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Dilemmas of Justice

Ruti G. Teitel

New York Law School, ruti.teitel@nyls.edu

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action is highly commendable and will hopefully be emulated throughout the region; it also affords an opportunity for further reflection on the problematic relationship between political justice and constitutionalism.

One should not dismiss political justice as being ultimately reducible to revenge or to the whim of those in power. Political justice has a legitimate place in a comprehensive scheme of justice meant for a society with a past marked by a wide gap between moral and legal norms. Indeed, comprehensive justice must be both forward- and backward-looking as it must address genuine issues of compensation and retribution as well as those of distribution. Moreover, when reliance on established legal norms is insufficient to effectuate the requisite dictates of compensatory and retributive justice, recourse to political justice could well be justified.

Notwithstanding its potential for legitimacy, political justice remains antagonistic to constitutionalism's commitment to the rule of law. In the case of constitutions enacted after violent rupture with the past, the demands of political justice might be reconciled with those of constitutionalism by confining the operation of political justice to the revolutionary period separating the *ancien regime* from the new constitutional order. Even where that is not possible, accommodation could still be achieved, in cases where the *ancien regime* altogether failed to criminalize reprehensible conduct, through appeal to unwritten law or through incorporation of legal norms embodied in international covenants.

When it comes to Hungary and to most of the remaining East and Central European democracies, however, there appears to be no justification for relying on either of these two alternative ways of reconciling political justice and constitutionalism. Focusing on Hungary in particular, the transition to constitutionalism was achieved without revolutionary rupture while the type of reprehensible conduct sought to be punished through enactment of the retroactivity law was fully subject to criminal sanction under the socialist regime. Under these circumstances, the call for political justice must derive its justification from the socialist state's failure to prosecute certain criminal offenders for "political reasons." This, in turn, leads to the following paradox: past injustices and the flouting of the rule of law may be redressed through application of a retroactivity law, but since the determination of what constitutes a "political reason" itself depends on political criteria, use of a retroactivity law seems

bound to undermine adherence to the rule of law. In the abstract there seems to be no way out of this paradox. Given the historical socialist disregard for the rule of law, however, the Hungarian constitutional court's decision and its commitment to the rule of law as an independent constitutional value seem eminently wise.

Invalidation of retroactivity laws does not entail abandoning the aims of comprehensive justice. It merely forecloses using criminal law to achieve the objectives of political justice.

Ruti Teitel

Professor of Law

New York Law School

The question before Hungary's constitutional court is important to the transitions taking place now in East and Central Europe, but it is also one which has long fascinated legal scholars. What are the rule-of-law constraints on the retroactive application of criminal justice?

In its decision on the November 1991 Law Concerning the Prosecutability of Offenses Committed Between December 21, 1944 and May 2, 1990, Hungary's constitutional court held that tampering with the statutes of limitations for treason and homicide was unconstitutional and offensive to principles of rule of law: "Legal certainty based on objective and formal principles takes precedence over justice which is partial and subjective at all times."

To what extent was the constitutional court's decision to invalidate the legislation required by rule-of-law principles? Below I suggest that principles of rule of law may well justify upholding that part of the challenged legislation which revives the statute of limitations for homicide; and I offer a basis for distinguishing the tamperings as to treason and homicide, particularly homicide committed against civilians on political grounds.

The rule-of-law principle the challenged legislation was held to offend is that of *nulla poena sine lege*. This principle against retroactivity in the operation of criminal justice requires that as a matter of fairness persons ought not to be held accountable for offenses not known to be unlawful at the time they were committed. The relevant question becomes whether the prosecutable acts would have been offenses and unlawful at the time of their occurrence.

According to the above principle, the revivals of the statute of limitations for treason and homicide in the challenged legislation arguably are distinguishable. As to the

treason offense, the reimposition of the statute of limitations today presents a tampering of a substantive nature. A post-Communist understanding of treason is utterly different from the understanding of treason during the prior regime. In 1956, at the time of the treasonous acts in question, persons committing the acts would not have known of their criminal nature. As to this offense, therefore, the revival of the statute of limitations constitutes substantive retroactive legislation.

Concerning the offense of homicide, in distinction, the revival of the statute of limitations does not present the substantive creation of criminal liability for a new offense; homicide was unlawful in 1956. As to homicide, the proposed legislation is arguably jurisdictional in nature, and would not contravene the principle against retroactive criminal justice.

A similar analysis has applied in constitutional review of World War II-related prosecutions. Substantive retroactive legislation has been distinguished from that which is jurisdictional. Under this standard, the proposed homicide provisions would be understood to confer jurisdiction today on Hungary's courts with respect to acts that were unlawful at the time they were committed. With respect to the category of offenses, though the proposed legislation still implies a tampering of a jurisdictional nature, it is compatible with the principle of rule of law.

An important justification for the jurisdictional tampering is that the homicide acts that are the subject of the challenged legislation fall within a category of grave criminal offenses, crimes against humanity. Protection of the rule of law also implies adherence to fundamental international law norms such as the principle of the imprescriptibility of crimes against humanity. The failure to refer to any national or international precedents on this question is a glaring omission in the Hungarian constitutional court's opinion.

Notwithstanding the above, the challenged legislation may still suffer from a constitutional defect in its selective retroactivity. The principle against retroactive criminal legislation tells us something about the community we properly hold criminally accountable. If the proposed legislation is applied retroactively—and selectively—its selective enforcement raises problems of bill of attainder and equal protection. There would be additional problems which I have not addressed concerning the law's enforcement, for example, the availability of defenses such

as due obedience.

The balance struck by the Hungarian constitutional court whereby rule-of-law interests against jurisdictional tamperings override the competing interest in adherence to the principle of the imprescriptibility of crimes against humanity in the long run will not afford legal certainty. The question before the court involved competing principles of criminal justice, and as such will no doubt continue to haunt the region.

Roger Errera

Member, Conseil d'état

Paris, France

I regard this as a decision of a very high legal standard. The legal concepts it applies are essential: rule of law; legal certainty; non-retroactivity of criminal law; *nullum crimen*,

nullum poena sine lege; prohibition of vaguely worded statutes, especially in the field of criminal law; equality before the law. There is little doubt that the decision will, in time, be influential in the other Central and Eastern European countries.

How and when, we cannot know at this moment: it will take some time for the decision to be fully translated and known in the other countries. Other factors might be: the scope of the jurisdiction of the new constitutional courts; the kind of statutes that will be referred to them (e.g. the Czechoslovak *lustrace* law); and, most important, the quality of the judges sitting in the courts and the general political context.

In due time, law professors, lawyers, members of parliaments, judges and politicians will not be able to ignore the Hungarian decision. The comments devoted to it in Western European or North American law journals will no doubt find their way to Central and Eastern European readers.

Any Western European reader of the decision cannot fail to recognize in it familiar notions. The content of the concept of legal certainty, for example, owes much to the case law of the European Commission and Court of Human Rights construing the words "prescribed by law," which figure in paragraph of many articles of the European Human Rights Convention. To a French reader at least, the notions of necessity and proportionality of penalties evoke the corresponding clause of the 1789 Declaration of the Rights of Man and Citizen. It is more difficult to find parallels from countries where there is no statute of limitations (see, e.g. the English War Crimes