸² In the Eastern European societies there is practically very little unknown about the crimes of the Communist regime, as well as about who was behind those crimes.⁸³ Therefore, for the truth commission, the “fact-finding” process becomes in fact a process of decantation of the essential facts, of the “representative” aspects which would have to be included in the final report of the commission. These essential facts will refer mainly to the political body which exercised the power, rather than to particular individuals and crimes. The truth commission will therefore be expected to acknowledge rather than to discover the state sponsored human rights violations, and to present coherently those essential elements of the Communist structure of power which makes it eligible for the moral and legal division of responsibility.

If the truth is already known, the inevitable question to answer at this point would then be whether the post-Communist societies still need commissions of truth. The answer to this question relates to the fact that we live in a culture profoundly marked by the legal discourse, a discourse often radiating beyond its own declared boundaries. Accordingly, societies expect an official legal statement about the injustice of a regime, even when this

⁸²Richard D. Ralston, “Apartheid, South Africa’s ‘Peculiar Institution’: Law Versus Justice in a Repressive Society,” in *Totalitarian and Post-Totalitarian Law*, eds. Adam Podgorecki, and Vittorio Olgiati (Dartmouth: Oñati I.I.S.L., 1996), p. 215 ff.

⁸³Appelbaum. In this respect, the commission would be informed by agencies placed outside both legal and political discourse. These agencies are part of the civil society implicated in the process of keeping the history records of that society. Among these agencies represented by historians, sociologists, lawyers, etc., Nino includes the artists whose contribution to the presentation of the account of the oppressive regime can, he argues, be just as important as the one of a truth commission. Nino, “When Just Punishment is Impossible,” p. 74.

injustice - formally speaking - might have been “legal.” It was to this need for official recognition of the crimes and perpetrators that Juan E. Méndez, the Director of Americas Watch, referred to when arguing that knowledge which is officially sanctioned, and thereby made “part of the public cognitive scene” acquires a mysterious quality that is not there when it is “merely truth.”⁸⁴ The primary function of a truth commission would therefore be not so much the “fact-finding” but the *acknowledgement* of truth.⁸⁵

The reason why the truth revealed by the commission can have more authority, and a greater impact upon the acknowledgement of collective responsibility in the process of political justice, is a combination of the elements of the commission’s mandate, and of the commission’s setting up details.

6.3.2 Collective Responsibility and the Mandate of the Truth Commission

The mandate which the society is ready to give to the truth commission plays an important role in the acknowledgement of truth about the past regime, and hence in the integration of collective responsibility of the structures of power in a legal process of

⁸⁴Juan E. Méndez, Review of *A Miracle, A Universe*, by Lawrence Wechsler, *New York Law School Journal of Human Rights* 577 (1991): 583.

⁸⁵Hayner, p. 607. Jorge S. Correa, “Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship,” *Notre Dame Law Review* 67, Issue 5 (1992), pp. 1457-1485.

political justice.⁸⁶ In this respect, the non-European “truth experiences” can help one in identifying the essential parameters of a truth commission’s mandate.⁸⁷ In principle, there is a set of elements always present in the process of truth finding by such a commission which should be reflected in the mandate received. In the mandate, the goals of the investigation, as well as the investigative powers which the commission is invested with in order to achieve its goals, should be described.⁸⁸ The way in which these goals and powers are described can generate significant limitations for the process of truth finding, or it can empower the commission with invaluable tools. Ideally, in order to be able to disentangle the web of the power structures responsible for the human rights violations of a regime, a commission of truth should be given as wide a mandate as possible.⁸⁹

⁸⁶The commission’s mandate usually follows from a revolution, but it can also spring from a “change of heart,” or nature, at the government level. This mandate is usually given by the body which initiates the whole process: the administrative power, the representative body of the country, etc. For the different ways of organising a commission of truth see Hayner, p. 599 ff. Also Neil J. Kritz, ed., Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Washington D.C.: United States Institute of Peace Press, 1995), pp. 1-225.

⁸⁷Hayner, pp. 598-599.

⁸⁸See the Preamble and Article 1, and Article 2 and Article 4 respectively, from the Decree Establishing the National Commission on Truth and Reconciliation. Chile: Comisión Nacional de Verdad y Reconciliación, pp. 5-9. Also, The Mexico Peace Agreements: Provisions Creating the Commission on Truth (UN Doc. S/25500 (April 1, 1993), in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 174-176.

⁸⁹Mary Albon, “Truth and Justice: The Delicate Balance - Documentation of Prior Regimes and Individual Rights,” The Charter Seventy-Seven Foundation, New York (30 October - 1 November 1992), pp. 15-18. The mandate of the German commission of inquiry oscillates between the ambiguous task of “confronting the past” and the redundant one of “assessing personal responsibility” (Article I). This redundancy appears not only from the fact that the legal discourse is the one primarily in charge of assessing personal (legal) responsibility, but also because of the actual provisions of the act establishing the German commission. These provisions are far too “global,” conveying more obviously the predominant assessment of the SED regime, rather than of individual responsibility. The German commission, for instance, was asked to address the decision processes of the SED; the relation of the SED and the government apparatus, particularly the relation between the various levels of the SED and the Ministry for State Security; the structure and mode of operation of national security, the police and the justice system; etc. (Article II). Also, the commission was asked to contribute to the clarification of the matter of government criminality in the GDR (Article IV). Germany: Law Creating the Commission of Inquiry on

Two elements of the mandate would be particularly important for the role of the commission in acknowledging the responsibility of the Communist partocracy. Firstly, the mandate would have to establish those acts characteristic to the Communist oppressive regime and which will constitute the object of the inquiry, acts such as illegal imprisonment, unlawful executions, repression of democratic movements and persecution of dissidents, etc.⁹⁰ The commission would have to select those events most evocative for the nature of the regime and, where necessary, support its generalisations with statistical data.⁹¹

Secondly, trying to identify and to build upon the potential for action and intention of the *Nomenklatura*, the mandate of the investigative commission would also have to identify those elements which will make a bridge between the acts of the regime and that part of the Communist bureaucracy which practically embodies the regime. Therefore, it will be for the commission to elaborate on the role of the *Nomenklatura* in conferring a systematic character to the individual crimes and violations of human rights committed during the Communist regime. The reflection of these two elements in the mandate of an investigative commission is crucial for the degree of acceptance of the truth proposed by

“Working Through the History and the Consequences of the SED Dictatorship,” Act No. 12/2597 (May 14, 1992). In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 216-219.

⁹⁰Human Rights Watch, Special Issue: Accountability for Past Human Rights Abuses 4 (New York: Human Rights Watch, December 1989), p. 1.

⁹¹Popkin and Roht-Arriaza, p. 269.

the commission.⁹²

In order to convey authoritativeness, the mandate should be broad enough to cover the main categories of violations and abuses committed by the Communist regime. It should also allow the commission to be detailed enough in its report so that the facts described are convincing and do not appear too general. The report should include, for example, an in depth investigation into some cases illustrative of the regime's *modus operandi*, and summary statistics referring to the other cases.⁹³ At the same time, in order to establish the link between individual crimes and the *Nomenklatura* as the embodiment of the Communist regime, it is very important for the truth commission to have the freedom to establish overall patterns and explanations.⁹⁴

In order to unravel the truth about the gross human rights violations which took place, the commission needs to be vested with some sort of authority. This authority derives from the authority of the truth commission's sponsor, usually the new government.⁹⁵ The authority given to the commission must allow greater access to information sources, such as the Secret Police archives, greater security or protection to inquire into sensitive issues,

⁹²Nino, "When Just Punishment is Impossible," p. 73.

⁹³Hayner, p. 635 ff. Also, José Zallaquett, "Introduction" to the Report of the Chilean National Commission on Truth and Reconciliation, Comisión Nacional de Verdad y Reconciliación, trans. Phillip E. Berryman, 2 vol. Notre Dame: University of Notre Dame Press, 1993, p. 15-16.

⁹⁴Hayner, p. 601.

⁹⁵Popkin and Roht-Arriaza, pp. 265.

and a greater impact with the final report written by the commission.⁹⁶ Last but not least, a post-Communist truth commission will have to adopt its own specific way of looking into the past, reconstructing it from the perspective of an assessment of the regime as a whole. This function will imply considering a dimension of responsibility which goes beyond the individual one. In this sense, as a rule, a truth commission will be looking for the “binder” that holds together the abuses and violations of the regime, and it will be looking for those essential elements which make those violations part of the same unique policy of the same unique structure of power.

All these aspects of the mandate have a direct impact upon the acknowledgement of the responsibility of the Communist regime, and it is because of this impact that a truth commission becomes indispensable to a coherent process of dealing with the human rights violations of the past. Attempting to present the global truth rather than the particular one, a truth commission will concentrate on the essential, presenting the overall picture of the political violence during a specified period.⁹⁷ These generalisations can shape the historical account towards an acknowledgement of the *Nomenklatura*’s responsibility for the repressive regime. This cognitive process will concentrate on those gross violations of human rights which have been established as the main object of a process of political justice.

⁹⁶The greater impact of the report can be achieved through publication and dissemination of the report, but also through the government’s pledge to follow the recommendations included in the report. Popkin and Roht-Arriaza, pp. 286-287. Zallaquett, p. 11. Shirley Williams, “Democratic Accountability and Popular Empowerment,” Contribution in Towards Democracy: Building a Culture of Accountability in South Africa, ed. André du Toit (Cape Town: IDASA, 1991), p. 46.

⁹⁷Hayner, p. 607.

Focussing on the collective dimension of accountability for human rights violations does not mean that the individual responsibility should not figure among the goals of the investigation undertaken by a truth commission. The individual and collective responsibility should rather complement each other and the investigation should emphasise this complementarity. Nevertheless, as it was mentioned earlier, a truth commission should evaluate a government or political regime, and therefore the role of the latter's leading agencies are bound to predominate in the commission's enquiry.

It is in this dimension of the commission's mandate that the importance of the truth commission for the acknowledgement of a collective responsibility resides. It is mainly this aspect of addressing "the regime" which needs official acknowledgement. Therefore, more often than not, and the Eastern European countries would be no exception, the commission's investigations would start with individual violations of rights which, to a certain extent, are already in the public domain. The commission would then gather them into a coherent construction emphasising not the individuality of each crime or violation but their common elements; those elements which link the crimes to a collective political body as much as to the individual perpetrator.

Another important aspect which can have an impact upon the eventual collective agency (agencies) assessed in the process, is the temporal dimension of the commission's mandate.⁹⁸ Of course, a truth commission always focuses on the past. The mandate

⁹⁸The majority of the truth commissions have also been characterised by a geographic dimension which was included in the mandate. The analysis of the responsibility for the violations committed has been limited to the national bodies only, ignoring completely the important role sometimes played by

though will have to include a delimited time span to which the investigative powers should apply. This delimitation is more difficult in Eastern Europe than in most other cases of transition to democracy, given the unusual length of the Communist regime. The succession of several generations of the *Nomenklatura* and of several Communist governments which adopted varying degrees of repression of their citizens, might prompt a post-Communist government to establish only the most violent instances of the Communist rule as the object of the commission's inquiry. This rather artificial isolation which contradicts the reality of the Communist *Nomenklatura* as conglomerate political body,⁹⁹ could be prevented by bringing the *Nomenklatura*, and not the mere Communist government of a specific period, to the centre of the inquiry. Addressing the Communist regime as a whole would be in this sense the appropriate approach. There could, of course, be a more limited object of the commission's inquiry, e.g. an inquiry into human rights violations related to the events of the 1956 repression in Hungary, or of the 1968 events in Czechoslovakia. In both global or particularistic approaches, however, the violent events are to be assessed against the regime in order to establish its role.

foreign governmental or non-governmental organisations. Hayner, p. 635. In the case of the Communist rule the picture would hardly be complete without taking into account the role played by the Soviet Union in establishing and maintaining those regimes. Without exonerating the domestic Communist partocracy, comments on this aspects included in the final report could put the Communist history as a whole in the right perspective. This perspective - for which the political and legal discourse might not yet be ready - would enlarge the span of responsibility towards a cupola to which the domestic Communist bureaucracies belonged. Courtois, pp. 13 and 27-28. With respect to this issue, the German commission of inquiry was given the mandate to judge the significance of the international framework conditions, particularly the influence of Soviet politics in the former GDR (Article II, 6). Germany: Law Creating the Commission of Inquiry on "Working Through the History and the Consequences of the SED Dictatorship," Act No. 12/2597 (May 14, 1992). In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), pp. 216-219.

⁹⁹See *supra* the discussion on the *Nomenklatura* as a conglomerate organisation, Section 5.5.

A truth commission's activity ends with the submission and publication of a report including its findings and recommendations which should reflect an assessment of the past regime.¹⁰⁰ For the commission's effectiveness, and for the impact of its report, it is important to trace through the mandate rather precise tasks for the commission, and to give it a precise deadline for the presentation of the report. This does not mean that a truth commission has to be established at a precise time after the transition to a democratic regime has started. The complexity of the reality in the Eastern European countries shows that not all the countries are ready at the same time for this cathartic enterprise.¹⁰¹ It should be recognised that for a process of political justice addressing the human rights violations, there is a need for a favourable political context, and for some countries this favourable context might be later than for others.¹⁰²

However, once a favourable context has been created and the process of justice has been started by instituting a truth commission, the political momentum and the social motivation for such an enterprise should not be wasted; a precise deadline for the submission of the report should be included in the commission's mandate so that the commission delivers in the shortest time possible the results of its assessment. The inquiry into the complexity of the Communist past might sometimes be frustrated by this

¹⁰⁰ A second type of time limitation refers to the fact that the commission usually exists temporarily, for a pre-defined period of time. Hayner, p. 640.

¹⁰¹ Huyse, "Justice after Transition."

¹⁰² See Human Rights Watch, "Special Report," p. 2.

type of time limitation; however, the alternative of an endless inquiry can be worse.¹⁰³

This suggested rather dynamic, storming approach to the inquiry corresponds in a way with the need to concentrate on the generalities of the repressive regime, illustrated only with a limited but well documented number of particular cases.¹⁰⁴

6.3.3 The Commission and the Commissioners:

Setting Up a Truth Commission

The commission's agenda, focusing on the state-sponsored human rights violations, and on the identification of the structures of power, brings in the question of the setting up of a truth commission,¹⁰⁵ the question of who could be up to the task of assessing the Communist regime, and who could be invested with the mandate and authority to do it. The Czech Act on the Illegality of the Communist Regime (Act No. 198/1993) addressed exactly this need for official acknowledgement of the past, offering an authoritative official statement about the Communist regime. Although having the legislature's endorsement, the Act No. 198/1993 was very different in substance from what a truth commission's report would be, lacking many of the latter's potential qualities.

¹⁰³The German commission of inquiry, for instance, was not provided with a firm deadline for the presentation of its final report. This fact determined several postponements of the date when the report should have been made public. Hayner, p. 627.

¹⁰⁴Popkin and Roht-Arriaza, pp. 264-269.

¹⁰⁵Zallaquett, "Introduction," pp. 8-9.

In its haste to answer to the social expectations for political justice, the Czech legislative power dispensed with the need for an independent commission of inquiry. Based upon the activity of such a commission, the parliament could have legislated later, acknowledging its findings. Instead, the Czech legislature took itself the place of the “fact-finding body.” However, in a process of political justice, this dispensation can bring important disadvantages. The potential of “justice by truth” relies upon the independent nature of the commission itself, and upon its potential of objectivity. In the complex context of political justice, the issue of establishing the authoritative truth about a repressive regime is not an issue which can be decided exclusively through the majority vote. Such a vote would not convey sufficient authority.¹⁰⁶

While the authority of the legislative body originates in legitimating democratic elections, the authority of the commission is secured primarily through its scope and method of investigation.¹⁰⁷ These are outlined in the mandate, and reflected in its composition. The composition of the commission can have a considerable impact upon the public perception of the commission’s report, and also upon the authority of eventual legal acts - screening laws, acts addressing statutes of limitations or establishing the status of the Secret Police archives, etc. - based upon this report.¹⁰⁸ This does not mean that the whole process of truth-acknowledging would not have to gain an important dimension from a

¹⁰⁶Speaking about the despotism of the majority, Elster writes that today, as in the 18th century, “constitutions must protect individual rights from the excesses of democracy.” Elster, “On Majoritarianism and Rights,” p. 19.

¹⁰⁷Zallaquett, “Introduction,” p. 21 ff.

¹⁰⁸Popkin and Roht-Arriaza. Also, Alejandro M. Garro and Henry Dahl, “Legal Accountability for Human Rights Violations in Argentina,” Human Rights Law Journal 8 (1987): 299- 337.

legislative endorsement of the commission's report. It only means that the legislature should not come into the process at a too early stage, when the legislative authority might not be sufficient.

The fulfilment of the functions of a truth commission are decisively dependent upon the commission's capacity for impartiality regarding the central point of the inquiry, which is the past government and its role in the human rights violations which have occurred.¹⁰⁹ The acknowledgement of the decisive role played by the structures of the Communist power in the oppressive regime depends not only upon the mandate received by the commission, but also upon the irrefutable authority and credibility of the commission. It is through its authority and credibility that a truth commission can succeed in offering not only the truth, but also an "authoritative truth" about the nature of the human rights violations which have occurred under the Communist regime. The "cathartic" function the acknowledgement of truth is supposed to have in society, the function of purification through truth, also depends more than anything upon the credibility of the commission. It is only by trusting the commission that the society will acknowledge its past of human rights violations in the way it might be exposed in the commission's report.¹¹⁰ This trust is built upon the fact that its members have not been part of the repressive regime, and the fact the commissioners are tuned into the realities of the society.

¹⁰⁹ Juan E. Méndez, "Acknowledgement, Truth, and Justice - Argentina," in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer (Cape Town: IDASA, 1994), pp. 39-40.

¹¹⁰ Besides these limitations usually embedded in the mandate of the commission, there are a series of "external" limitations belonging to the social realities: pure political constraints, the difficulty in having unrestricted access to the necessary information (see the discussion about the Secret Police archives in Chapter Three), the lack of necessary resources for pursuing the inquiries, etc. Hayner, pp. 644-651.

It is essential for a truth commission to be independent from all the actors in the contested history. This attribute of independence cannot be covered by a representative political body alone; a non-political body is therefore required at the foundation of the process of political justice. The members of such an investigative body should have an undisputed moral authority to examine and evaluate impartially the Communist regime.¹¹¹ This impartiality might appear difficult to achieve, given the stronghold that the *Nomenklatura* had for a long time over society. A weakened civil society inherited from the Communist regime is also increasing the practical difficulties in establishing a truth commission with sufficient authority and detachment from the Communist regime. Only such a commission would be able to offer the objective and authoritative truth about the Communist regime and its crimes.

The experiences of the non-European processes of transition to democracy vary with respect to the source of independence and moral authority of the investigatory commissions involved in the process. Some tried to balance political figures from across the political spectrum,¹¹² while others tried to achieve the same goals of impartiality and moral authority through the appointment of foreign dignitaries as commissioners.¹¹³ For

¹¹¹Méndez, "Acknowledgement, Truth, and Justice," p. 38. Correa, p. 145 ff.

¹¹²A commission with this type of structure was set up in Chile, following the end of the military dictatorship. To a certain extent, this system worked. Correa, pp. 1479-1480. The democratically elected President Patricio Aylwin established in 1990 a well balanced commission including persons from the various political sectors of Chile. Hayner, pp. 621-623.

¹¹³This was the case, for instance, in El Salvador. The United Nations "Commission on the Truth for El Salvador" was created through the peace accords between the Salvadoran government and the Farabundo Martí National Liberation Front (FMLN) in April, 1991. The commissioners were appointed by the Secretary-General of the United Nations with agreement by the two parties to the accords. The commissioners were highly respected international figures. Also, due to neutrality concerns, the staff of

the Eastern European political and historical realities, each of the two approaches can present both advantages and disadvantages.

One advantage of a commission composed of representatives of all political groups in society would be the fact that, when part of the process of truth revealing, the different groups in society will be less likely to disagree with, and challenge the factual basis of the report. This might widen the acknowledgement of the violent Communist past, especially in the conditions in which, as shown in Chapter Two and Chapter Three, the political spectrum is highly divided as to the nature of the Communist past, and the necessity of a process of political justice.

However, a commission made up of representatives of different political groups can be accompanied by certain drawbacks to which Eastern European societies would be susceptible. In this respect, human rights activists have noted the “timidity” of the report of such a mixed commission.¹¹⁴ This timidity was explained largely by the commission’s effort to be “balanced,” and especially by the need to maintain consensus among commissioners with all too different agendas. For the Eastern European countries this type of commission might bring even more difficulties, given the rather scrambled political spectrum which was formed after half a century of Communist rule. In fact,

the commission - fifteen professional staff and several administrators - included no Salvadorans. Hayner, pp. 627-628.

¹¹⁴David Weissbrodt and Paul W. Fraser, review of The Report of the Chilean Commission on Truth and Reconciliation, published by Comisión Nacional de Verdad y Reconciliación, Human Rights Quarterly Review 14, no. 4 (November 1992): 620.

almost the same argument used against adopting a declaration by mere majority vote (as it was done in the Czech Republic) can be validly used against a balanced but politicised commission. The difference between the two is that in the case of the commission one deals with a kind of sized-down politically polarised body reflecting, to a large extent, the political spectrum of the parliament.

These disadvantages would be to a large extent absent from the second type of commission. Appointing well-respected foreign dignitaries as commissioners ensures a necessary distance of the commission from political fights.¹¹⁵ A commission of foreign dignitaries can also prevent, to a large extent, the use of the commission's activity for increasing the political capital of one party or another. Such a commission can be credited with greater objectivity and disinterestedness, and it can increase the chances that the report summing up its activity will be widely publicised and will have its recommendations implemented through international pressure.

In spite of all these advantages, the very distance from the political scene of the eventual international commissioners can prove problematic.¹¹⁶ The resulting report can be seen as "a merely UN document" which gives an outside vision of a historical period.¹¹⁷ This perception makes more likely that the conclusions of the report, instead of being publicly

¹¹⁵Hayner, p. 628.

¹¹⁶Popkin and Roht-Arriaza, p. 269.

¹¹⁷Hayner, pp. 635-651.

assumed, will be discounted at least by some part of the political class and society.¹¹⁸ In the case of the Eastern European post-Communist countries, besides this domestic drawback there is also a global ideological aspect which might hinder the acknowledgement of the report. This aspect refers to the fact that the Communist partocracy has put an ideological barrier not only, as shown in the previous chapter, between its apparatus and the rest of the society, but also between itself and the rest of the non-Communist world.

The selection of an international team could prove difficult, although not impossible, and it would be likely for such a commission to be met with contestations which would weaken its authority.¹¹⁹ An international commission could give the impression that the “victors’ ideology” would again be imposed. When setting up the commission it should also be considered the desirable goal (to which we shall come back later), that the commission’s report is sanctioned by the legislative power. Having this goal in mind, one should consider that a final report written by an international team might appear more difficult to be sanctioned by the legislature. These difficulties can be procedural, as well as political.¹²⁰ The incorporation into the domestic law of what might be perceived as a foreign document can be procedurally more demanding than the sanctioning of a domestic report. Also, as suggested earlier, the political reaction to a report written by a “foreign” commission might not be the desired one.

¹¹⁸Huyse, p. 105 ff. Also, Buergenthal, pp. 497-499.

¹¹⁹Buergenthal, p. 500.

¹²⁰Hayner, pp. 641-643. Also, Huyse, p. 123.

Taking into consideration the drawbacks of both types of commission, and also the nature of the Communist regime one might find it desirable to avoid both the overt politicisation of the commission (as it appears in the case of a commission composed of representatives of all political forces in society), and the international formula of the commission. A possible alternative would be to look outside both the political and the international arena. This implies the search for those exponents of the emerging post-Communist civil societies who can be credited with a strong commitment to democracy and impartiality. Although it is not impossible, this task in itself is not easy.¹²¹ The legacy of the total control of the Communist bureaucracy over the entire social life leaves the emerging post-totalitarian civil societies, from where the commissioners should be selected, weak and sometimes only in an incipient form. An unavoidable difficulty in selecting the commissioners is also the fact that the exponents of the civil society could themselves be part of the old dissidence and victims of the Communist regime. This fact might not make those persons the most evident choice of candidates when searching for impartiality.

In spite of the difficulties we have just seen, the complexity of the transition from Communism makes choosing the commissioners from within the civil society a better choice than choosing them from within the political or international circles. This formula is preferable for avoiding both politicisation and exaggerated distance from the needs and reality of the post-Communist societies.¹²² In the debates on other controversial issues,

¹²¹See Vaclav Havel, Vaclav Klaus, and Petr Pithart, "Civil Society After Communism: Rival Visions," *Journal of Democracy* 7, no. 1 (January 1996): 11-23.

¹²²Huyse, "Justice after Transition," p. 105.

such as the use of Secret Police archives, anti-agent legislation, etc., it has been proven that, in spite of being themselves victims of the Communist regime, many of the dissidents would possess the necessary degree of impartiality which would ensure both truth and the protection of the democratic principles.¹²³ It must be recognised though that in the case of the post-Communist societies it will be difficult to find anybody who has not been - actively or passively - “on the other side” of the wall put up by the *Nomenklatura*.¹²⁴

Setting up a commission of inquiry into the activities of a repressive regime will always face difficulties. Often, extended negotiations have to take place between the different political forces in order to agree on the format, the functions, and the mandate of the commission.¹²⁵ Since the legitimacy of the post-Communist political arrangement is generally built upon the exposure and distancing from the totalitarian past, the implication of all the political forces in the truth-finding process is inevitable. However, the activity of the commission is important, not only for re-enforcing the legitimacy of the new government, but also for offering a more solid ground and coherence to political

¹²³Jan Urban, “Keeping Silent about Silence,” in Truth and Justice: The Delicate Balance, Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1 (1993), pp. 85-95.

¹²⁴This argument might appear as the opposite extreme from Urban’s idea that in the Communist societies everybody was dirtied by complicity and compliance (See *supra* Chapter Three, note 47. Also, Urban, p. 86). What is meant in fact by being “on the other side” is not that everybody who was not part of the *Nomenklatura* was a dissident, but that the *Nomenklatura* put a wall between itself and the rest of society. This situation can render it difficult to find those necessary commissioners by following “formal standards of impartiality.” This sharp gap between the structures of power and the persons they rule is not, however, a characteristic only of a Communist regime. See Pamela Constable and Arturo Valenzuela, A Nation of Enemies: Chile under Pinochet (New York: W. W. Norton, 1991).

¹²⁵Zallaquett, p. 17. Simpson and Vanzyl, pp. 403-404.

justice actions. This is the “foundational” element of a truth commission’s activity which is provided by the fact that the commission goes further than mere rhetorical exposing and distancing of the totalitarian past.¹²⁶ This “foundation” is missing, or compromised, when the legislator acts directly, enacting laws on the illegality of a previous regime.

Although the legislative power should not replace the truth commission, the legislative sanctioning of the commission’s report is important for the commission’s findings to take effect within a legal process of political justice. In this way only it will be made clear that the systematic human rights violations exposed, and the responsible agencies pointed at, in the report are acknowledged as real crimes and real legal actors respectively. The legal sanctioning of the report, through existent constitutional routes, represents an essential stage in the acknowledgement of the crimes of the Communist regime. It is at this stage that “declarative acts,” such as the Czech Act on the Illegality of the Communist Regime, can intervene. The difference would be that being based on a non-partisan report which documents both crimes and criminals, the declarative act would have a better chance of making an impact on the legal dimensions of political justice. Although other constitutional formulas could be found for the official endorsement of the report, passing a legislative act which would confirm the commissions’ report by direct incorporation of its conclusions or, resuming the report in a declarative legislative statement and offering the report as an annex to the declarative act itself, can serve as suggestions.¹²⁷

¹²⁶Popkin and Roht-Arriaza, pp. 280-283.

¹²⁷Juan E. Méndez, “In Defence of Transitional Justice,” in Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams (Notre Dame & London: University of Notre Dame Press, 1997), p. 21-22.

6.4 Building on the Truth: Prosecuting and Screening Revisited

It was said earlier that a truth commission should be the foundation of a process of political justice. What would grow on this foundation? What would be the outcome of a truth commission in the context of a post-Communist society? And especially, what would be the place of a truth commission's report in the legal acknowledgement of the collective responsibility? These are legitimate questions the answers to which shall be outlined in the remaining pages.

The report of a truth commission can have important consequences for a process of political justice, addressing different levels of legal agency and responsibility, and different domains of the legal discourse. Firstly, the report written by the investigative commission could have implications for both individual and collective legal responsibility. As an important aspect of the commission's activity, for instance, the mandate received by the commission can and should include the power to make recommendations according to the findings of the inquiry.¹²⁸ Through recommendations the commission provides "pressure points" around which civil society and the international community can formulate their demands for democratisation of the state

¹²⁸The Chilean Report, for instance, contains an extensive part with recommendations to be followed by various social agencies. See, Chile. Comisión Nacional de Verdad y Reconciliación, Report of the Chilean National Commission on Truth and Reconciliation. The same power of making recommendations was established through the mandate given to the El Salvador truth commission. Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," Vanderbilt Journal of Transnational Law 27 (1994), p. 497.

apparatus.

The implication of these recommendations could be both legal and non-legal.¹²⁹ The commission could, for example, demand the new government to take specific legislative measures for the democratisation of the state apparatus. As a result of the acknowledgement of the role of the Communist *Nomenklatura* in systematic human rights violations, the truth commission could also recommend concrete measures necessary for the dismantling of the repressive machine. In this way, the report can offer coherent arguments in favour of passing screening or “de-nomenklaturisation” laws and, eventually, anti-agent legislation; it could also suggest the extent to which the post-Communist government could open the Secret Police archives - for the purpose of screening or for other reasons - without violating specific human rights.¹³⁰ Also, the report might, as a non-legal implication, include recommendations referring to the pursuit of further lines of inquiry into the activities of the regime. Although these inquiries might not have an immediate legal impact, their outcome could well open up new lines of legal action.

As to the individual legal responsibility, a very important potential consequence of the

¹²⁹ Among others, the German commission of inquiry had the mandate to make recommendations to the *Bundestag* with respect to legislative measures and other political initiatives. The commission was also asked for suggestions of how to come to terms with the East German past in pedagogical and psychological terms (Article IV). Germany: Law Creating the Commission of Inquiry on “Working Through the History and the Consequences of the SED Dictatorship,” Act No. 12/2597 (May 14, 1992). In *Laws, Rulings, and Reports*, vol. 3 of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington D.C.: United States Institute of Peace Press, 1995), p. 218.

¹³⁰ Lakos, pp. 75-77. Also, Klingsberg, pp. 10-11.

commission's activity can be provided by incorporating into the constitutive mandate the power of "naming names" in its final report.¹³¹ The commission should be allowed to name not only the collective agency which is identified with the Communist regime, but also those individual actors who played an important active role in violations of human rights, and who "distinguished" themselves in this way.¹³² This can be seen as just a part of the process of "punishing by truth," but it can also bring a certain amount of pressure to bear on the criminal prosecution of notorious perpetrators of human rights violations.

Including in a truth commission's mandate the power of naming names is bound to expand the legal implications of the commission's report. However, providing names for the prosecution of the Communist crimes should not represent the main, or direct, objective of a truth commission.¹³³ Generally speaking, there is no legal need for a truth commission to be established in order to start the prosecution of individual perpetrators of human rights violations. As it was said earlier, the identity of the perpetrators and the extent of the violations are widely known, or easily available for the prosecution. Besides, although the truth commission will inquire into serious crimes of the regime, and will refer to those crimes as such, the truth commission should make clear that the conclusions of its report do not carry the same legal weight as a court's ruling.

¹³¹Hayner, p. 647. Also Zallaquett, pp. 9-10. Buerghenthal, p. 535.

¹³²On the importance of this part of the Truth Commission's mandate see Buerghenthal, p. 519-521. Also Douglass W. Cassel Jr., "International Truth Commissions and Justice," The Aspen Institute Quarterly 5, no. 3 (Summer 1993), pp. 81-82.

¹³³If the activity of a truth commission does not automatically lead to the prosecution of individual perpetrators, it does not mean that the opposition to the formation of such commissions is not strong. One of the explanations can be the fact that the truth can be perceived as a real alternative to punishment. Also, truth can be a liability from which prosecution may spring at any time.

With respect to the relationship between prosecution and the report of the truth commission, it should also be said that the latter should not amount to a *de facto* amnesty¹³⁴ unless, of course, the political context offers no choice. The publication of the report should not be conditioned by an amnesty, and the commission should pass on to the prosecution any new relevant information. In principle, for the integrity of the law, the decision to prosecute or not to prosecute should not be a political one.¹³⁵ Nor should the report replace the indictment of the prosecution; the report may inform the prosecution, but it may not replace it.¹³⁶ In this sense, in as many cases as possible, prosecutions based on, or related to, issues raised by the truth commission's report, should follow. These prosecutions are necessary not only for bringing punishment, but also for reinforcing the authoritative perspective offered in the truth commission's report over the human rights violations of the past regime. On the other hand, not taking up such prosecutions would either undermine the credibility of the report or, if the report is largely acknowledged in the society, it would weaken the authority of the judicial system.

However, it should be mentioned that prosecution of acts emphasised in the

¹³⁴H. Adam, "Trading Justice for Truth," World Today 54, no. 1 (1998): 11-13.

¹³⁵It is sometimes argued that investigating the past may endanger the future, especially in a politically fragile environment such as any society in transition is. Nevertheless, from the analysis of the activity of the different truth commissions which have functioned, it appears that no truth commission to date has caused a situation to become worse. Hayner, p. 610. "Human Rights Watch recognizes the difficulty that some governments may face in holding members of their own armed forces accountable for their gross abuses of human rights... We do not believe that these difficulties justify disregard for the principle of accountability. We consider that accountability for gross violations of human rights should remain a goal of a government that seeks to promote respect for human rights." Human Rights Watch, Accountability for Past Human Rights Abuses, p. 1.

¹³⁶See the recent Pinochet case in Great Britain which tries to take the findings of the Chilean Truth and Reconciliation Commission further, to its logical criminal conclusions. Guardian, 26 November 1998, p. 1.

commission's report, as well as the recommendations made by the commission for dealing with certain aspects of the totalitarian legacy, are only by-products of a truth inquiry. Beyond these "by-product" implications of a truth inquiry, the greatest impact of the commission's report will be with respect to the acknowledgement of collective responsibility for the gross human rights violations which took place under the Communist regime. Telling the truth *about the regime* is a primary function of the commission.¹³⁷ This central function derives from the commission's general mandate to address and establish the "global truth" rather than the particular events. To fulfil its mandate, the commission of truth has to identify and delimitate the power structures which stood for the Communist regime. With respect to this identification and delimitation of the Communist regime, one can presume that the analysis undertaken by the commission would not differ essentially from the one proposed in these pages. The identification of the potential for action and reason for action within the informal structures of the Communist *Nomenklatura*, would most likely lead a truth commission to *identify* these structures with the Communist regime.

The importance of the acknowledgement of the truth about a regime lies in the fact that, given the authority the report should enjoy, the commission's inquiry offers a platform for a *legal acknowledgement* of the repressive nature of the Communist regime.¹³⁸ It is on this kind of inquiry that legislative initiatives such as the Czech Act on the Illegality

¹³⁷Adam, p. 11.

¹³⁸On the consequences of a lack of such legal acknowledgement, see Helen Suzman, "The Erosion of Accountability," in Towards Democracy: Building a Culture of Accountability in South Africa, ed. André du Toit (Cape Town: IDASA, 1991), p. 44.

of the Communist Regime could be grounded. The reason why this kind of initiative should not come without a proper “truth inquiry” is of a political rather than legal nature. The type of *legislative declaration* such as the Czech Act on the Illegality of the Communist Regime is based solely upon the authority of the legislature.

Although such a legislative declaration confirms elements which are already in the public domain, the highly politicised context which the declaration addresses makes the legislative act become easily controversial when it is implemented by mere majority vote. The issue of political justice does not benefit from building exclusively upon the will of the majority; a dimension of democracy which has its own limitations.¹³⁹ Besides, such pure legislative declarations expose the post-Communist government to the accusation of trying to gain legitimacy cheaply by putting an unsubstantiated label on the Communist regime. Though the distinction might not seem so important, the situation improves radically if the legislative declaration is based upon the findings of an impartial body, not implicated in the political fight.¹⁴⁰ In this last case, the authority of law is essentially assisted by the authority of an objective and impartial truth-finding commission.

Since the purpose of such a declaration is exactly to emphasise the nature of the past regime, a truth commission can serve this purpose in several ways. Firstly, as mentioned before, it helps delimiting and identifying the power structures of the Communist regime.

¹³⁹Jon Elster, “On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution,” *East European Constitutional Review* 1, no. 2, (1992): 24.

¹⁴⁰Hayner, p. 598.

Secondly, it can establish and formulate a link between numerous human rights violations and the Communist regime. Thirdly, the commission also helps a declarative act to avoid, or to give substance to vague and apparently empty terms such as “the regime,” “the supporters.”¹⁴¹ This comes as a consequence of identifying the Communist regime within conglomerate bureaucratic power structures, and of establishing a clear link between these structures and specific human rights violations.

Issuing mere moral statements through the legislative power - such as it was claimed with respect to the Czech Act on the Illegality of the Communist Regime - is also bound to confuse the issue at stake in the Eastern European process of political justice. This issue is the legal acknowledgement of the human rights violations, and the affirmation of the principle of legal accountability of the social agents involved in these violations.¹⁴² An act in which a vaguely defined collectivity is associated with the words “illegal” and “criminal,” and which it claims to bring no legal implications while changing the statute of limitations for certain serious crimes, is bound to create confusion and misunderstanding. Accordingly, this type of declaration should be very precise, clearly defining in its text the terminology that is being used.

The possibility - opened through the commission’s inquiry - of a coherent identification of the Communist regime with a specific political agency offers in fact for the first time

¹⁴¹For an example of such a use of vague terms, see *supra* the discussion on the Czech Act on the Illegality of the Communist Czechoslovakia, Chapter Three, Section 3.5.

¹⁴²Orentlicher, pp. 2539-2541. Suzman, pp. 497-498.

a potential legal agent which can participate in the process of distribution of legal responsibility. The debate on collective agency has shown that a formal organisation can be seen as something more than just a sociological entity, that it can be regarded as a legal actor as well. In the *Nomenklatura*'s case, as in the case of any other conglomerate organisation, the "ontological" move from the individual members to the organisational structure creates also a legal dimension, fulfilling the move from individual to collective responsibility. This move, from individual to collective, can be emphasised in the commission's report, acknowledging the last without denying the former. The commission will therefore be able, based on its mandate, to illustrate the correspondence established in the earlier chapters between the individual and the collective triangles of responsibility.

The report of the commission should also be able to offer a basis for excluding - at least from the domain of collective political responsibility for the human rights violations - certain categories of actors which, as it was argued in Chapter Five do not belong to the structure of power embodied by the *Nomenklatura*, and do not carry the same degree of responsibility for the human rights violations.¹⁴³

¹⁴³See supra the discussion on Secret Police agents and collaborators, Section 3.3.

6.5 Conclusions: Beyond the Truth Commission's Report

According to what was said so far in this chapter, it appears that, if properly set up, a truth commission, by its very existence and activity, can have a major impact upon the process of political justice, and especially upon the acknowledgement of the collective dimension of the responsibility for the human rights violations. "Justice by truth" is an important dimension of justice, especially following a regime based on censorship and repression. Making recommendations and "naming names" can bring an often needed extra pressure on the new governments to answer the call for justice. Moreover, identifying "the regime" and offering in this way a basis for the legal acknowledgement of the Communist bureaucracy's role in the human rights violations helps to establish a balance between the responsibility of individual and collective actors.

However, finding the truth and declaring it, making recommendations and "naming names," identifying crimes and culprits, are not the only important aspects derived from a truth commission's activity. Of course, all these are important, first of all in themselves, through the cathartic function of the acknowledgement of truth, and secondly, through the possibilities the authoritative truth opens for other measures of justice. Both the dimension of "finding" as well as the one of legally "declaring" the truth address the collective dimension of a process of political justice dealing with the Communist regime. Nevertheless, as important as the aspect of knowledge might always be, justice is not only about knowledge; justice is about government and political agency accountability, about

measured retribution, reparation and deterrence.

These aspects of justice are all important aspects in the approach to any crime; they become even more essential, however, when they refer to serious human rights violations. In this sense, it is argued that under certain conditions, the use of judicial means to address human rights violations is the most appropriate approach for the successful consolidation of a constitutional regime.¹⁴⁴ Therefore, one should be entitled to hope that something more than truth-acknowledgement can be achieved.

As Chapter Four and Chapter Five indicated, there is potential for an acknowledgement of legal agenthood and therefore legal responsibility of the collective agent identified in the Communist *Nomenklatura*. This acknowledgement could be promoted, or rather induced, through elements identified in the final report of a truth commission. Based on this acknowledgement of the report, one can try to take the process of political justice beyond mere recognition and acknowledgement of the truth about the Communist violations of human rights, fully into the legal domain. Yet, the importance of the functions fulfilled by a truth commission in this respect cannot be stressed enough. As Juan E. Méndez has put it, the primary task in a process of political justice is to recognise that there is a past to be reckoned with.¹⁴⁵ The tasks of justice, however, should not end

¹⁴⁴Carlos H. Acuña and Catalina Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts," in Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams (Notre Dame & London: University of Notre Dame Press, 1997), p. 95.

¹⁴⁵Méndez, "In Defence of Transitional Justice," p. 3.

with this reckoning.

The Hungarian and Czech (initially Czechoslovak) legal measures analysed in Chapter Two and Chapter Three have given the impression that not much is possible in order to make the Communist partocracy legally accountable for human rights violations. Notorious crimes and injustices appeared impossible to prosecute because of their expired period of limitation; the responsibility for deliberately allowing the period of limitation to expire became a residuum of history for which nobody was to be held accountable; the same fate appeared to have befallen the question of leadership responsibility for the systematic policies of human rights violations sponsored by the party-state apparatus in Eastern Europe.

As was said earlier, a truth commission's report, which has eventually been incorporated in a legal act acknowledging the commission's findings, can offer the foundation for addressing at least those shortcomings of legal justice related to the role of the Communist structures of power in the human rights violations which have occurred under the Communist regime. There are basically three dimensions along which the law could make use of the truth commission's report. Firstly, in the truth commission's report could be found, systematically presented and argued, arguments for a legitimate rule revision (i). Secondly, an acknowledged authoritative truth about the Communist regime can induce into the legal discourse a more differentiated legal approach to the distribution of responsibility for human rights violations among the different social (individual and collective) actors (ii). Thirdly, the truth commission's report can contribute to more

favourable conditions for the prosecution of both individuals and specific governmental agencies (iii).

(i) Speaking about legitimate rule revision, Chapter One established that a “procedurally tamed” recognition of the right to revolution is a *sine qua non* condition for the true protection of the citizens against the abuse of power.¹⁴⁶ This protection would include the right to retroactively evaluate and hold accountable the structures of power for human rights violations. It is for allowing this evaluation (based upon the specificity of the Communist rule), that the retroactive revision of certain rules, and especially a differentiation in the application of the principles of the rule of law, is necessary. However, revising retroactively the parameters of the rule of law and applying them in a more differentiated manner needs solid legitimising arguments.¹⁴⁷

By concentrating upon the specificity of the Communist rule and of the Communist structures of power, the report of a truth commission offers exactly these type of arguments. In the first part of this chapter it was established that the recognition of powerful collective social agents represents one aspect which should invite cautiousness in applying the principles of the rule of law in an undifferentiated way. For a real protection of the rule of law’s underlying values of equality, autonomy and security it is evident that there is a need for differentiated legal parameters.

¹⁴⁶Sunstein, “Problems with Rules,” pp. 1008-1012.

¹⁴⁷Kis, “What Shall We Do?” p. 11.

One of the main parameters which seem under pressure when facing a totalitarian structure of power, is the legal security. The wider the discretion of the structure of power, the lesser this structure can expect to be protected by the principle of legal security; an agent which does not allow assessment while in the process of exercising its power, should expect some kind of assessment when going out of power.¹⁴⁸ By documenting this discretionary exercise of power of the Communist regime, and by identifying the structure(s) of power which stood for that regime, the commission of truth fulfils an indispensable role: it offers authoritative arguments for a “procedurally tamed” revision of the way in which the principle of legal security is applied in the process of political justice.

Consequently, by concentrating on the collective dimension of the human rights violations which occurred under the Communist regime, the truth commission sets the standard for how the issue of post-totalitarian justice should be addressed. Spelling out the essence of the role of the internal decision structure of the Communist power, the institution of the truth commission actually holds the key to the legitimate revision of those rules governing the attribution of responsibility.¹⁴⁹ Through its activity, the commission helps to identify those “pressure points” in the concept of the rule of law where the conflict between the legitimate social expectations for justice and the rigours

¹⁴⁸Schulhofer, pp. 27-29.

¹⁴⁹Sunstein, p. 1008 ff.

of the legal discourse can be resolved.¹⁵⁰

(ii) A second dimension in which the legal discourse could capitalise on the authoritative report which addresses the Communist regime as a whole, is assuming a differentiated approach to the distribution of responsibility for human rights violations. The fact that an arborescent social agent such as the *Nomenklatura* cannot be practically brought in front of a criminal court should not mean that nothing can be done to acknowledge in law its role in the repression of basic human rights. Acknowledgement, and especially legal acknowledgement can be matched by properly designed measures of enforcing collective accountability.¹⁵¹ Screening measures therefore should not be discarded altogether, regardless of their justification.

How exactly could a truth commission's activity help in assessing the legitimacy of screening measures applied as a specific way of enforcing collective accountability? Firstly, this is achieved by establishing as unique object of both the truth commission's activity, and of the screening measures, the human rights violations committed under the Communist regime. Screening for purely protective (preventive) reasons, equality of opportunity, or other legitimate reasons, should not be dismissed from the start. However, the meaning of a truth commission's activity is to emphasise the collective political responsibility of the Communist regime for systematic human rights violations. By

¹⁵⁰B. S. Lyons, "Between Nuremberg and Amnesia: The Truth and Reconciliation Commissions in South Africa," *Monthly Review* 49, no. 4 (1997): 19.

¹⁵¹Frank, p. 93 ff. French, "Collective and Corporate Responsibility," p. 182 ff.

dealing with state-sponsored human rights violations brought to light by a truth commission, the inconsistencies in justification of a screening law can be prevented: the Communist bureaucracy could be up for screening not because of an alleged weakness to blackmail, or danger of sabotage, as it was claimed during the debate on the Lustration Law, but because of having actively instituted and maintained a repressive regime in which systematic violations of human rights took place.¹⁵²

Secondly, by offering strict criteria for identifying what should be understood by “the regime,” a truth commission’s report can contribute both to the legitimation and to the consistency of legal measures of screening. These criteria would help avoid both over-inclusiveness and under-inclusiveness in the definition of the collective political actor implicitly generated by a screening act. Both mistakes featured in the Czechoslovak, as well as in other screening laws;¹⁵³ collaborators of the Secret Police have been collectively assimilated with “the regime” in its institutional meaning, while leaving out other more important categories of officials who established, perfected and benefited from the state built upon the Secret Police.¹⁵⁴

A legally incorporated truth report brings authoritative clarity instead of legislative confusion to a process of screening, making it obvious and somehow indispensable. Screening for the right motives - the systematic violations of human rights that occurred

¹⁵²Massey, p. 207 ff.

¹⁵³Huyse, “A Devil's Choice,” p. 129 ff.

¹⁵⁴Arthur Berney, “A Critique of Lustration,” p. 138-140.

under a certain structure of power - would not bring confusion, such as it happened with the Lustration Law, but clarity. A legally sanctioned report offers to a process of screening a coherent basis. It can offer well defined political actors the (collective) responsibility of which can be acknowledged. It would bring a viable differentiation in the concept of legal responsibility. This differentiation makes possible that the criminal responsibility (individual and, where appropriate, collective) is complemented in this way with a very important dimension of collective political responsibility. The core of this collective responsibility will refer to extended human rights violations which resulted in an inhuman and illegal regime.

Bringing under the spotlight, through the report of a truth commission and its legislative acknowledgement, the Communist *Nomenklatura*, is the first step in reestablishing the balance of responsibilities for the human rights violations which occurred under the Communist regime. The further steps though have to be conceived with even greater care. We spoke in Chapter Four and Chapter Five about a homology between the individual responsibility, with action and intention originating in the same individual person, and the collective responsibility, with action and reason for action originating in the same structure. Because this is a homology, and not an identity, one has to take into consideration the practical difficulties related to thinking about collective accountability in criminal terms, and finding the appropriate means for holding accountable a collective actor involved in organised political crime. In this context, banning an entire structure

from power, such as the Czechoslovak Lustration Law attempted,¹⁵⁵ might appear as a minimal but necessary measure for reaffirming justice for the human rights violations related to the Communist regime.

(iii) As to the third line of influence of the truth commission into the legal approach to political justice, one could say that to a certain extent a legally sanctioned authoritative position towards the Communist crimes can encourage or generate dimensions of criminal prosecution which otherwise might be ignored or side-lined. This influence of the truth commission takes place even though, generally speaking, the prosecution does not need to be offered by outside (non-legal) agents such as the truth commission, ready-made justifications for indicting individual suspects of human rights violations.

Earlier, when speaking about the different dimensions of the truth commission's report, the eventual mandate to "naming names" directly associated with human rights violations was mentioned. This way of inducing prosecution however was presented as a "by-product" of the commission's activity. This is so because the main function of a truth commission is to assess the regime, and not to take over the prosecutorial functions of inquiry into individual crimes. There is, however, another way in which the commission's mandate to assess the Communist regime can influence the way prosecution proceeds. This way, just like the initiation of normative screening measures based upon the

¹⁵⁵The Lustration Law was characterised, however, by both over-inclusiveness with respect to the "inferior" categories, such as collaborators and informers, and under-inclusiveness with respect to the "superior" categories, such as some of the higher positions of the *Nomenklatura* structure. See supra Chapter Three, especially in sections 3.4.4 and 3.4.6.

commission's report, is dependent upon the viability and success of the arguments brought by the commission of truth for the (retroactive) legitimate rule revision.

For instance, accepting arguments for the revision of specific procedural rules can influence the range of crimes to be accounted for, as well as the type of social actors to be brought to justice in the process of distribution of criminal responsibility. Given the totalitarian nature of the Communist partocracy, which would be addressed by the truth commission, the revision of the statute of limitations in the way the Hungarian Zétényi-Takacs law attempted, could appear as legitimate. A legally sanctioned truth report can help in opening up the principle of the rule of law towards acknowledging the exceptional (legal) circumstances created by the Communist regime. These circumstances - advanced, as it was seen in Chapter Two, in the Zétényi-Takacs law in Hungary - referred to the practically unlimited power the Communist power structures possessed over the society, and to the comparatively long period over which the Communist rule extended. Acknowledging the nature of the regime, through its representative body, and amending the statute of limitations, would re-open for prosecution those crimes concealed and protected by the Communist structure of power.

On the other hand, the report can stimulate a fairer distribution of responsibility between the various social actors. For instance, a report emphasising the importance of the structures of power in the systematic violations of human rights can offer a quasi-legal but important support to controversial judicial decisions such as the ones taken in the

German border guard trials.¹⁵⁶ This support is beneficial both with respect to the suspension of the sentences of the individual border guards, as well as with respect to the sentencing of those Politburo members who had no immediate influence over the border regime of the former GDR.

Besides this direct impact over the criminal law approach, it can be said that the truth about the involvement of the Communist elite in systematic policies of human rights violations and cover up of these violations, might steer the debate on political justice towards screening as a precondition for the successful prosecution of individual perpetrators. In other words, enforcing accountability even at the individual level might prove unachievable if the law enforcement agencies, and other influential government institutions, are filled with representatives of the old power-structures. These structures of power, now becoming occult interest groups, could still hamper the realisation of justice even at the individual criminal level by interfering with the process of justice.¹⁵⁷ It should be said though, that however important the prevention of this type of interference would be, screening measures should be argued for primarily from the perspective of a need for legal accountability of the collective political actors.

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¹⁵⁶See *supra* the discussion on the border guards trials, Section 2.3.

¹⁵⁷The result of the Hungarian criminal trials related to the 1956 repression is a good example in this sense. Similar examples though are to be found all over the Soviet bloc. See *supra* Halmai and Schepelle, Chapter Two, note 123, and discussion.

Is collective responsibility a part of a spectrum of responsibilities assessed in a process of justice following a repressive regime? Should this issue be addressed before addressing other issues of justice such as what to do with the grudge informers of the Communist regime, or the collaborators of the StB, or indeed with the German border guards? I believe that for the ultimate protection of the citizens against “unbridled bureaucracies,” the answer to these questions should be “yes.” I believe that there is enough evidence for giving collective responsibility an important place on the map of legal responsibilities assessed when addressing the state-sponsored human rights violations.

In Chapter Two and Chapter Three we have seen in detail two different approaches to political justice. They both illustrated the difficulties which sprang up in a process of political justice which lacks a coherent concept of collective agency and collective responsibility. These concepts appear as necessary to complement the individual agent and individual responsibility. The Hungarian approach through criminal law, analysed in Chapter Two, emphasised the hesitations of the criminal law to accommodate “exceptional circumstances,” or “political reasons.” These “exceptional circumstances” referred exactly to the nature of the Communist regime; they referred to the fact that an apparently functional legal system can be incapacitated by a structure of power. Ignoring this reality appeared to undermine the idea of justice and therefore to undermine the authority of the legal discourse itself.

Although the Communist structure of power was not acknowledged as such, one could still identify in the Hungarian debate on political justice half-spoken statements proving

the need for a concept of collective responsibility: the repealed Zétényi-Takacs law spoke about acknowledging “political reasons” which prevented the prosecution of Communist crimes, and the Hungarian Constitutional Court, while still rejecting these reasons, acknowledged the responsibility of the “previous regime” for not having prosecuted those crimes.

Even clearer allusions for complementing individual and collective responsibility for the human rights violations associated with the Communist regime came from the trials of the border guards in Germany; sentenced border guards have been pardoned because of “circumstances” and “special conditions” related to the Communist regime. Also, related to the same border crimes, Politburo members, some of whom had no direct responsibility over the border regime, have been convicted for collective manslaughter, and for collectively “failing to set up a more humane border policy.”

The Zétényi-Takacs law and the decisions of the Hungarian Constitutional Court on the suspension of the statute of limitations, as well as the criminal sentences in the border guard trials, suggested the need for an assessment of the Communist regime as a whole, undertaken within the criminal law discourse. In both cases, however, the legal discourse obviously struggled to accommodate and “tame” the concept of collective legal responsibility.

The same impression was given by the second type of approach to political justice; the approach through “administrative” measures of screening. The Czechoslovak Lustration

Law, and all its preceding acts analysed in Chapter Three, offered in this sense a good example of the hesitations in acknowledging collective responsibility even when this responsibility appears as the only coherent explanation to a legislative act. The analysis of the inconsistencies of the screening law showed that, in spite of contrary claims, the law does convey both criminal responsibility and collective blame.

The collective and criminal law dimension of the Lustration Law became even more obvious once the Czech parliament issued the Act on the Illegality of the Communist Regime. Speaking about responsibility of “the regime” for clearly definable crimes, and waving the statute of limitations for serious crimes committed under the same regime, this law established an undeniable link between “the regime” and serious human rights violations. Yet, the legislator and the Czech Constitutional Court denied any direct implication of this law for the distribution of legal responsibility between the individual and the collective actors implicated in the human rights violations.

Trying to find both an explanation and a solution to the inconsistencies of the approach to collective agency and responsibility, Chapter Four established two important aspects. Firstly, it established that the hesitations in acknowledging collective responsibility are rooted in issues found beyond the legal discourse, in the metaphysical ideas of autonomy and rationality of the social actors. Secondly, Chapter Four argued for the potential of homologous - individual and collective - concepts of intention, action and actor, based on the same idea of autonomy and rationality. Looking through the various theories on collective responsibility, we arrived at identifying a viable complementing triangle of

responsibility, similar but not identical to the individual triangle of responsibility. As opposed to this triangle of the individual responsibility, the collective responsibility proposed is based on action and reason for action originating in the same collective structure. The potential for this type of collective responsibility is characteristic of self-organised collectivities possessing a coherent internal decision structure.

By establishing this homology of elements of responsibility a new perspective became possible over the issue of political justice in Eastern Europe; both the criminal law approach and the administrative procedures could gain coherence and substance through the application of such a concept of collective agency and responsibility. That is to say, if one could only identify a viable organisation with a strong enough internal decision structure to convert apparently individual acts and particular reasons in organisational actions performed for organisational reasons.

For the identification of such an organisation we started from quasi-legal statements taken from the case studies analysed in Chapter Two and Chapter Three. These statements indicated, somehow vaguely, that “the regime” was the one primarily responsible for the human rights violations in Eastern Europe, and for the lack of protection given to these rights. These statements however appear unable to convey legal responsibility: “the regime” appeared as being everything and nothing, an amorphous mass of political gossip and self-censorship, of ignorant leaders and over-zealous subordinates, of apparent altruistic goals and evident criminal means. Looking for an “internal decision structure” into this amorphous mass appeared hopeless, the definition of “the regime” oscillating

between identifying the regime solely with the Secretary General of the Party, or expanding it to contain all the more or less willing party members, Secret Police collaborators and informers, etc. Neither of these two extremes seem to offer a viable alternative to responsibility. A much more credible formula, however, appeared: the apparently insignificant, “made-for-administrative-purposes” list of offices and positions called *Nomenklatura*. An a-constitutional party-state hybrid, the *Nomenklatura* appeared as a highly structured organisation whose internal decision structure was highly efficient in converting the organisational acts of will into normative parameters in all domains of social life.

Isolating this a-typical social actor from all the “noise” referring to the Communist regime, opened for a process of political justice the option of identifying whether the decisions resulting in violations of basic human rights derived from the place where the real power was vested, that is to say from the *Nomenklatura*. Without attempting to go into the procedural details of such a process, for the discussion of which an entire thesis would have been needed (discussion eventually anchored in a specific domestic legal system) Chapter Six looked at the potential impact the isolation of an identifiable structure of power and collective actor can have for the process of justice after a totalitarian regime. Firstly, it is argued that the specificity of the collective actor, the *Nomenklatura*, calls for a differentiated reading into the requirements of the principles of the rule of law. This differentiation is helped, it was argued, by arguments brought by a commission of truth instituted to assess the Communist regime as such. An a-typical quasi-legal or hybrid institution designed to match the a-typical nature of the agent it

assesses, the commission of truth appeared also as the foundation of any other measure of political justice. Its major contribution, however, takes place in the domain of collective accountability for human rights violations.

In this sense, by addressing the issue of collective political accountability, the commission's report was shown to play a major role in systematically constructing the arguments for the legitimate rule revision and for the differentiated application of the principles of the rule of law to the specific measures of political justice. Based upon this foundation, it appears that measures of screening should not be ruled out as a way of enforcing collective accountability of the structures of power. At the same time, prosecution of individual perpetrators appears to be influenced both by the legitimate revision of rules, such as the rules governing the statute of limitations, and, more importantly, by the prosecution becoming part of a more coherent approach to justice. In this approach the individual criminal accountability is complemented, largely through measures of screening, by elements of collective political accountability for the same violations of human rights.

Enforcing collective, as well as individual, accountability for the same violations of human rights is an expression of the interdependence between the individual responsibility and the responsibility of the structures of power, for crimes such as the systematic violations of fundamental human rights. It is in the interest of justice that - if political circumstances allow it - both individual and collective responsibility receive equal attention. Though we have dealt here mainly with the concept of collective

responsibility within the process of political justice, the emphasis upon the collective dimension of this process should not mean the neglect of the individual responsibility. The emphasis upon the collective responsibility comes from the very specificity of the process of political justice itself. The acknowledgement of this concept in law is meant to strengthen and not to weaken the deterrence from criminal acts committed by individual persons for political reasons, or facilitated, incited or tolerated by the political context. Accordingly, the proposed collective political responsibility of the Communist *Nomenklatura* for an illegal and criminal regime comes to complement the individual criminal responsibility for human rights violations committed under that rule.

Of course that, to a certain limited extent, the post-totalitarian regimes in Eastern Europe do not *have to* screen the state apparatus of elements of the Communist structure of power. As mentioned in the opening chapter, the international law practice, as well as the good sense of political transition, allow for a certain margin of appreciation and balancing between the need for justice and the need for social reconciliation and peace. Other reasons than justice, however, should prevail only in very special imperative circumstances. And, even in those circumstances it is important to establish in the legal, if not the political and legislative debate the fact that, should it so choose, a post-Communist society *could* decide to screen the old structure of power from office.

In the end, the idea should be reinforced that the whole process of political justice must be very carefully conceived and balanced procedurally. Special care should be taken to avoid a “normative contamination” between different dimensions of responsibility and

their enforcing mechanisms. Using traditional procedural criminal law rules for non-criminal law legislation, such as screening, must be avoided. At the same time, controlled procedural flexibility should be allowed in order to be able to address the exceptional circumstances which lead to a revolution. And, speaking about the care with which the whole process of political justice should be dealt with in Eastern Europe, it should be remembered by both the supporters and the critics of political justice, that revolutions, like trees, are judged by the fruit they bear.

SELECTED BIBLIOGRAPHY

A. Books and Articles

Acuña, Carlos H. and Catalina Smulovitz. "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts." In Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams, pp. 93-122. Notre Dame & London: University of Notre Dame Press, 1997.

Adam H. "Trading Justice for Truth," World Today 54, no. 1 (1998): 11-13.

African Rights (Organisation). "Rwanda: Who is Killing, Who is Dying, What is To Be Done?" Discussion paper, African Rights. London: African Rights (May 1994).

Albon, Mary. "Truth and Justice: The Delicate Balance - Documentation of Prior Regimes and Individual Rights." The Charter Seventy-Seven Foundation, New York (30 October - 1 November 1992): 15-18.

Albon, Mary. "Truth and Justice: The Delicate Balance. Rapporteur's Report." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 34-66. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Albon, Mary. "Project on Justice in Times of Transition," The Charter Seventy Seven Foundation - New York. Report of the Project Inaugural Meeting." Salzburg (7-10 March 1992): 5-18. Reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 1, General Considerations, ed. Neil L. Kritz, pp. 49-53. Washington D.C.: United States Institute of Peace Press, 1995.

Amnesty International. "Oral Statement by Amnesty International before the United Nations Commission on Human Rights, Sub-Committee on Prevention of Discrimination and Protection of Minorities," pp. 1-4. Amnesty International, International Secretariat (August 1991).

Apostolidis, Charalambos. Doctrines Juridiques et Droit International. Paris: Eyrolles, 1991.

Applebaum, Anne. "Une mémoire en cache une autre." Commentaire 78, Été 1997.

Arendt, Hannah. "Contribution to the conference held at the American Academy of Arts and Sciences, March 1953" In Totalitarianism, ed. Carl J. Friedrich, pp. 133-134. Cambridge, MA: Harvard University Press, 1954.

- Arendt, Hannah. The Origins of Totalitarianism. Cleveland: Meridian, 1958.
- Aslund, Anders. Gorbachev's Struggle for Economic Reforms: The Soviet Reform Process, 1985-1988. London: Pinter, 1989.
- Avtorkhanov, Abdurakhman. Stalin and the Soviet Communist Party: A Study in the Technology of Power. London: Atlantic Books for the Institute for the Study of the USSR, 1959.
- Avtorkhanov, Abdurkhaman. The Communist Party Apparatus. Chicago: University of Chicago Press, 1966.
- Baldwin, Robert. "Introduction - Risk: The Legal Contribution." In Law and Uncertainty: Risks and Legal Processes, ed. Robert Baldwin and P. Cane, pp. 3-26. Boston, Mass : Kluwer Law International, 1996.
- Ball, George. Global Companies: The Political Economy of World Business. Englewood Cliffs, N.J.: Prentice-Hall, 1975.
- Baltzell, Digby. The Philadelphia Gentlemen: The Making of a National Upper Class. New York: The Free Press, 1958.
- Bankowski, Zenon and Geoff Mungham. "Political Trials in Contemporary Wales: Cases, Causes and Methods." In Essays in Law and Society, ed. Zenon Bankowski and Geoff Mungham, pp. 53-70. London, Boston, Henley: Routledge and Kegan Paul, 1980.
- Barnett, A. Doak. "Social Stratification and Aspects of Personnel Management in the Chinese Communist Bureaucracy." China Quarterly 28 (October-December 1966): 8-39.
- Barry, D., George Ginsburgs, and Peter B. Maggs, eds. Soviet Law After Stalin: The Citizen and the State in Contemporary Soviet Law. Law in Eastern Europe Series, no. 20. Leyden: Sijthoff, 1977.
- Bedau, Hugo Adam. "On Civil Disobedience," Journal of Philosophy 58 (1961): 653-661.
- Bedau, Hugo Adam, ed. Civil Disobedience in Focus. London, New York: Routledge, 1990.
- Benomar, Jamal. "Confronting the Past: Justice After Transition." Journal of Democracy 4, no. 1 (January 1993): 3-14.
- Berger, Peter. "New Attack on the Legitimacy of Business." Harvard Business Review 54 (1976), pp. 82-89.

Berney, Arthur. "A Critique of Lustration." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 138-147. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Blizek, William. "The Concept of Social Responsibility." Southern Journal of Philosophy 9 (1977): 7-9.

Boethius, Anicius. Boecius de consolacione philosophie, trans. G. Chaucer. Amsterdam: Theatrum Orbis Terrarum, 1974.

Bonneau, T. La Court de Cassation et l'application de la loi dans le temps. Paris: Press Universitaires de France, 1990.

Borneman, John. Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe. Princeton, New Jersey: Princeton University Press, 1997.

Boucquey, Nathalie. "Hot Spots in the Bubble: Ecological Liability in Markets for Pollution Rights." In Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization, eds. Gunther Teubner, Lindsay Farmer and Declan Murphy. Chichester: John Wiley & Sons Ltd., 1994.

Bren, Paulina. "Lustration in the Czech and Slovak Republics." RFE/RL Research Report 2, no. 29 (16 July 1993): 16-22.

Brummer, James J. Corporate Responsibility and Legitimacy: An Interdisciplinary Analysis. New York : Greenwood Press, 1991.

Brunner, Georg. "The Essence of Stalinism." Problems of Communism 30, no. 3 (May - June 1981): 87-90.

Brunner, Georg. "The Legal Status of the Hungarian Socialist Workers' Party." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, ed. Dietrich A. Loeber, et al., pp. 265-301. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Buergenthal, Thomas. "The United Nations Truth Commission for El Salvador." Vanderbilt Journal of Transnational Law 27, no. 3 (1994): 497-544.

Bulgaria: Constitution Watch. East European Constitutional Review 2, no. 1 (Winter 1993): 2-3.

Bulgaria: Constitution Watch. East European Constitutional Review 4, no. 2 (Spring 1995): 5-7.

Burns, John P., ed. The Chinese Communist Party's Nomenklatura System: A Documentary Study of Party Control of Leadership Selection, 1979-1984. London: M.E. Sharpe, Inc., 1989.

Burns, John P. "Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura." China Quarterly 138 (June 1994): 458-491.

Caponi, Remo. "La nozione di retroattività della legge." Giurisprudenza Costituzionale 35 (1990): 1332-1368.

Caporaso, J.A. Theories of Political Economy. New York: Cambridge University Press, 1992.

Casey, John. "Actions and Consequences." In Morality and Moral Reasoning, ed. John Casey. London: Macmillan, 1971.

Cassel, Douglass W. Jr. "International Truth Commissions and Justice." Aspen Institute Quarterly 5, no. 3 (Summer 1993): 77-90.

Cepl, Vojtech. "Ritual Sacrifices: The Mania for 'Lustration' in Czechoslovakia." East European Constitutional Review 1, no.1 (Spring 1992): 24-26.

Clinard, M. and P. Yeager. Corporate Crime. New York: Free Press, 1980.

Coleman, James S. "Responsibility in Corporate Action." In Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses, eds. Klaus J. Hopt and Gunther Teubner, pp. 69-93. Berlin. New York: Walter de Gruyter, 1985.

Colwill, J. "From Nuremberg to Bosnia: War Crimes Trials in the Modern Era." Social Justice 22, no.3 (Fall 1995): 111-128.

Conan, Eric and Henry Rousso. Vichy, un passé qui ne passe pas. Paris: Fayard, 1994.

Connolly, William E. The Terms of Political Discourse. Oxford: Martin Robertson, 1974.

Conquest, Robert The Harvest of Sorrow: Soviet Collectivisation and the Terror-Famine. London: Hutchinson, 1986.

Constable, Pamela and Arturo Valenzuela. A Nation of Enemies: Chile under Pinochet. New York: W. W. Norton, 1991.

Copp, David. "What Collectives Are: Agency, Individualism and Legal Theory." Dialogue 23 (1984): 253-258.

Correa, Jorge S. "Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship." Notre Dame Law Review 67, Issue 5 (1992): 1457-1485.

Cotterrell, Roger. The Sociology of Law: An Introduction, 2nd edition. London: Butterworth, 1992.

Cotterrell, Roger. "The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality." Social and Legal Studies 5, no. 4, (December 1996): 451-470.

Courtois, Stéphane et al. Le livre noir du communisme: crimes, terreur et répression. Paris: Editions Robert Laffont, 1997.

Craig, Paul P. "Formal and Substantive Conceptions of the Rule of Law." In Diritto Pubblico, pp. 35-55. Saggi, 1995.

Cullen, Francis T., William J. Maakestad, and Gray Cavender. "The Ford Pinto Case and Beyond: Corporate Crime, Moral Boundaries, and the Criminal Sanction." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 103-107. London: Sage Publications, 1984.

Czech Republic: Constitution Watch. East European Constitutional Review 2/3, no. 4/1 (Fall 1993/Winter 1994), p. 6.

Daes, Erica-Irene A. Freedom of the Individual Under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights. New York : United Nations, 1990.

Davis, Michael, "How To Make the Punishment Fit the Crime." In Criminal Justice, eds. J. Roland Pennock and John W. Chapman, pp. 119-155. New York and London: New York University Press, 1985.

De George, Richard T. Moral Responsibility and the Corporation. Paper presented at the 1978 meeting of the Society for Value Inquiry, in conjunction with the American Philosophical Association, December 27, 1978, pp. 1-20.

De Luce, Dan. "Alleged StB Collaborators Barred from Public Office." Prague Post, 8-14 October 1991, pp. 1-2.

De Luce, Dan. "In the Eyes of the Law: Prisoners of Past and Present See Screenings in a New Light." Prague Post, 22-28 October 1991, p. 3.

De Luce, Dan. "Destroyed StB Files." Prague Post, 31 March - 6 April 1992, p. 1.

Devlin, P. "The Enforcement of Morals." In Morality and the Law. Robert M. Baird and Stuart E. Rosenbaum (eds.), pp.15-35. New York: Prometheus Books, Buffalo, 1988.

Domenach, Jean-Marie. "Laisser les morts enterrer les morts." Le Monde (20 February 1990): 2.

Donaldson, Thomas. Corporations and Morality. Englewood Cliffs, N.J.: Prentice-Hall, 1982.

Donaldson, Thomas and Patricia Werhane, eds. Ethical Issues in Business: A Philosophical Approach. Englewood Cliffs, N.J.: Prentice-Hall, 1979.

Du Toit, André. "Introduction" to Towards Democracy: Building a Culture of Accountability in South Africa, ed. André Du Toit, pp. 5-41. Cape Town: IDASA, 1991.

Dworkin, Ronald. Taking Rights Seriously, 7th ed. London: Duckworth, 1994.

Dwyer, Susan and Joel Feinberg, eds. The Problem of Abortion. Belmont, CA: Wadsworth Pub., 1997.

Edwards, J. "The Moral Dilemmas of Positive Discrimination." Social Policy and Administration 22, no. 3 (Dec 1988): 210-221.

Eekelaar, J. M. "Principles of Revolutionary Legality." In Oxford Essays in Jurisprudence, Second Series, ed. A. W. B. Simpson, pp. 22-43. Oxford: Clarendon Press, 1973.

Eisenberg, Arthur. "Truth and Justice: The Delicate Balance: Reflections on a Conference held at the Central European University, Budapest, Hungary." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 148-164. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Elster, Jon. Nuts and Bolts for the Social Sciences. Cambridge: Cambridge University Press, 1989.

Elster, Jon. "On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution." East European Constitutional Review 1, no. 2 (Spring 1992): 23-26.

Elster, Jon. "On Majoritarianism and Rights." East European Constitutional Review 1, no. 3 (Fall 1992): 19-24.

Errera, Roger. "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?" East European Constitutional Review 1, no. 2 (Summer 1992): 19-20.

Ewald, François. L'etat providence. Paris: Bernard Grasset, 1986.

Eyal, G. and E. Townsley. "The Social Composition of the Communist Nomenklatura: A Comparison of Russia, Poland, and Hungary." Theory and Society 24, no. 5 (October 1995): 723-750.

Feinberg, Joel. Doing and Deserving. Princeton: Princeton University Press, 1970.

Feldbrugge, F.J.M. "The Status of Law Under Communist Party Rule." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31,

ed. Dietrich A. Loeber, et al., pp. 3-19. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Feldbrugge, F. J. M., ed. The Distinctiveness of Soviet Law. Law in Eastern Europe Series, no. 34. Dordrecht, Boston MA: Martinus Nijhoff Publishers, 1988.

Felkay, Andrew. Hungary and the USSR, 1956-1988: Kadar's Political Leadership. New York, London: Greenwood, 1989.

Ferringer, Natalie Jean. Crimes Against Humanity: A Legal Problem in War and Peace. Charlottesville, University of Virginia, PhD, 1980. Ann Arbor: University Microfilms International, 1991.

Ferro, M. Des soviets au communisme bureaucratique: les mecanismes d'une subversion. Paris: Gallimard, 1980.

Finger, B. "Was Russia a Workers' State?" New Politics 4, no. 2 (Winter 1995): 168-179.

Finnis, J. M. "Revolution and the Continuity of Law." In Oxford Essays in Jurisprudence, Second Series, ed. A. W. B. Simpson, pp. 44-76. Oxford: Clarendon Press, 1973.

Fisk, Milton. The State and Justice. Cambridge: Cambridge University Press, 1989.

Fisse, Brent. "The Use of Publicity as a Criminal Sanction against Business Corporations." Melbourne University Law Review 8 (June 1971): 105-150.

Fisse, Brent. "The Duality of Corporate and Individual Criminal Liability." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 69-85. London: Sage Publications, 1984.

Fletcher, George. Rethinking Criminal Law. Boston: Little, Brown, 1978.

Foucault, Michel. "Disciplinary Power and Subjection." In Power, ed. Steven Lukes, pp. 229-242. Oxford: Blackwell Publishers, 1992.

Frank, N. "Choosing Between Criminal and Civil Sanctions for Corporate Wrongs." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 85-102. London: Sage Publications, 1984.

Frank N. and M. Lombness. Controlling Corporate Illegality: The Regulatory Justice System. Cincinnati: Anderson Publishing Co., 1988.

Freeman, Michael D. A. Lloyd's Introduction to Jurisprudence, 6th ed. London : Sweet & Maxwell, 1994.

French, Peter A. Collective and Corporate Responsibility. New York: Columbia University Press, 1984.

French, Peter A. "The Corporation as a Moral Person." In Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics. eds. Larry May and Stacey Hoffmann. pp. 133-151. Savage, Md.: Rowman & Littlefield Publishers, Inc., 1991.

Friedrich, Carl J. "The Problem of Totalitarianism - An Introduction." In Totalitarianism, ed. Carl J. Friedrich, pp. 1-14. Cambridge, MA: Harvard University Press, 1954.

Fuller, Lon L. The Morality of Law. rev. ed. 1964. New Haven and London: Yale University Press, 1969.

Garro, Alejandro M. and Henry Dahl. "Legal Accountability for Human Rights Violations in Argentina." Human Rights Law Journal 8 (1987): 299- 337.

Garton Ash, Timothy. We the People: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague. Cambridge: Granta Books, 1990.

Goldman, Robert K. "International Law and Amnesty Laws." Human Rights Internet Reporter 12, no. 2 (Winter 1988): 9-11.

Grady, Robert C. "Obligation, Consent, and Locke's Right to Revolution: 'Who Is to Judge?'" Canadian Journal of Political Science 9, no. 2 (June 1976): 277-292.

Gurian, Waldemar. "Totalitarianism as Political Religion." In Totalitarianism, ed. Carl J. Friedrich, pp. 119- 129. Cambridge, MA: Harvard University Press, 1954.

Halmai, Gábor and Kim Lane Scheppele. "Living Well is the Best Revenge: The Hungarian Approach to Judging the Past." In Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams, pp. 155-184. Notre Dame & London: University of Notre Dame Press, 1997.

Harasymiw, Bohdan. "Political Patronage and Perestroika - Changes in Communist Party Leadership in Ukraine under Gorbachev and Shcherbytsky." In Echoes of Glasnost in Soviet Ukraine, ed. Romana M. Bahry, pp. 28-39. North York, Ontario: Captus University Publications, 1990.

Harasymiw Bohdan. "Nomenklatura: The Soviet Communist Party's Leadership Recruitment System." Canadian Journal of Political Science 2, no. 4 (December 1969): 494-521.

Harasymiw, Bohdan. Political Elite Recruitment in the Soviet Union. London: Macmillan, 1984.

Hart, H. L. A. and A. M. Honoré. Causation in the Law. Oxford: Clarendon Press, 1959.

Hart, H. L. A. The Concept of Law. Oxford: Clarendon Press, 1961.

Hart, H. L. A. "The Legal Enforcement of Morality." In Morality and the Law, ed. Robert M. Baird and Stuart E. Rosenbaum, pp. 38. New York: Prometheus Books, 1988.

Havel, Vaclav and John Keane, eds. The Power of the Powerless: Citizens Against the State in Central-Eastern Europe. London: Hutchinson, 1985.

Havel, Vaclav, Vaclav Klaus, and Petr Pithart. "Civil Society After Communism: Rival Visions." Journal of Democracy 7, no. 1 (January 1996): 11-23.

Hayek, Friedrich A. The Road to Serfdom. Chicago: University of Chicago Press, 1944.

Hayek, Friedrich A. The Constitution of Liberty. London: Routledge & Kegan Paul, 1960.

Hayner, Priscilla B. "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study." Human Rights Quarterly 16, no. 4 (1994): 597-655.

Hazard, John N. "The Status of Communist Parties under Law: Uniformity and Diversity." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31, ed. Dietrich A. Loeber, et al., pp. 483-497. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Held, Virginia. "Can a Random Collection of Individuals Be Morally Responsible?" In Collective Responsibility, eds. Larry May and Stacey Hoffmann, pp. 89-100. Rowman & Littlefield Publishers, 1991.

Henry, Stuart. Private Justice: Towards Integrated Theorising in the Sociology of Law. London: Routledge & Kegan Paul, 1983.

Hertz, John H. "Denazification and Related Policies." In From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism, ed. John H. Hertz, pp. 3-12. Westport Conn.: Greenwood Press, 1982.

Hill, Ronald J. and Peter Frank. The Soviet Communist Party. Boston, London: Allen & Unwin, 1986.

Hirszowicz, Maria. The Bureaucratic Leviathan: A Study in the Sociology of Communism. New York: New York University Press, 1980.

Hirtszowicz, Maria. Coercion and Control in Communist Society: The Visible Hand of Bureaucracy. Brighton: Wheatsheaf, 1986.

Hochstedler, Ellen, ed. Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6. London: Sage Publications, 1984.

Hochstedler, Ellen. "Introduction," to Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 9-12. London: Sage Publications, 1984.

Hodges, Donald C. The Bureaucratisation of Socialism. Amherst, Mass.: University of Massachusetts Press, 1981.

Höffe, Otfried. Political Justice: Foundations For a Critical Philosophy of Law and the State. Cambridge, UK; Cambridge, MA: Polity Press, 1995.

Holland, Kenneth M., ed. Judicial Activism in Comparative Perspective. London: Macmillan, 1991.

Holmes, Leslie. "The Democratic State or State Democracy? Problems of Post-Communist Transition." European University Institute, Jean Monnet Chair Paper RSC No. 97/48.

Holmes, Stephen. "Precommitment and the Paradox of Democracy." In Constitutionalism and Democracy, eds. John Elster and Rune Slagstad, pp. 195-240. Cambridge: Cambridge University Press, 1988.

Holmes, Stephen. "The Challenge of Post-Communist State Building: The Politics of Economics in the Czech Republic." East European Constitutional Review 4, no. 2 (Fall 1995): 52-55.

Holt, R. J. "The Grammar of Human Rights: A Wittgensteinian Analysis." Ph.D. thesis, London School of Economics, 1994.

Human Rights Watch. "Special Issue: Accountability for Past Human Rights Abuses." Human Rights Watch, no. 4 (New York: December 1989): 1-2.

Hungarian Screening Committee Chairman Refuses to Resign. Daily Digest, 18 January 1995.

Hungary: Constitution Watch. East European Constitutional Review 1, no. 3 (Fall 1992): 5-8.

Hungary: Constitution Watch. East European Constitutional Review 2/3, no. 4/1 (Fall 1993/Winter 1994): 10-12.

Hungary: Constitution Watch. East European Constitutional Review 3, no. 2 (Summer 1994): 8-10.

Huntington, Samuel. The Third Wave: Democratization in the Late Twentieth Century. Norman: University of Oklahoma Press, 1991.

Hutchinson, David. "Positivism and International Law." In Positivism Today, ed. Stephen Guest, pp. 46-64. Aldershot: Dartmouth, 1996.

Hutchinson, Allan C. and Patrick Monahan. "Democracy and the Rule of Law." In The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan, pp. 97-124. Toronto: Carswell, 1987.

Hutchinson, Allan C. Dwelling on the Threshold: Critical Essays in Modern Legal Thought. London: Sweet & Maxwell Limited, 1988.

Huyse, Luc. "A Devil's Choice: Dilemmas of Backward-Looking Justice." European Journal of Crime, Criminal Law and Criminal Justice 2, no. 2, (1994): 120-140.

Huyse, Luc. "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past." Law and Social Inquiry 20, no. 1 (Winter 1995), reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regime, vol. 1, General Considerations, ed. Neil J. Kritz, pp. 105-134 and 337-340. Washington D.C.: United States Institute of Peace Press, 1995.

Inkeles, Alex. "The Totalitarian Mystique: Some Impressions of the Dynamics of Totalitarian Society." In Totalitarianism, ed. Carl J. Friedrich, pp. 87-108. Cambridge, MA: Harvard University Press, 1954.

Ionescu, Dan. "Romania's Public War over Secret Police Files." RFE/RL Research Report 1, no. 29 (17 July 1992): 9-15.

Ito, Takayuki. "Controversy over Nomenklatura in Poland: Twilight of a Monopolistic Instrument for Social Control." Acta Slavonica Japonica 1 (1983): 57-103.

Jaspers, Karl. "Differentiation of German Guilt." In Guilt and Shame, ed. Herbert Morris, pp. 40-53. Belmont: Wadsworth Publishing Company, Inc., 1971.

Kadish, Mortimer R. and Sanford H. Kadish. Discretion to Disobey: A Study of Lawful Departures from Legal Rules. Stanford, Calif.: Stanford University Press, 1973.

Keeley, Michael. "Organisations as Non-Persons." Journal of Value Inquiry 15, no. 2 (1981): 149-55.

Kelman, Mark. "Interpretive Construction in the Substantive Criminal Law." Stanford Law Review 33 (1981): 591-673.

Kelsen, Hans. The General Theory of Law and State. Cambridge, Mass.: Harvard University Press, 1945.

Kelsen, Hans. The Pure Theory of Law, trans. from the 2nd (rev. and enl.) German ed. by Max Knight. Berkeley: University of California Press, 1970.

Kelsen, Hans. Introduction to the Problems of Legal Theory. Oxford: Clarendon Press, 1996.

Kettle, Steve. "Czech President Vetoes Extension of Screening Law." Daily Digest, 25 October 1995.

Kirchheimer, Otto. Political Justice. Westport, Connecticut: Greenwood Press Publishers, 1980.

Kirchheimer, Otto, and N. Leites. "Remarks on Carl Schmitt's *Legalität und Legitimität*," in Social Democracy and the Rule of Law, transl. L. Tanner and K. Tribe, pp. 148-178. London: Allen & Unwin, 1987.

Kirchheimer, Otto. "Legality and Legitimacy," reprinted in Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann, transl. by L. Tanner and K. Tribe, pp. 131-147. London: Allen and Unwin, 1987.

Kis, Janos. "What Shall We Do With Former Agents?" TD, (1994): 1-14.

Kis, Janos. "Meditation On Time Before Firing Squad Trials." TD, (1994): 1-36.

Klarsfeld, Arno. Papon: un verdict français. Paris: Ramsay, 1998.

Klenner, Herman. "On the Right to Revolution: A German Dilemma." In Enlightenment, Rights and Revolution, eds. Neil McCormick and Zenon Bankowski, pp. 287-296. Aberdeen: Aberdeen University Press, 1989.

Klingsberg, Ethan. "The Triumph of the Therapeutic: The Quest to Cure Eastern Europe Through Secret Police Files." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 8-33. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Klockars, K. B. "White Collar Crime." In Deviants: Voluntary Actors in a Hostile World, pp. 220-258. eds. E. Sagarin and F. Montanino, pp. 220-258. Morristown, N.J.: General Learning Press, 1977.

Konrad, George and Ivan Szelenyi. The Intellectuals on the Road to Class Power. Brighton: Harvester Press, 1979.

Korchak, Alexander. Contemporary Totalitarianism: A Systems Approach, East European Monographs, Boulder. New York: Columbia University Press, 1994.

Kramer, Ronald C. "Corporate Criminality: The Development of an Idea." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 13- 37. London: Sage Publications, 1984.

Kraus, Michael. "Settling Accounts: Postcommunist Czechoslovakia." Revised version of paper delivered at 1992 Annual Meeting of the American Political Science Association, The Palmer House Hilton, September 3-6, 1992. In Country Studies, vol. 2 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 548-549. Washington D.C.: United States Institute of Peace Press, 1995.

Kymlicka, Will. Justice in Political Philosophy, An Elgar Reference Collection. England: Aldershot, 1992.

La Spina, Antonio. "Modes of Legal Intervention and Totalitarian Effectiveness." In Totalitarian and Post-Totalitarian Law, ed. Adam Podgorecki and Vittorio Olgiati, pp. 39-69. Dartmouth: Oñati I.I.S.L., 1996.

Laber, Jeri. "Witch Hunt in Prague." The New York Review of Books (23 April 1992): 5-6.

Lacey, Nicola and Celia Wells. Reconstructing Criminal Law: Critical Perspective on Crime and the Criminal Process. London: Butterworths, 1998.

Ladd, John. "Morality and the Ideal of Rationality in Formal Organizations." The Monist, 54 (1970): 488-516.

Lakos, Janos. "Some Remarks on the Access to the Archives of the Former Regime." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 75-80. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Lefort, Claude. Un homme en trop: réflexions sur "L'archipel du Goulag". Paris: Editions du Seuil, 1986.

Leigh, Leonard H. Strict and Vicarious Liability: A Study in Administrative Criminal Law. London: Sweet and Maxwell, 1982.

Lenin, Vladimir Ilici. On the Soviet State Apparatus: Articles and Speeches. Compiled by L. A. Kashnitskaya and N. N. Surovtseva. Moscow: Progress Publishers, 1975.

Lessing, Lawrence. "The Path of Ciberlaw." Yale Law Journal 104, no. 7 (May 1995), pp. 1743-1755.

Lévy-Bruhl, Lucien. L'idée de responsabilité. Paris: Librairie Hachette, 1884.

Lindblom, Charles E. Politics and Markets: The World's Political-Economic Systems. New York: Basic Books, 1977.

Linz, Juan J. The Breakdown of Democratic Regimes: Crisis, Breakdown, & Reequilibration. Baltimore, London: Johns Hopkins University Press, 1978.

Locke, John. Two Treaties of Government, 2nd ed., vol. 2, ed. Peter Laslett. London : Cambridge University Press, 1967.

Loeber, Dietrich A. "Legal Rules 'For Internal Use Only.'" International and Comparative Law Quarterly 19, no. 1 (January 1970): 70-98.

Loeber, Dietrich A. et al., eds., Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe series, no. 31. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Los, Maria. "Lustration and Truth Claims: Unfinished Revolutions in Central Europe." Law and Social Inquiry 20, no. 1 (Winter 1995): 117-161.

Los, Maria. "In the Shadow of Totalitarian Law: Law-Making in Post-Communist Poland." In Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgati, pp. 275-322. Dartmouth: Oñati I.I.S.L., 1996.

Lövenhardt, John. "*Nomenklatura* and the Soviet Constitution." Review of Socialist Law 10 (1984): 35-55.

Lovinescu, M. "[Forgetfulness and the Illnesses of Transition.]" Revista 22 (Bucharest) 9, no. 12, (24-30 March, 1998): 8-9.

Lowit, Thomas. "Y a-t'il des etats en Europe de l'Est?" Revue Francaise de Sociology 20 (1979): 431-66.

Lucas, J.R. Responsibility. Oxford: Clarendon Press, 1993.

Lynxwiller, John et al. "Determinants of Sanction Severity in a Regulatory Bureaucracy." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 147-64. London: Sage Publications, 1984.

Lyons, David. Ethics and the Rule of Law. Cambridge: Cambridge University Press, 1984.

MacCallum, Gerald C. Jr. "Legislative Intent." In Legislative Intent and Other Essays on Law, Politics and Morality, eds. Marcus G. Singer and Rex Martin, pp. 3-35. Wisconsin: University of Wisconsin Press, 1993.

Malamud-Goti, Jaime. "Transitional Governments in the Breach: Why Punish State Criminals?" Human Rights Quarterly 12, no. 1 (1990): 1-16.

Marion Smiley. Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View. Chicago: University of Chicago Press, 1992.

Massey Stephen J. "Individual Responsibility for Assisting the Nazis in Persecuting Civilians." Minnesota Law Review 71 (1986): 136-149.

May, Larry. The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights. Notre Dame, Indiana: University of Notre Dame Press, 1987.

May, Larry. Sharing Responsibility. Chicago: University of Chicago Press, 1992.

Mayer, Ginger G. "Retroactive Application of Constitutional Rules Regarding Criminal Procedure." Cincinnati Law Review 56 (1988): 1097-1114.

McAdams, James A. "The Honecker Trial: The East German Past and the German Future." The Review of Politics 58, no. 1 (Winter 1996): 53-80.

McAdams, James A., ed. Transitional Justice and the Rule of Law in New Democracies. Notre Dame & London: University of Notre Dame Press, 1997.

McAuley, Mary. Politics and the Soviet Union. Harmondsworth: Penguin, 1977.

Méndez, Juan E. Review of A Miracle, A Universe, by Lawrence Wechsler. New York Law School Journal of Human Rights 577 (1991): 583-585.

Méndez, Juan E. "Acknowledgement, Truth, and Justice - Argentina." In Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer, pp. 35-40. Cape Town: IDASA, 1994.

Méndez, Juan E. "In Defence of Transitional Justice." In Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams, pp. 1-26. Notre Dame & London: University of Notre Dame Press, 1997.

Michnik, Adam and Vaclav Havel. "Confronting the Past: Justice or Revenge?" Journal of Democracy 4, no. 1 (January 1993): 20-27.

Montesquieu. The Spirit of Laws. Cambridge: Cambridge University Press, 1989.

Moore, Michael S. "The Moral and Metaphysical Sources of the Criminal Law." In Criminal Justice, Nomos 27, eds. J. Roland Pennock and John W. Chapman, pp. 11-51. New York: New York University Press, 1985.

Morgan, Jenny. "A Woman's Fight to Choose." Fulcrum Production for Channel 4, documentary transmission: 1 November 1997.

Morton, Peter. An Institutional Theory of Law: Keeping Law in Its Place. New York: Oxford University Press, 1997.

Morton J. Horowitz. "The Rule of Law: An Unqualified Human Good?" Yale Law Journal 86 (1977): 561-566.

Morvai, Krisztina. "Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court." East European Constitutional Review 2/3, no.4/1 (Fall 1993/Winter 1994): 32-35.

Neier, Aryeh. "What Should Be Done about the Guilty?" The New York Review of Books 37, no. 1 (1 February 1990): 32-35.

Nelson, Daniel N. "On Political Participation in Communist Systems." East European Quarterly 14, no. 1 (Spring 1980): 109-116.

Nelson, Daniel N. "Charisma, Control, and Coercion: The Dilemma of Communist Leadership." Comparative Politics 17, no. 1 (October 1984): 1-16.

Nelson, Daniel N. Elite - Mass Relations in Communist Systems. London: The Macmillan Press Ltd., 1988.

Nino, Carlos S. "The Duty to Punish Abuses of Human Rights Put Into Context: The Case of Argentina." Yale Law Journal 100, no. 8 (June 1991): 2619-2640.

Nino, Carlos S. "When Just Punishment is Impossible." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 67-74. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Nolan Committee's Inquiry. The Independent, 6 November 1995, p. 5.

Nonet, Philippe and Philip Selznick. Law and Society in Transition: Toward Responsive Law. New York: Harper and Row, 1978.

Norrie, Alan. "A Critique of Criminal Causation." Modern Law Review 54 (September, 1991): 685-701.

Nuti, Domenico Mario. "Post-kommunistiske mutationer," Samfundskøkonomen 8 (1996): 15-21.

Obrman, Jan. "The Parliament Approves Screening of Deputies." Report on Eastern Europe 2, no. 5 (1 February 1991): 5-7.

Obrman, Jan. "Laying the Ghosts of the Past." In Report on Eastern Europe 2, no. 24 (14 June 1991): 5.

Obrman, Jan. "Czech Parliament Declares Former Communist Regime Illegal." RFE/RL Research Report 2, no. 32 (13 August 1993): 6-10.

Offe, Klaus. "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions." Journal of Political Philosophy 1, no. 1 (March 1993): 17-44.

Olgiasi, Vittorio. "Law As an Instrument of 'Organizational Totalitarianism': Fascist Rule over Italian Lawyers." In Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiasi, pp. 123-167. Dartmouth: Oñati I.I.S.L., 1996.

Olson, David. "Organizational Dilemmas of Postcommunist Assemblies: Parliament by Design." East European Constitutional Review 4, no. 2 (Spring 1995): 56-60.

Oltay, Edith. "Hungary's Screening Law." RFE/RL Research Report 3, no. 15, (15 April 1994): 13-15.

Oltay, Edith. "Intelligence Services Burdened by Communist Legacy." Radio Free Europe Report on Eastern Europe 2, no. 19, (10 May 1991): 11-14.

Oltay, Edith. "Hungary's Attempt to Deal With Its Past." RFE/RL Research Report 2, no. 18 (30 April 1993): 6-10.

Orascu, Serban. "[On Communism and Its Victims]" Revista 22, Bucharest, 23-29 September 1997, p. 1.

Orentlicher, Diane F. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." Yale Law Journal 100, no. 8 (June 1991): 2539-2615.

Orentlicher, Diane F. "A Reply to Professor Nino." Yale Law Journal 100, no. 8 (June 1991): 2641-2643.

Osakwe, Christopher. "The Status of the CPSU Under Soviet Civil Law and of its Members Under Soviet Criminal Law and Procedure." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe Series, no. 31, ed. Dietrich A. Loeber, et al., pp. 149-168. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

O'Donnell, Guillermo and Phillippe C. Schmitter. Tentative Conclusions about Uncertain Democracies. Vol. 4 of Transition from Authoritarian Rule, eds. Guillermo O'Donnell, Phillippe C. Schmitter, and L Whitehead. Baltimore, London: Johns Hopkins University Press, 1986.

Paczkowski, Andrzej. "Notes on the Problem of Establishing the Material Truth about the Network of Agents." Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 96-102. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Papua New Guinea: A Death to Pay For. BBC2 documentary, The Learning Zone Series, 7 December 1998.

Parisi, Nicollette. "Theories of Corporate Liability." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 41-68. London: Sage Publications, 1984.

Pataki, Judith. "Dealing with Hungarian Communists' Crimes." RFE/RL Research Report 1, no. 28 (1992): 21-24.

Peczenik, Aleksander. "Weighing Rights." In Enlightenment, Rights and Revolution, eds. Neil MacCormick and Zenon Bankowski, pp. 175-196. Aberdeen: Aberdeen University Press, 1989.

Pehe, Jiri. "Bill of Fundamental Rights and Liberties Adopted." RFE/RL Research Report 2, no. 4 (27 January 1991): 1-4.

Pehe, Jiri. "Parliament Passes Controversial Law on Vetting Officials." Report on Eastern Europe 2, no. 43 (25 October 1991): 5-9.

Perry, R. B. General Theory of Value: Its Meaning and Basic Principles Construed in Terms of Interest. Cambridge, Mass.: Cambridge University Press, 1954.

Peterson, Ingrid. Four Theories of Responsibility, Studies in Philosophy no. 3. Lund: Lund University Press, 1990.

Pincoffs, Edmund L. The Rationale of Legal Punishment. New York: Humanities Press, 1966.

Podgorecki, Adam. "Totalitarian Law: Basic Concepts and Issues." In Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati, pp. 3-37. Dartmouth: Oñati I.I.S.L., 1996.

Podgorecki, Adam. "Polish Communist and Post-Communist *Nomenklaturas*." In Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati, pp. 323-340. Dartmouth: Oñati I.I.S.L., 1996.

Podgorecki Adam and Vittorio Olgiati, eds. Totalitarian and Post-Totalitarian Law. Dartmouth: Oñati I.I.S.L., 1996.

Poland: Constitution Watch, East European Constitutional Review 2, no. 3 (Summer 1993): 12-14.

Popkin, Margaret and Naomi Roht-Arriaza. "Truth As Justice: Investigatory Commissions in Latin America." Law & Social Inquiry 20, no.1 (Winter 1995). Reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 1, General Considerations, ed. Neil J. Kritz, pp. 262-289. Washington D.C.: United States Institute of Peace Press, 1995.

Pospisil, Leopold. Anthropology of Law: A Comparative Theory. New Haven: HRAF Press, 1974.

Prantle, Heribert. "Writing on the Wall for Krenz." The Guardian, 27 August 1997, p. 14.

Public "Anxiety" Will Force MPs to Disclose, Independent (London), 7 November 1995, p. 4.

Pusylewitsch, Teresa. "The Position of the Polish United Workers' Party in the Legal System of the People's Republic of Poland." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe Series, no. 31, ed. Dietrich A. Loeber, et al., pp. 303-332. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Quint, Peter. "The Constitutional Law of German Unification." Maryland Law Review 50, no.3 (1991): 475-631.

Ralston, Richard D. "Apartheid, South Africa's 'Peculiar Institution': Law Versus Justice in a Repressive Society." In Totalitarian and Post-Totalitarian Law, eds. Adam Podgorecki and Vittorio Olgiati, pp. 215-249. Dartmouth: Oñati I.I.S.L., 1996.

Rawls, John. A Theory of Justice. Oxford: Oxford University Press, 1971.

Rawls, John. "Justice as Reciprocity." In Utilitarianism, ed. Samuel Gorovitz, pp. 244-255. Indianapolis: Bobbs-Merrill, 1971.

Raz, Joseph. "The Rule of Law and Its Virtue." Law Quarterly Review 93 (April 1977): 195-211.

Raz, Joseph. "On the Functions of Law." In Oxford Essays in Jurisprudence, Second Series, ed. A. W. B. Simpson, pp. 278-304. Oxford: Clarendon Press, 1973.

Raz, Joseph. The Authority of Law. Oxford: Clarendon Press, 1979.

Raz, Joseph. The Morality of Freedom. Oxford: Clarendon Press, 1988.

Richard H. Piles and Cass R. Sunstein. "Reinventing the Regulatory State." University of Chicago Law Review 62, no. 1 (Winter 1995): 1-129.

Richardson, Anita L. and Leonard B. Mandell. "Fairness Over Fortuity: Retroactivity Revisited and Revised." Utah Law Review, no. 1 (1989): 11-61.

Richie, R. and S. Hill. "Proportional Representation." Social Policy 26, no. 4 (Summer 1996): 25-37.

Rigby, T. H. and Bohdan Harasymiw, eds. Leadership Selection and Patron - Client Relations in the USSR and Yugoslavia. London: George Allen and Unwin, 1983.

Riols, Yves-Michel. "Les actions du régime communiste pourront être jugées." Le Monde, 20 February 1993, p. 16.

Rosen, Laurence. "Intentionality and the Concept of the Person." In Criminal Justice, eds. J. Roland Pennock and John W. Chapman. pp. 252-278. New York: New York University Press, 1985.

Rosenberg, Tina. "Reconciliation and Amnesty," contribution in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer, pp. 66-68. Cape Town: IDASA, 1994.

Rosenberg, Tina. The Haunted Land: Facing Europe's Ghosts After Communism. London: Vintage, 1995.

Rosenfeld, Michel. "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of Their Predecessors without Sacrificing the Rule of Law?" East European Constitutional Review 1, no. 2 (Summer 1992): 17-18.

Ross, George. "Crime and Punishment." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 111-122. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Rybicki, M. "Le gouvernement et sa position dans le systeme politique de la Republique Populaire de Pologne (1970-1980)." In Revue d'Etudes Comparatives Est-West 14, no. 4 (December 1983): 97-118.

Rzeplinski, Andrzej. "A Lesser Evil?" East European Constitutional Review 1, no. 3 (1992): 33-35.

Sajo, Andras. "On Old and New Battles: Obstacles to the Rule of Law in Eastern Europe." Journal of Law and Society 22, no.1 (Mar 1995): 97-104.

Sartre, Jean-Paul. Critique of Dialectical Reason. London: Verso, 1982.

Schauer, Frederick. Playing by the Rules. Oxford: Clarendon Press, 1991.

Schudson, Charles B., A. P. Onelion and E. Hochstedler. "Nailing an Omelette to the Wall: Prosecuting Nursing Home Homicide." In Corporations as Criminals, Perspectives in Criminal Justice Series, no. 6, ed. Ellen Hochstedler, pp. 131-147. London: Sage Publications, 1984.

Schulhofer, Stephen J. "Dilemmas of Justice: How Can Democratic Governments Deal with the Injustices of their Predecessors without Sacrificing the Rule of Law?" East European Constitutional Review 1, no. 2 (Summer 1992): 18-19.

Schultz, Lothar. "The Status of the Communist Party in the Czechoslovak Socialist Republic." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe Series, no. 31, ed. Dietrich A. Loeber, et al., pp. 255-263. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Schwartz, Paul. "Constitutional Change and Constitutional Legitimation: The Example of German Unification." Huston Law Review 31, no.4 (Winter 1994): 1027-1104.

Schwartz, Herman. "Lustration in Eastern Europe." Parker School of East European Law 1, no. 2 (1994): 141-171.

Screening Law in Poland. Daily Digest (February 2, 1996).

Selznick, Philip. "Self-Regulation and the Theory of Institutions." In Environmental Law and Ecological Responsibility: The Concept and Practice of Self-Organization, eds. Gunther Teubner, Lindsay Farmer and Declan Murphy, pp. 396-402. Chichester: John Wiley and Sons, 1994.

Shklar, Judith N. Legalism. Oxford: Oxford University Press, 1964.

Shklar, Judith N. Montesquieu. Oxford: Oxford University Press, 1987.

Shklar, Judith N. "Political Theory and the Rule of Law." In The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan, pp. 1-16. Toronto: Carswell, 1987.

Shugart, Matthew. "Of Presidents and Parliaments: The Post-Communist Democracies Offer a Diversity of Legislative-Executive Configurations." East European Constitutional Review 2, no. 1 (Winter 1993): 30-32.

Siklova, Jirina. "Lustration or the Czech Way of Screening." East European Constitutional Review 5, no. 1 (Winter 1996): 57-62.

Simons, William B. and Stephen White, eds. The Party Statutes of the Communist World. Law in Eastern Europe Series, no. 27. Dordrecht, Boston MA: Martinus Nijhoff Publishers, 1984.

Simpson G. and P. VanZyl. "La commission pour la verité et la reconciliation sera-t-elle le meilleur desinfectant?" Temps modernes 50, no. 585 (September-December 1995): 394-407.

Singer, Peter. Democracy and Disobedience. Oxford: Oxford University Press, 1973.

Smith, Gordon B. "Guidance by the Communist Party of State Administrative Agencies in the USSR." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe Series, no. 31, ed. Dietrich A. Loeber, et al., pp. 179-188. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Steimann, Horst. "The Enterprise as a Political System." In Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses, eds. Klaus J. Hopt, and Gunther Teubner, pp. 401-427. Berlin. New York: Walter de Gruyter, 1985.

Steinberger, Peter J. The Concept of Political Judgment. Chicago: University of Chicago Press, 1993.

Stone, Christopher D. "A Comment on 'Criminal Responsibility in Government.'" In Criminal Justice, eds. J. Roland Pennock and John W. Chapman, pp. 241-266. New York: New York University Press, 1985.

Stone, Christopher D. Where the Law Ends: The Social Control of Corporate Behaviour. Illinois: Waveland Press, Inc., 1991.

Sturdza, Mihai. "The Files of the State Security Police." RFE/RL Research Report 2, no. 37 (13 September 1991): 22-31.

Sunstein, Cass R. "Problems with Rules." California Law Review 83, no. 4 (1995): 956-1026.

Sunstein, Cass R. "The Dubious Status of the Charter of Rights and Freedoms: A Constitutional Anomaly in the Czech Republic?" East European Constitutional Review 4, no. 2 (1995): 50-51.

Sutherland, Edwin H. White Collar Crime. New York: Dryden, 1949.

Suzman, Helen. "The Erosion of Accountability." In Towards Democracy: Building a Culture of Accountability in South Africa, ed. André du Toit, pp. 43-46. Cape Town: IDASA, 1991.

Taras, R., ed. Handbook of Political Science Research on the USSR and Eastern Europe: Trends from the 1950 to the 1990. Westport, Conn.: Greenwood Press, 1992.

Teitel, Ruti. "How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?" The Council on Foreign Relations Latin America Project Paper, New York 17 May 1990.

Teitel, Ruti. "How Can Democratic Governments Deal With the Injustices of Their Predecessors Without Sacrificing the Rule of Law?" East European Constitutional Review 1, no. 2 (Summer 1992): 18-19.

Teitel, Ruti. "Documentation of Prior Regimes and Individual Rights." In Truth and Justice: The Delicate Balance, ed. Ethan Klingsberg, pp. 5-8. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Teubner, Gunther. Law as Autopoietic System. London: Blackwells, 1992.

Teubner, Gunther. "The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability." In Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization, eds. Gunther Teubner, Lindsay Farmer and Declan Murphy, pp. 17-47. Chichester: John Wiley & Sons Ltd., 1994.

Then, Rudolf H. W. "Party and Bureaucracy." In Public Policy and Administration in the Soviet Union, ed. Gordon B. Smith, pp. 18-52. New York: Praeger; Washington: American Society for Public Administration, 1980.

Thompson, Dennis F. "Criminal Responsibility in Government." In Criminal Justice, Nomos 27, ed. J. Roland Pennock and John W. Chapman, pp. 201-240. New York and London: New York University Press.

Thoreau, Henry David. Civil disobedience. London: Peace Pledge Union, 1940.

Tilly, Charles. "War Making and State Making as Organized Crime." In Bringing the State Back In, eds. Peter B. Evans, Dietrich Reuschmeyer, and Theda Skocpol, pp. 169-191. Cambridge: Cambridge University Press: 1985.

Tontsch, Gunther H. "The Romanian Communist Party in the Romanian Legal System." In Ruling Communist Parties and Their Status Under Law, Law in Eastern Europe Series, no. 31, ed. Dietrich A. Loeber, et al., pp. 239-253. Dordrecht, Boston, Lancaster: Kluwer Academic Publishers Group, 1986.

Tribe, L. H. American Constitutional Law. Mineola, N.Y.: Foundation Press, 1978.

Unger, Roberto Mangabeira. Law in Modern Society: Toward a Criticism of Social Theory. New York: Free Press; London: Collier Macmillan, 1977.

Urban, Jan. "Keeping Silent about Silence." In ed. Ethan Klingsberg, pp. 85-95. Budapest: Central European University, Institute for Constitutional and Legislative Policy, Working Paper no.1, 1993.

Van Tine, Matthew E. "Application of the Federal Parole Guidelines to Certain Prisoners: An Ex Post Facto Violation." Boston University Law Review 62 (1982): 515-551.

Velasquez, Manuel G. Business Ethics: Concepts and Cases. Englewood Cliffs, NJ: Prentice Hall, 1982.

Velasquez, Manuel G. "Why Corporations Are Not Morally Responsible for Anything They Do?" In Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics, eds. Larry May and Stacey Hoffmann. pp. 111-131. Savage, Md.: Rowman & Littlefield Publishers, Inc., 1991.

Voslensky, Michael. "Nomenklatura: Anatomy of the Soviet Ruling Class." London: The Bodley Head Ltd., 1984.

Walicki, Andrzej S. "Transitional Justice and the Political Struggles of Post-Communist Poland." In Transitional Justice and the Rule of Law in New Democracies, ed. James A. McAdams, pp. 185-237. Notre Dame & London: University of Notre Dame Press, 1997.

Walzer, Michael. Spheres of Justice: A Defence of Pluralism and Equality. Oxford: Blackwell, 1985.

Wasserstrom, Richard. "The Relevance of Nuremberg," Philosophy and Public Affairs 1, no. 1 (Fall 1971): 22-46.

Weber, Max. "The Types of Legitimate Domination." In Economy and Society: An Outline of Interpretive Sociology, vol. 3, eds. Gunther Roth and Claus Wittich. New York: Bedminster Press, 1968.

Weeks, Albert L., ed. The Soviet Nomenklatura: A Comprehensive Roster of Soviet Civilian and Military Officials. Washington D.C.: Washington Institute Press, 1987.

Weinrib, Ernest. "The Intelligibility of the Rule of Law." In The Rule of Law: Ideal or Ideology, eds. Allan Hutchinson and Patrick Monahan, pp. 59-84. Toronto: Carswell, 1987.

Weissbrodt, David and Paul W. Fraser. Review of The Report of the Chilean Commission on Truth and Reconciliation, published by Comisión Nacional de Verdad y Reconciliación. Human Rights Quarterly Review 14, no. 4 (November 1992): 601-622.

Wells, Celia. Corporations and Criminal Responsibility. Oxford: Clarendon Press; New York: Oxford University Press, 1993.

Werle, G. "'We asked for Justice and Got the Rule of Law:' German Courts and the Totalitarian Past." South African Journal on Human Rights 11, no. 1 (1995): 70-83.

Weschler, Lawrence. "The Velvet Purge: The Trials of Jan Kavan." The New Yorker 68, no. 35 (19 October 1992): 78-79.

Whiler, Joseph H. H. "On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State." In International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, eds. Joseph H. H. Whiler, Antonio Cassese and Marina Spinedi, pp. 319-335. Berlin, New York: Walter de Gruyter, 1989.

Williams, Shirley. "Democratic Accountability and Popular Empowerment." Contribution in Towards Democracy: Building a Culture of Accountability in South Africa, ed. André du Toit, pp. 46-56. Cape Town: IDASA, 1991.

Witt-Hansen, Johannes. "Marxism, Leninism, Maoism." In Politiske ideologier fra Platon til Mao, ed. Svend Erikstibe, pp. 173-230. Copenhagen: Politikens Forlag, 1972.

Wolf, Susan. "The Legal and Moral Responsibility of Organizations." In Criminal Justice, eds. J. Roland Pennock and John W. Chapman, pp. 267-286. New York: New York University Press, 1985.

Woodhouse, Diana. Ministers and Parliament: Accountability in the Theory and Practice. Oxford: Oxford University Press, 1994.

Wróblewski, Jerzy. The Judicial Application of Law, Law and Philosophy Library Series, vol. 15, eds. Zenon Bankowski and Neil MacCormick. Dordrecht, London: Kluwer Academic, 1992.

Yasmann, Victor. "Legislation on Screening and State Security in Russia." RFE/RL Research Report 2, no. 32 (1993): 11-16.

Zallaquett, José. "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints." In State Crimes: Punishment or Pardon, Justice and Society Program of Aspen Institute. Queenstown: Aspen Institute, 1989.

Zallaquett, José. "Introduction" to Report of the Chilean National Commission on Truth and Reconciliation, Comisión Nacional de Verdad y Reconciliación, trans. Phillip E. Berryman, 2 vol. Notre Dame: University of Notre Dame Press, 1993.

Zallaquett, José. "Why Deal with the Past?" Contribution in Dealing with the Past: Truth and Reconciliation in South Africa, eds. Alex Boraine, Janet Levy, and Ronel Scheffer, pp. 8-15. Cape Town: IDASA, 1994.

B. Official Documents

Chile: Comisión Nacional de Verdad y Reconciliación. Report of the Chilean National Commission on Truth and Reconciliation, trans. Phillip E. Berryman, 2 vol. Notre Dame: University of Notre Dame Press, 1993.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), (1953) U.K.T.S. 71; 213 U.N.T.S. 221, Cmd. 8969, E.T.S. 5.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (New York Convention), (1968) G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, UN Doc. A/7218.

Czech and Slovak Federal Republic: Report of the Parliamentary Commission on StB Collaborators in Parliament, reproduced in Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 307-311. Washington D.C.: United States Institute of Peace Press, 1995.

Czech and Slovak Federal Republic: Act Stipulating Certain Additional Requirements for the Holding of Certain Offices in State Organs and Organizations of the Czech and Slovak Federal Republic, Act No. 451/1991 Sb (“Lustration Law”). Unofficial translation.

Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, Pl. US 1/92. In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 349-363. Washington D.C.: United States Institute of Peace Press, 1995.

Czech Republic: Act on the Illegality of the Communist Regime and Resistance to It. Act No. 198/1993 (9 July 1993). In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 366-368. Washington D.C.: United States Institute of Peace Press, 1995.

Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime, Pl. US 198/93 (21 December 1993). In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 370-372. Washington D.C.: United States Institute of Peace Press, 1995.

Geneva Convention Relative to the Treatment of Prisoners of War (1950) 75 U.N.T.S. 135.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 U.N.T.S. 287.

Hungary: Constitutional Court Resolution 1/1990(II.12)AB. In Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 3, Laws, Rulings, and Reports, ed. Neil J. Kritz, pp. 629-636. Washington D.C.: United States Institute of Peace Press, 1995.

Hungary: Constitutional Court Decision on the Statute of Limitations, No. 2086/A/1991/14 (5 March 5 1992). Reproduced in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 3, Laws, Rulings, and Reports, ed. Neil J. Kritz, pp. 636-640. Washington D.C.: United States Institute of Peace Press, 1995.

Hungary: Constitutional Court Decision, 11/1992 (III.5)AB h. Translated and published in Journal of Constitutional Law in Eastern and Central Europe 1, no. 1 (1994), pp. 129-156.

Hungary: Law on Background Checks To Be Conducted on Individuals Holding Certain Important Positions, No. 23 (8 March 1994). In Laws, Rulings, and Reports, vol. 3 of Transitional Justice: How Emerging Democracies Reckon with Former Regimes, ed. Neil J. Kritz, pp. 418-425. Washington D.C.: United States Institute of Peace Press, 1995.

International Covenant on Civil and Political Rights, (1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

Mexico Peace Agreements: Provisions Creating the Commission on Truth for El Salvador. UN Doc. S/25500 (1 April 1993).