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PUBLIC ORDER AND SECURITY VERSUS RULE OF LAW IN TRANSITION COUNTRIES

I propose, to deal with the contradiction that is posed in the title of this paper in the following way: Are there any elements of the contradiction between public order/security and new-born rule of law that are specific to Central and Eastern Europe and what are the dilemmas for the constitutional courts in the region? After attempting to respond to the organizers original question, I would also like to deal with a relevant, but perhaps more substantive problem: on what basis can fundamental rights, and especially the right to life, as an almost absolute right, be restricted in order to protect public order and security?

RIGHTS-RESTRICTIONS IN TRANSITION

The more general problem behind the first question is whether there exists a special, lower standard of freedom allowing for more restriction in transition countries. One theoretical answer to this question was given by Richard A. Posner, chief judge of the US Court Appeals for the Seventh Circuit, and Professor at the University of Chicago Law School at a conference on economic perspectives with regard to basic rights held in Budapest in 1995.[1] Posner warns the East European new democracies to proceed in a very cautious way with liberal rights. It may be counterproductive, he intimates, for post-communist societies in transition to "accord a high priority to securing all the negative liberties. Perhaps those liberties differ greatly in their value to a poor society". More specifically, while "the protection of property rights and of basic political rights is very important", it would be bad strategy to "attach similar importance to the following rights: to protection from police brutality in pre-trial detention, to protection from custodial abuse in public psychiatric hospitals, and to the provision of competent defence attorneys to indigent criminal defendants". János Kis, in his critique, calls this Judge Posner's priority thesis.[2] One of the arguments Judge Posner marshals in support of his priority thesis is his well-known cost-benefit analysis, but he also offers another argument that is based on historical observations. It would not be wise for the new democracies of Eastern Europe to copy the system of rights recognized today in the United States, he says, because these are not "rights semper et ubique, but are rather the culmination of a specific historical process".

The sign of a similar general regularity in the sequencing of legal evolution can be detected in the measures, which the Czech legislature took immediately after the collapse of Communism to criminalize the support or propagation of totalitarian (or exclusive) ideologies. The law was directed against movements that advocated the suppression of citizens' rights and freedoms; Nazism and Communism were named in brackets in the text of the law. This approach was presumably justified in view of the Communist legacy. The Act on the Era of Non-freedom declared that, "in the years from 1948 to 1989, the communist regime violated human rights as well as its own laws".[3] The Czech Constitutional Court found that "under these circumstances, it is justifiable to prevent by means of criminal law the support and propagation of movements that would seek once again to suppress citizens' rights and freedoms".[4] The Czech Constitutional Court upheld the law, which was found to serve pluralism.

Another basic question confronting all transitional governments is whether to undertake the prosecution of the leaders of the ousted regime for the abuses they inflicted upon the nation. When a decision is made to prosecute, the desire to use criminal sanctions may run directly counter to principles of a democratic legal order, such as ex post facto and nulla poena sine lege, barring the prosecution of anyone for an act which was not criminal at the time it was committed. Some of the worst violations of human rights were crimes under the old system, but they obviously were not prosecuted. If the statute of limitations for these crimes has already elapsed by the time of the transition, can the new authorities still hold the perpetrators accountable for their deeds? In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes, particularly those committed to suppress dissent, in 1956 and

1968 respectively, had not been prosecuted for entirely political reasons, it was legitimate to hold that the statute of limitations had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly. In both countries, the matter was put to the newly created constitutional court for review. Each court handed down a decision, which eloquently addressed the need to view the question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On the basis — with plainly similar fact patterns — the Czech constitutional court upheld the re-running of the statute of limitations for the crimes of the old regime as a requirement of justice, while the Hungarian court struck down the measure for violating the principle of the rule of law.

In Hungary the first elected parliament passed a law concerning the prosecution of criminal offences committed between December 21st, 1944 and May 2nd, 1990. The law provided that the statute of limitations start over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and the infliction of bodily harm resulting in death — but only in those cases where the "state's failure to prosecute said offences was based on political reasons". The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court in its unanimous decision, 11/1992. (III. 5.) AB, struck down the parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves had changed definition during that time as well). The basic principles of criminal law — that there shall be no punishment without a crime and no crime without a law — were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of the defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional.[5]

The Constitutional Court of the Czech Republic in its decision of December 21st, 1993 on the Act on the Illegality of the Communist Regime rejecting the challenge filed by a group of deputies in the Czech Parliament upheld a statute suspending limitations periods between 1948 and 1989 for criminal acts not prosecuted for "political reasons incompatible with the basic principles of the legal order of a democratic State".[6] The Czech decision permitting suspension of the limitations period relied, in part, on the decision of the German Federal Constitutional Court from November 12, 1996, in which the Court upheld the convictions of former German Democratic Republic (GDR) officials who had helped hand down the shoot-on-sight policy that resulted in the death of 260 people trying to cross the border between East and West Germany, or East and West Berlin, between 1949 and 1989. It rejected the defence argument that the German constitution's provision that "[a]n act may be punishable only if it constituted a criminal offence under the law before the act was committed", Basic Law article 103, para. 2, prohibited such prosecutions. This article, the Court found, did not apply to a case such as this where a state (the GDR) had used its law to try to authorize clear violations of generally recognized human rights.

In the newly unified Germany, the trial of the border guards for shootings at the Berlin Wall offers another illustration of the question, formulated by the Hungarian constitutional judges, as to whether "the certainty of the law based on formal and objective principles is more important than necessarily partial and subjective justice". The Border Protections Law of the former GDR authorized soldiers to shoot in response to "acts[s] of unlawful border crossing". Such acts were very broadly defined and included border crossings attempted by two people together or those committed with "particular intensity". The custom at the border was to enforce the law strictly: supervisors emphasized that "breach of the border should be prevented at all costs". The German trial courts relied on precedents of the Federal Constitutional Court elevating the principle of material justice over the principle of the certainty of the law in special circumstances.

Thus, the Hungarian court, on the one hand, and the Czech and German courts, on the other, formulated the dilemma in a similar manner, but came down on opposite sides: the Hungarian court interpreted the rule of law to require certainty, whereas the Czech and German courts interpreted it to require substantive justice.[7]

The rights-restrictive attitude of the Czech Constitutional Court was confirmed in the Rekvényi

decision[8] of the European Court of Human Rights (ECt.HR) in the context of the restriction of the right of association and freedom of speech. The origins of this position stem from a minority position of some of the members of the European Commission of Human Rights, which, at that time, was responsible for referring complaints to the ECtHR. In the Castells case,[9] the commissioners considered Spain, in 1979, to be undergoing a period of "transition to democracy". The dissenters, who called Senator Castells "a known political representative of Basque extremism", believed that the criminalization of the speech in question would have served to prevent disorder in 1979, which was a couple of years after the end of the dictatorship.

Contrary to the majority opinion in the Rekvényi and to the dissenters' assumptions in Castells, the Hungarian Constitutional Court explained in its decision 30/1992, which declared the defamation provision of the Criminal Code to be unconstitutional, that although the "unavoidable social tensions of system-change" (i.e. the post-1989 political-economic transition) notably increase the danger of inciting large public audiences to hate certain groups, the particular circumstances of Hungary's recent past does not justify limitation but, rather, more rigorous protection of the freedom of expression: "Political culture and healthy public opinion can be formed only through self-cleansing. [...] Disparagement shall be countered by criticism."

In its decision 13/2000, the Court unanimously rejected the petitions, which asserted that the provision of the Criminal Code — providing for the punishment of those who degrade any of Hungary's national symbols — violates the constitutional right to freedom of expression. The reasoning of this decision seems in contradiction to the ruling of 1992: "[T]he Court has confirmed in several of its rulings that the limitation of certain rights is allowable during the period of transition from a totalitarian state apparatus to a democratic society, until democratic institutions are fully stable, even when such limitation would otherwise be unjustified in the case of a country that has undergone uninterrupted democratic development."

The Hungarian judges this time even argued that this newly found principle had indeed been applied by the Strasbourg-based justices, for example in Rekvényi v. Hungary, where it was used to validate a limitation of the freedom of expression.

This kind of citing of the historical circumstances of the change of system recalls the concept of the German Federal Constitutional Court, which likewise cites historical reasons in reacting to militant threats to democracy by limiting the freedom of expression — namely, Germany's interest in avoiding a repeat of the scenario that followed the collapse of the Weimar Republic. In a 1994 decision concerning a public presentation in which the speaker denied the Holocaust — a decision hauntingly reminiscent of the reasoning of Hungary's justices, Germany's Federal Constitutional Court declared that while the German Constitution protects opinions without regard to their content and their manner of expression, the protection of publicly delivered assertions of fact hits a dead end at the point where such assertions are incapable of contributing to the formation of democratic opinion and will.[10]

RESTRICTIONS OF RIGHT TO LIFE

If we reject a rights-restrictive attitude that is based on historical circumstances, or, alternatively, if we argue that after about 15 years of the beginning of the transition these circumstances are no longer relevant, countries in Central and Eastern Europe face the same question as other "old democracies" do: On what basis can fundamental rights be restricted? The most interesting aspect of the question is, whether, in the case of the allowing the shoot-down of a civil aircraft being used by terrorists as a weapon, the right to life of suspected terrorists or of the innocent passengers can also be subject of restriction.[11] Another relevant question that is not dealt with here has to do with whether or not constitutional democracies can accept any exception for the prohibition of torture — in order to force terrorists to reveal plans that threaten the lives of others for example.[12]

With regard to the basis of the legitimate restriction of rights, one can explore the notion of what Sanford Levinson termed a "right to security" that serves as the predicate for the State's limiting a variety of traditional rights, especially during times of perceived "emergencies". According to Levinson, such "right" would be drawn from some Hobbesian notion that the basic duty of the state is to protect its citizens against the threat of attack or a general economic collapse.[13] Giorgio Agamben mentions another means of justification in his book on State of Exception — referring to Santo Romano — where he defines emergency as a subjective right of the State.[14]

The other question is whether the most important fundamental rights, such as the right to life and the right to human dignity, which are treated in most of the modern constitutions, including those of Central and East European states as absolute rights, can be

limited in order to guarantee public order and security. One of the characteristics of this region is that all of the constitutional courts have dealt with the "hard cases" of the right to life and to human dignity, and in four of these countries (Hungary, Lithuania, Ukraine, and Albania) the death penalty was abolished by the national constitutional courts.

The Hungarian Constitutional Court took the lead with its decision 23/1990, which abolished the death penalty.[15] In this decision, the justices defined human dignity as an absolute concept that constitutes a unity with the right to life. With regard to the absolute nature of these two rights, the justices of the Court undeniably went further than their German masters. In claiming that the justices focused exclusively on human dignity and failed to pay due regard to the need of the society to retaliate, one can raise a communitarian argument against the liberal decision.[16] In addition, protecting the right to life and to human dignity were the reasons that the Lithuanian Constitutional Court abolished the death penalty in 1998, and that their Ukrainian and Albanian colleagues did so in 1999. The Lithuanian decision emphasized the protection of the absolute character of the right to life, as well as the constitutional provisions on prohibition of torture, and cruel treatment and punishment degrading human dignity.[17] The Ukrainian Constitutional Court stated that, "the right to life as inalienable right is an inseparable part of human dignity".[18] The Albanian constitutional judges did not treat the right to life as an absolute right, but declared the use of capital punishment in peacetime as an arbitrary restriction.[19]

The Hungarian Constitutional Court, during its one and half decade long jurisprudence, has come a long way in the interpretation of the right to life and human dignity. As we have seen, this jurisprudence began with the concept of the indivisibility and absolute nature of these two rights in decision on the unconstitutionality of capital punishment. The jurisprudence continued when the state acknowledged that the state's acceptance of the deprivation of life can be justified only when a choice has to be made between human lives in the abortion cases; in other cases the institutional duty of the state to protect life can be limited by the mother's right to self-determination, which forms a part of her human dignity. In a decision concerning euthanasia, the Court admitted that deciding on euthanasia is a manifestation of self-determination. At the same time, however, because of the state's institutional duty to protect life, the justices did not consider it as a constitutional requirement to be guaranteed by the legislature. The Hungarian constitutional judges' latest decision on the policemen's use of firearms delivered in spring 2004 represented a regrettable setback, as the Court found constitutionally permissible the state consent on the deprivation of life in cases where there is no choice between lives.[20]

The use of firearms is defined by the act as a shot fired intentionally at a person, and in these cases the policeman is authorized to kill a person consciously. The petitioners considered certain cases of the use of firearms contrary to the right to life and asked the justices to declare such usage unconstitutional and null. One of these cases entails someone failing to comply with a policeman's order to lay down a weapon or another dangerous instrument carried by him, and his behaviour seems indicative of using the weapon directly against humans. The other group consists of those uses of firearms, where the policeman intends to catch the perpetrators of certain serious crimes against state, humanity and life, or to prevent their violent rescue, or escape.[21] One part of the challenged regulation permits the policeman the use of firearms also in cases where it does not serve the prevention of direct danger to life. However, according to the jurisprudence of the Constitutional Court, the state can constitutionally permit taking human life only in cases where the law tolerates the choice between human lives, and accordingly does not punish killing a person. Such a situation occurs for example in self-defence, where one wards off an attack against his life by killing an aggressor.

The justices did not consider unconstitutional those cases of using firearms where it is permissible to fire intentionally a shot in order to catch or to prevent the escape of a person who intentionally killed another human. Thus, in these situations the justices made an exception under their rule, namely the earlier commission of a crime does not itself mean a direct threat to lives, and that is why it is not reasonable to endanger the life of the perpetrator.

It is easy to admit that, no matter how obstinate a criminal might be, shooting him does not protect the lives of others. The justices — realizing this contradiction — stated that they have to take a stand on the issue of whether it is constitutionally permissible to endanger a life when it is not aimed at preventing the threatening of other lives. Because, as the majority decision underlines, the mere fact that someone murdered a person before, does not logically lead to the conclusion that he intends to kill or endanger the life of others. Moreover, the justices also sensed that the problem lies in being unsure as to whether the person against whom the policeman used his firearm committed the murder in question.

According to the majority reasoning, the legal situation of the person threatened by the policeman is special if that person killed someone before (according to the logic of the policeman in any case). From the right to life — says the Court's argumentation — follows the requirement that a decision be made on the legal responsibility of the person taking the life of another: This requires the presence of the alleged perpetrator, which can be assured by arresting him. Hence the foundation of the reasoning: "he who violates the right to life by taking another person's life (let us add again: supposedly — G.H.) ... takes the risk ... of putting his own life into danger." This line of reasoning, however, fails to provide an answer to the following question: on which grounds can an earlier act result in putting the perpetrator's life at risk. It seems as though the vulnerability of the perpetrator's life would serve as a sanction or punishment of the murder that he is supposed to have previously committed. But in this case the limitation of the right to life — even if it does not necessarily mean taking the life, but only endangering it — must meet the same constitutional standard that was used by the Constitutional Court when it found capital punishment unconstitutional. Namely, risking the life of a supposed murderer is, in itself, a limitation of the essence of his right to life. The reasoning, according to which the use of firearms in a specific situation is lawful only if the policeman knows beyond doubt that the person whom he is shooting at killed before, does not eliminate constitutional violation. Making the prosecutor, the judge and the executioner in a justizmord case does not make the death penalty constitutional.

Basically the majority decision employed similar reasoning to reinforce the provision of the act, according to which, the taking of life should be avoided "as far as possible" during the application of coercive measures. Only Justice András Holló's dissent, which was endorsed by Justice István Kukorelli, expressed reservations. Justice Holló's dissent detailed a concern that both permitting the pursuit of those who have previously committed murder and accepting the death of a person as a possible result of using coercive instruments, create a statutory possibility for the arbitrary deprivation of life that is contrary to the Constitution. It seems that in taking this decision, the majority of justices revised the concept of their predecessors on the indivisibility and absolute nature of the right to life and human dignity. This is a bad message to deliver in a world, which is inundated by claims of vendetta between state terror and private terror.[22]

NOTES

1. See, Richard A. POSNER, "The Cost of Enforcing Legal Rights." *East European Constitutional Review,* Vol. 4, No 3, (Summer 1995), pp. 71–83.
2. See Janos KIS, *From Costs and Benefits to Fairness: A Response to Richard Posner.* Ibidem, pp. 84–87.
3. Act No. 480/1991 Sb.
4. E.g. ÚS 5/92.
5. The English language translation of the decision has been published in László SÓLYOM – Georg BRUNNER, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, Ann Arbor: The University of Michigan Press, 2000, pp. 214–228. (Hereafter, this book will be abreviated as SÓLYOM/BRUNNER.)
6. English translation is in *The Dilemmas of Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Vol. III. Laws, Rulings, and Reports* (ed. Neil J. KRITZ). Washington, DC.: US Institute of Peace Press, pp. 620–627.
7. The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism see H.L.A. HART, "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, 1958, p. 593. Fuller rejected Hart's abstract formulation of the problem, and instead focused on post-war Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law. See, Lon L. FULLER, "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, 1958, p. 630. About the debate see Ruti G. TEITEL, *Transitional Justice.* Oxford: Oxford University Press, 2000, pp. 12–14.
8. Rekvényi v. Hungary, May 20, 1999. Application No. 25390/94.
9. Castells v. Spain, April 23, 1992. Application No. 11798/85.
10. On these grounds, the Constitution does not protect assertions of fact known by the one making the assertion to be false or which can be proven false. Germany's Federal Constitutional Court considers the so-called "Auschwitz lie" to be an assertion of this sort, which, in the judgement of the Court, has been proven false. *Beschluss des Ersten Senats vom* 13.4. 1994. *Europäische Grundrechte Zeitschrift*, 17–18/1994, pp. 448–452.
11. The latter problematic is discussed in Gábor SULYOK: "An Assessment of the Destruction of Rogue Civil Aircraft under International Law and Constitutional Law." Published in this issue.

12. In the legal literature see Alan M. Dershowitz, *Why Terrorism Works — Understanding the Threat, Responding to the Challenge.* New Haven – London: Yale University Press, 2002; Winfried Brugger, "May Government Ever Use Torture? Two Responses From German Law." *American Journal of Comparative Law* 48 (2000). In Germany see the case of Wolfgang Daschner decided by the Frankfurter Landgericht in 20 December, 2004.
13. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*. Paper delivered on 28 March, 2005 as the Sibley Lecture at the University of Georgia Law School, p. 1. The Hungarian translation was published in *Fundamentum,* 3/2005.
14. See Giorgio Agamben, *Ausnahmezustand*. Frankfurt am Main: Suhrkamp, 2004, p. 40.
15. See English translation of the decision in Sólyom/Brunner, pp. 118–138.
16. At the same time, if we examine the opinions of the justices voting with the majority for the abolishing of death penalty, we can observe that several of them dealt with the consequences of the different criminal theories on death penalty. These arguments were left out of the extremely short and concise majority decision and were put into the concurring opinions, because the justices followed different approaches. Justice András Szabó, for example, represented the retributive criminal theory, while Justice János Zlinszky stressed the importance of prevention that cannot be proved in case of death penalty on the basis of scientific achievements.
17. Case No. 2/98. Judgment of 9 December 1998.
18. Case No. 11-rp/99. Judgment of 29 December 1999. The Court declared the death penalty as unconstitutional, after which the Ukrainian Parliament annulled it.
19. Case No. 65. Judgment of 10 December 1999.
20. 9/2004. (III. 30.) AB.
21. In a recent case a policeman shot down, an injured desperately a member of Ukrainian gang of thieves trying to escape at the streets of Budapest. *Népszabadság,* 7 September, 2005.
22. We all remember Jean Charles de Menezes, the 27-year-old Brazilian man, living and working as an electrician, who as an innocent victim was shot dead on July 23, 2005 by the London police in their hunt for the failed suicide bombers targeting the capital two days earlier. See Man shot in terror hunt was innocent young Brazilian. *Observer,* Sunday July 24, 2005.