Politics of Transitional Justice: German, Hungarian, and Czech Decisions on *ex post facto* Punishment

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**Introduction**

“What is achieved in this trial is exactly what we [the Communists] were always accused of doing: Ridding oneself of political foes by the means of criminal law, but, of course, all within the rule of law,” asserts the defendant in one of the recent high-profile criminal trials in Germany. The defendant’s name is Erich Honecker, former head of state of East Germany (GDR), and he is charged with complicity in the deaths of dozens of young GDR citizens who were shot at the border trying to flee their home state. While the figure of Honecker does not provoke many sympathetic responses, his trial—as well as trials of his colleagues and the border police officers that shot escapees—caused many liberals a severe stomachache. Isn’t the trial a political trial in that it is about something else than justice? Moreover, is Honecker not right to say, “the goal of this trial is to completely discredit the GDR and socialism in Germany”?*

The trials of the border guards were not unique: Many post-communist countries put representatives and agents of the *ancien régime* on trial. In all cases, legal questions overlapped with political and moral issues. The charge of subverting justice to suit politics was always present. My argument is that some high-profile cases during democratic transitions are indeed political trials: they feature an argument about fundamental political principles that mirrors a current political conflict. The dominant problem in these trials is the legal and moral relationship between the old and the new regime: They probe whether the *ancien régime* was a legitimate political order and whether its laws have a claim to validity after the state backing them has disappeared. Generally, political trials taking place at the junction between two regimes tend to be preoccupied with “delving into the predecessor’s record, holding it up to contempt, and instilling into the public feelings of loyalty and gratitude toward those who have delivered them from the evil,” as Otto Kirchheimer aptly characterized it (1961:10). Thus, they pour political judgments into legal forms.

After giving a brief overview of three instances of political trials in the Czech Republic, Germany, and Hungary and their political context, I will show how the concept of political justice contributes to understanding the dynamics of the trials. I will examine how the courts tap into political judgments in order to reach legal conclusions. Political trials in transitional contexts are, as I will argue, unavoidable.
In a final step I will therefore propose criteria for distinguishing better from worse political trials.

**Cases, Judgments, Issues**

In each of the three countries, there were legal episodes in which public discussion about the broad issue of how to punish perpetrators of state-sponsored violence crystallized. The court decisions were written at a time of awareness about the importance of these issues, and about the possible options. Although the incidents to be judged were different and the Constitutions, laws, and political contexts varied, one crucial legal issue emerged: What do rule of law requirements imply about the possibility of dispensing *ex post facto* justice, i.e. re-interpreting the penal code to establish criminality, or to revive statutory limitation periods that had already run out? Strikingly, the courts formulated very different and yet coherent responses to similar issues, in each case justifying their decisions in terms of the rule of law.

**Border Guards**

The East German cases that attracted most political attention cover the shootings at the border to West Germany. East Germans were generally not allowed to travel or immigrate to Western countries without special permission, and trying to cross the border without a permit was considered a crime. All refugees were accordingly criminals by definition, so that the border guards were ordered to fire at escapees in order to stop the crime in progress. In effect, oral orders and policy guidelines issued by the Politburo mandated the prevention of escapes even at the cost of killing the refugees—these are the infamous ‘shoot to kill’ orders. Although they were in tension with the GDR law governing the use of firearms by police and armed forces, and in violation of international human rights conventions, these orders in effect replaced written law.

Starting in 1992, border guards involved in the shootings, as well as their superiors faced charges in criminal courts of unified Germany. The Courts faced problems regarding the distribution of responsibility along the chain of command, which I will not reiterate here, and the more basic problem of establishing criminality of the shootings and the orders. Quite stringent rule of law norms in the Constitution and the Unification Treaty mandate that acts can only be punished if they were criminal according to the laws valid at the time and place of commission: the GDR laws. The GDR obviously approved of the shootings, and the laws
were interpreted to allow for this practice. Even if the laws can be reinterpreted in a ‘human rights-friendly way’ (BVerfG 1996) to establish criminality, the problem of retroactivity remains. In German law, an interpretation that was not used at the material time and establishes unforeseen criminality is retroactive. What the courts need, therefore, is a justification for superseding the prohibition on retroactivity.

In 1946, at the beginning of the efforts of German courts to adjudicate Nazi crimes, the legal philosopher Gustav Radbruch developed a formula that still guides much of the debate about positive norms and extra-legal standards. His argument is that “positive law, secured by command and force, takes precedence even when its content is unjust and unreasonable, assuming however, that the positive law does not depart from justice to such an unbearable extent that it has given way to justice as ‘incorrect law.’”3 Courts dealing with border guards cases use Radbruch’s formula as a justification for reinterpreting GDR law in the light of the GDR’s international human rights obligations and more general human rights standards, emphasizing the right to life and the right to freedom of movement. The courts were also at pains to prove that the border guards were actually aware of these moral standards that could have guided their conduct, but they still decided to follow the orders. This argument is not too convincing since the young men were selected as border guards precisely because they did not doubt the legitimacy of such orders (Rosenberg 1995:271-3).

The core of the decisions, however, lies in evaluating the GDR state practice of the shoot-to-kill orders according to international law and common principles. Predictably, the courts found that the orders violated basic principles of humanity. The courts admitted that these yardsticks were their own, but also claimed that these human rights standards had a living reality in the GDR. The decisions ultimately build on moral and political evaluations of the GDR policies, and their language is condemnatory: For example, the Federal Appeals Court reasons that the shoot-to-kill orders subordinated the escapees’ right to life to the State’s interest of preventing them from fleeing (BGH 1993:143). Therefore, the practice rests on “an obvious gross violation of principles of justice and humanity” so grave that “it violates legal principles of human worth and dignity that are common to all peoples.” Thus, it cannot be accepted as an excuse (144). The Federal Constitutional Court finally holds that there are laws and orders so unjust that they lose their normative validity, and that ordering the shooting of people that merely try to cross a border belongs in this category. In these exceptional cases, expectations of legality need not prevail (BVerfG 1996:133), so that retroactive punishment is justified under special circumstances. This Constitutional Court decision sets the
threshold for the availability of legal excuses, and the standard continues to be applied.

In the end, the overwhelming majority of the indicted border guards were pronounced guilty of different charges of manslaughter, even though most sentences were suspended. The highest-ranking officials were found guilty of manslaughter in different cases and received prison terms of up to seven and a half years.

Judging the Prague Spring

The Czech debates about the criminal justice component of transitional justice focused on a law that was adopted by the Czech Parliament on July 9, 1993. The *Act on the Illegality of the Communist Regime and Resistance to It* is a highly declarative piece of legislation that contains many symbolic and condemnatory statements alongside with a few legally important clauses. The law starts by listing the political and moral failures of the Communist regime, as well as crimes committed, and goes on declaring “that the regime based on 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,” and that “the Communist Party of Czechoslovakia was a criminal and contemptible organization.” Further, it goes one to exonerate resistance to the regime, even when it involved violence or collaboration with a foreign power, and states that those harmed and persecuted deserve compensation and “moral satisfaction.” The legally most important clause is, however, Article 5, stating that “the period of time from 25 February 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 him] were dismissed.” Parliament’s strategy was to declare the former regime illegal and illegitimate through demonstrating that it had commissioned crimes against its citizens even against its own laws, as in crushing the Prague Spring of 1968. These crimes were not prosecuted for purely political reasons, i.e. for reasons beyond the normal obstacles to justice like difficulty of obtaining evidence. Since the state did not even try to punish, perpetrators cannot legitimately rely on their impunity, goes the argument.
Predictably, the law was challenged in front of the Constitutional Court. The main points of contention were that the law stipulates a collective guilt and authorizes the government to discriminate against former members of the Communist Party, and that the extension of the statutory limitations was a violation of the prohibition on *ex post facto* lawmaking.

This debate about the proper scope of the ban on retroactivity, which was part of the criminal trials in Germany, took place in a different legal context in the Czech Republic. Since the limitation periods had to be prolonged through legislative action, the debate about political underpinnings of transitional justice was more abstract, in the absence of actual defendants in the dock. The Constitutional Court, in its December 1993 decision, upheld the controversial law. The Court argued that during the Communist rule, judicial authorities had been so corrupted by the Party that the reasons for which they chose not to prosecute are incompatible with even basic rule of law requirements. The concept of limitation periods presupposes the state’s intention, effort, and readiness to conduct prosecutions. Absent these requirements, limitation periods merely shield state-sponsored crimes, so that reliance on them becomes unjustifiable. Doing otherwise, the Court reasons, would mean “a sign that crime may become non-criminal, so long as it is organized on a massive scale and carried out over a long period of time under the protection of an organization empowered by the state” (Czech Constitutional Court 1993:623). Far more self-conscious of their political partiality than the German courts, the Czech Constitutional Court flatly rejects claims that the Communist order was legitimate on its own terms and should be judged by neutral principles. Instead it states that “our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society” (Czech Constitutional Court 1993:373). These values were understood to mandate an approach to transitional justice that emphasizes substantively just outcomes and devalues the Communist regimes’ legal practices.

**Hungarian Legal Revolution**

In Hungary, too, criminal suits against human rights violators could not be brought easily. The period with the gravest political crimes accompanied the 1956 uprising, and limitation periods for these crimes had already run out. After fierce debate, parliament passed a law mandating that statutory limitations for treason, voluntary manslaughter, and infliction of bodily harm resulting in death could not be counted between December 21, 1944 and May 2, 1990 if the failure to prosecute the
crimes “was based on political reasons” (Halmai and Scheppele 1997:158). The President refused to sign the law and sent it to the Constitutional Court, which, in a manner strikingly different from the Czech case, struck down the law. Placing an emphasis on Hungary as Rechtsstaat and the strict adherence to rule of law principles, the Court refused to let the political change lead to a devaluation of the fallen regime’s laws. It identifies the “security of law,” understood as “the protection of rights previously conferred, non-interference with the creation or termination of legal relations, and limiting the ability to modify existing legal relations to constitutionally mandated provisions” (Hungarian Constitutional Court 1992:632) as the highest legal principle. Moreover, it emphasizes that “the unjust outcome of legal relations does not constitute an argument against the principle of the security of law” (633). The emphasis on procedural over substantive justice seemed insurmountable. Yet, there was one path the parliament could take—and took the following year—that could reconcile the quest for a just outcome with the requirement of formal legality. In a new law of 1993, the issue was reframed. The acts were now referred to as violations of international law such as war crimes and crimes against humanity. The applicability of statutory limitations for these types of crimes is excluded by the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which Hungary had ratified and incorporated into domestic law (Halmai and Scheppele 1997:166). The Constitutional Court finally upheld the passages of the new law that were exclusively grounded on these international law norms.

The Court decisions in these three countries concerned different stages of the transitional justice process, and yet the issues that the German courts dealt with in concrete cases are similar to those that the Czech and Hungarian Courts dealt with in the course of judicial review of legislation: the authority of the written law versus requirements of substantive justice. In all cases, the reasons given for the decisions come down to political judgments about the legitimacy of the Communist regime, and about its relationship to the new regime. The Hungarian Court took a legalistic route by emphasizing the legal nature of the regime change, while the other courts undertook huge efforts to show the break in legitimation and legal system. This intertwining of political and legal arguments hints that analyzing the cases in terms of political justice can lead to a better appreciation of their status and consequences.
Political Justice

One may think that for these cases to be ‘political,’ it is sufficient that the courts engage in interpretations of legal terms informed by the judges’ political views. This notion would lead to calling quite many trials political, since jurisprudence depends on interpreting abstract legal terms in light of precedence and common conceptions of politics. The use of the term ‘political trial’ should instead be in pointing to some trials deviating from the ordinary scheme of legal proceedings in that they are somewhat closer to politics—maybe in having a dialogical relationship with the political arena. If, however, almost all trials were political trials, the concept would have little analytical value.

I will consequently try to employ a narrower notion of political justice. For the purpose of this analysis, political trials are high-profile cases in which a legal agenda is consciously connected to a political agenda that mirrors a current conflict about fundamental principles or values in the polity. This does not imply any judgment of the fairness or outcome of the trial. Political trials can be conducted by any regime and with any degree of procedural fairness.

What are political trials good for? The parties to the trial want to see their political and moral judgments validated by a judicial authority, hoping to either change or maintain important political principles. These trials can have remarkable political effects. By using the authority of the courtroom, they might transform a political conflict into an authoritative pronouncement of the state’s principles and spell out the political self-understanding of the legal community. Put in a nice way, political trials “bring together for public consideration society’s basic contradictions, through an examination of competing values and loyalties” (Christenson 1986:3). Or, less favorably, they try to turn a particular political position “into the common sense of a whole community” (Sa’adah 1998:143) or even enlarge the area of political action “by enlisting the services of the courts in behalf of political goals” (Kirchheimer 1961:419). In any event, trials have a strong potential for asserting not only the validity of a particular law, but a broader set of political values—this is the expressive function of law and punishment.6

In some cases, trials can be occasions “in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies” (Shklar 1964). There is, however, an interesting logic at work that makes the occurrence of show trials—as defined by a fundamental lack of rule of law protections—highly unlikely in liberal democracies. The political ends pursued in a political trial determine the available means. For example, regimes that have given up on claims to formal justice tend not to legitimize court decisions in
political trials through formal legal procedures, as can be seen in the Moscow trials of the 1930s, or the Nazi’s ‘People’s Court.’ In these cases, the prosecution and the judicial bench are virtually indistinguishable, and no rules of evidence or common sense logic can stand in the way of the regime’s wish to mark the defendants as its enemies. Any regime committed to promoting liberal values including the rule of law, in contrast, is far more constrained in enlisting the courts for political persecutions. In criminal trials, the defendants need to be granted procedural protections; otherwise the commitment to liberal principles looks unconvincing. Likewise, press coverage of the case cannot be censored easily for the same reasons. With these guarantees in place, the outcome of the case will be far from certain. Consequently, political trials within the constraints of the rule of law resemble contests over the moral and legal basis of the state rather than “a unilateral reaffirmation of unassailable power positions” (Kirchheimer 1961:50). Not only does the defendant have a chance of being acquitted in a legal sense, but also can the trial backfire if it is perceived as a show trial by a roughly liberal public (117). Political trials are, accordingly, both more legalistic and more risky if they are conducted by liberal regimes as opposed to authoritarian or totalitarian regimes that publicly renounce formal justice.

Given that political trials are public contests in which political arguments are poured into legal forms, what can be said about political trials during democratic transitions?

**Political Trials in Times of Transition**

First, political trials are close to unavoidable during periods of radical political change (Christenson 1986:244). Regimes that have come to power against the declared opposition of their predecessor will replace one mode of legitimacy by another (Christenson 1986:249) and mark their predecessors as illegitimate. Crucially, they will assert that there is a deeper justification for the regime change than the brute fact that they have ‘won.’ The fundamental political issue in these trials is, accordingly, the wickedness of the *ancien régime* and the successor’s justification for sitting in judgment on it.

Judging the predecessor’s legitimacy is a tough task, but it is hard to imagine how courts in a new liberal regime can avoid it for long. Consider the following case: In an election campaign, a candidate says that persons who have violently resisted the fallen regime and were convicted of treason and high treason are plainly traitors paid for by foreign powers—and not heroes. The public is out-
raged. A public official sues the candidate for defamation. The court has to address the delicate question whether those who betrayed the former regime are still traitors, and whether political crimes against the old regime are blameworthy. What the court needs is a judgment on the moral and political relationship between the two regimes.

The case is modeled after the German Remer/Lehr case of 1952, in which the Minister of the Interior, Robert Lehr, sued Ernst Remer, a largely unreformed Nazi, for defamation of the men who tried to assassinate Hitler on July 20, 1944. The court concluded the legitimacy of resistance against the Third Reich from this regime’s record of not only tolerating injustice, but also “consciously using unjust policies in subordinating the policy goals to the respect for even the most fundamental human rights.” This decision was the first occasion in which a West German court acknowledged the fundamentally wicked character of the Nazi regime, and the court needed such an assessment for rehabilitating the men of July 20. My argument is that trials like this one, not necessarily instigated by the state, are likely to arise after any radical regime change. The boundaries of legitimate political disagreement and the scope of political crimes such as treason are transformed, and these changing boundaries will be tested. Courts facing these cases may have different approaches, but their responses will draw upon notions of the (il)legitimacy of the old regime and the extent of the legal change in the political transformation.

The difference between the Czech and the Hungarian Constitutional Courts’ treatment of the prior regime’s political principles illustrates the range of options available in the post-1989 cases. The Hungarian Court’s pronouncement that “the legitimacy of the different (political) systems ... is a matter of indifference from ... the viewpoint of the constitutionality of laws” (Hungarian Constitutional Court 1992:632), and that “what constitutes ‘political reasons’ [for the decision not to prosecute] ... cannot be determined with the necessary unambiguity—especially in light of the many political changes which had taken place during the long interval covered by this law” (639) suggests much deference to prior decisions, and little desire to overturn them in the name of superior principles. The Court, although allowing for political change, would not privilege the last political regime over prior ones.

The Czech Court, in contrast, calls the Communist state a “regime of illegality” (Czech Constitutional Court 1993:621) and emphasizes the “discontinuity of values from the ‘old regime’ in spite of the ‘continuity of ‘old laws’” (373). Furthermore, “in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be
considered as legitimate” (373), so that value judgments of the new (democratic) regime enjoy legal primacy. Questioning the conditions that led to impunity much more rigorously than their Hungarian counterparts did, the Czech judges found that the Communist regime had become a guarantor of impunity (622)—a state so unjust that perpetrators should not be able to rely on it. Since their vision of the rule of law embodies substantive justice, they could approve of the retroactive prolonging of the statutory limitations from within the framework of the rule of law.

The German Constitutional Court, it seems, wanted to have the best of both ways. The result, however, seems awkward. Normally, holds the Court, the expectation of legal certainty is protected as one of the highest principles of the Rechtsstaat (BVerfG 1996:132). This normal case presupposes, however, separation of powers and democracy, so that the results of legislation can presumed to be substantively just. In the case of the GDR, however, none of these requirements were met. Therefore, the principle of substantive justice takes precedence in this exceptional case. Akin to the reasoning of the Czech Court, the German Court declares that the injustice of the Communist regime “can exist only as long as it is protected by that State’s power” (1996:133). The problem is that the non-retroactivity clause only becomes important when political principles change: in these cases it is supposed to protect legalistic expectations against incursions based on substantive justice arguments. If this principle is superseded in exceptional cases, it consequently loses much of its force. German courts had long held on to a very strict interpretation of the ban on retroactivity when they were adjudicating Nazi crimes. The sudden shift at a moment when the crimes before the Court were much less grave seemed insincere to many (Schlink 1994). In short, the German Constitutional Court’s argument combines a reference to legal certainty and formal legality as high principles, but suspends them due to an overwhelming substantial injustice that occurred in absence of the normal protections such as democracy and separation of powers. The argument is rendered unconvincing only in light of the former path of German courts in adjudicating grave injustices.

Given that the decisions about the statutes of limitations and the fate of the border guards are political justice, what follows for understanding and evaluating the trials? First, we should take a close look at the arguments about fundamental political principles employed, rejected, and endorsed by the Courts. The arguments will show how the courts—and major political actors—construct the legal and moral relationship between the old and the new regime, and how they bring
rule of law norms into play. As the statutes of limitation cases suggest, there are several ways of employing rule of law values in order to justify transitional justice measures and legal constructions of the transition. It is therefore necessary to see the decisions in their political contexts. This does not preclude judging political trials according to liberal standards. General norms like consistency and a reasonable connection between the facts and the legal categories, among others, can be used to judge political trials from a liberal perspective. In what follows, I will first illustrate the courts’ interpretations of rule of law requirements in light of the injustices of the prior regime, using the issue of *ex post facto* lawmaking. Then I will turn to propose standards for evaluating the trials derived from what we know about the functioning of political trials, and apply these standards to the cases.

**Constructing Justice from Injustice**

Why do Court decisions about matters of retroactivity turn out to be so different? Two broad ways of explaining the variations in interpreting retroactivity seem plausible. First, there is the ‘realist’ argument that societies punish as well as they can, given the political constraints due to the power of ex-communists. The unparalleled intensity of German prosecution and lustration suggests that full-scale ‘decommunization’ might be dependent on the marginalization of sympathizers of the old regime (Holmes 1994:33). Also, there are obvious cases in which a punitive strategy is precluded by a strong communist party, but the Czech Republic, Hungary, and Germany don’t fit this group. Opportunities for punitive and condemnatory strategies were widely present, but not used. Even in the Czech case, the harsh Court decision was not followed by a sweep of prosecutions. The ‘realist’ approach can consequently not fully account for the variation among the cases.

The other explanation focuses on the normative shift that accompanies the transition. The argument is that the approach to transitional justice and rule of law principles depends on the interpretation of the prior regime’s injustices (Teitel 2000:13-4). In all cases, “the best way to deal with the past is to do better now” (Halmai and Scheppele 1997:156), but what exactly “doing better” means varies a lot. Rule of law principles allow for a variety of applications, and the application chosen will depend on the specific injustices committed by the prior regime. This explanation can evidently not neglect the fact that different interpretations of the ‘prior injustices’ are possible, and that political power, standing, and influence of groups determine which interpretation is adopted by the Courts. Yet, in combination with attention to the political context, this approach can explain quite well why legal arguments go one way or another.
Especially in determining the scope of the prohibition on retroactivity, courts have to engage in interpretation of the past regime and its injustices, and have to go on to find the “controlling rule of law value” (Teitel) for the new regime. The ancien régime’s record does not automatically determine the conception of fundamental injustice that must not be continued. Yet, there are more and less plausible interpretations.

The Hungarian Constitutional Court held that “the State under the rule of law’s basic element is the security of law,” and, moreover, that these guarantees “cannot be brushed aside by reference to historical situations and the State under the rule of law’s demand for justice.” The Court stresses the continuity of the State through the normative shift and the legality of this transformation (Hungarian Constitutional Court 1992:632, 633). In identifying arbitrariness and legal decisions according to political gusto as the major injustices of the ancien régime, the court infers that “a state under the rule of law cannot be created by undermining the rule of law” in its meaning of procedural justice (633). Also, the Court views non-retroactivity as a human right and stresses the theme of ensuring equal protection of the law regardless of one’s political stance. This reasoning seems very much oriented to formal legality alone. In times of transition, however, placing so much emphasis on rule of law protections conveys a very distinctive and pronounced vision of what the political principles of the state should be. In its disregard of the legal and moral features of the predecessor regime, the judgment seems awkward in the context of East European politics (Schulhofer 1992:19)—although it is admirable for being consequent.

The Czech and German courts, in contrast, sent a very different message about legal and political principles of the respective states. The Czech Court declared, “consciousness of the fact that injustice is still injustice, even though it is wrapped in the cloak of law [is] reflected ... in the Constitution of the Czech Republic” (1992:373). As a result, “the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society” (373). The Czech Court’s version of legal continuity is, therefore, that criminal acts committed under the protection of the state should now be prosecuted (163). The equivalent to the Hungarian court’s reasoning that the rule of law cannot be advanced by undermining its principles in practice is the Czech’s court insistence that impunity would mean substituting legality for an absent legitimacy of the regime (Zifcak 1998:161).

The German Courts did not decide on a retrospective withdrawal of statutory limitations, but on the validity of an excuse for killing that was covered by the then
dominant understanding of the law. Furthermore, the German courts operate from within a 40 years tradition of West German legalism. They accordingly need to produce both an intelligible legal response to the GDR border shootings and a decision that fits the precedents. In authorizing the application of Radbruch’s formula in these cases, the Court makes quite sweeping judgments about the moral quality of GDR politics: The GDR “incited, going beyond positive law, to such grave injustice, tolerating and encouraging it, that it gravely breached human rights recognized by the international community” (BVerfG 1996:133). The Court therefore claims that these laws were protected by brute state power, and not by any recognizable claim to justice. By incorporating political legitimacy and minimal requirements of substantive justice in the notion of the Rechtsstaat, the Court is able to conclude the invalidity of the border guards’ excuses from the GDR’s lack of legitimacy.

The visions of the Hungarian Constitutional Court might sound more sympathetic than the ones of its Czech and German counterparts emphasizing the need for substantive justice, but they are just as political. Each argument reflects a particular perception of the prior regime’s injustices (Teitel 2000:16-7). If the specific injustices resided in the disregard of positive law and the penetration of law with politics, as described in Fraenkel’s Dual State (1969), the responses will emphasize the need for legal certainty—as did the judgment of the Hungarian Constitutional Court (Teitel 2000:17). If the perception of prior injustices stresses the violation of substantive conceptions of justice, in contrast, the emerging responses will be more concerned about finding an extralegal standard of substantive justice than adhering to procedural notions of the rule of law—this is what the Czech and German courts stressed.

Since there can be starkly different accounts of the ancien regime, the courts’ ability to support their conclusions with a record of the past regime that is intelligible to the people who have lived through it is decisive for a good decision (McAdams 2001:19). Evidently, the verdict of gross substantive injustice does not suit all kinds of regimes, and neither does a story that a regime’s main injustice lay in mingling law and politics. The communist regimes in Czechoslovakia and East Germany were more repressive than the Hungarian one, and collapsed quickly, whereas the Hungarian transition took several months of negotiations. These different histories and transitions are, and should be, reflected in the approaches of the respective Constitutional Courts. The political constellations and the form of transition do not directly translate into judicial strategies. Rather, they are mediated through constructions of justice and the rule of law from interpretations of injustice.
Degrees of Acceptability

There are many arguments supporting the claim that political trials are often procedurally unjust, aim at promoting certain values at the expense of others, and therefore should be avoided by liberals. In fact, political trials cannot be just in a conventional sense: they do not aim at justice as the predictable and regular application of the law. Even if they cannot be just, they can be more or less justified. Because of this, and because political trials are sometimes bound to happen, we should think about what distinguishes better political trials from worse ones. The verdict that trials can be evaluated only regarding the political purposes they serve (Shklar 1964:145) seems insufficient. For example, trials can be simply unsuitable to serve a particular goal because of their procedures. Likewise, treating justice as a purely instrumental value in democratic transitions does not fully capture the task of judicial systems even in transitions. There will be procedural minimum requirements that have to be met for a trial to be inherently acceptable, and to make a contribution to a more liberal society.

Drawn from the discussed cases, I am proposing some criteria for more acceptable trials. First, the legal and moral arguments in the judgments need to be reasonable against the backdrop of a plausible record of the predecessor regime. Second, the legal principles applied by the court must continue to be valid. Third, guilt should not be established by association. Finally, courts should demonstrate some sense of deference towards a democratically elected legislature.

First, any legal judgment must be reasonable if held against a plausible account of the politics of the ancien regime. Court decisions that need to diminish the predecessor regime’s acts are as ‘bad’ as decisions that rest upon an implausibly aggravated account of the cruelties. If the judicial arguments do not relate to the experiences of the people who have lived in the fallen regime, the educational and political value of the trials diminishes, and so does the credibility of the courts. Some of the border guards judgments indeed portrayed the GDR life and the dominating values in a way that is inconsistent with the experience of most East Germans (McAdams 2001:25). For example, the frequent assertion that the young men did or should have known that the shootings were immoral, and indeed in violation of the GDR criminal code (BGH 1993:149, see McAdams 2001:33) are clearly at odds with what GDR citizens thought about this issue. Once the “thirst for justice” (McAdams) leads to arguments not based upon the historical record, the story told about injustice brought to justice lacks credibility, even more
so if the story is being told by ‘victors’ who had not experienced the regime they are judging.

Second, the principles first applied in a political trial in transitional times should continue to be valid. Even when the judgment is retroactive in a core sense, some justice might lie in sustaining the principles underlying the judgment. In this spirit, Michael Walzer notes that the trial of Louis XVI “aims at asserting and vindicating a general principles, and a principle too that continued to be applied after the king was condemned” (1992:77), stressing that Louis was “killed in accordance with new political principles” (6). This might cause little relief to those actually convicted. The main justification for retroactive punishment, however, lies in the value of political change and the emphasis on substantive justice. A conviction arrived at on rules that continue to apply is somewhat less arbitrary because these rules were not chosen for reasons of expediency, but on principled grounds.

Next, criminal guilt should not be established by association. Retroactive punishment might establish criminality for acts that were considered legal before, but the penalty still refers to acts as opposed to thoughts or states of mind. The tempting move of creating criminal guilt by association goes much further in making mere membership the decisive factor for guilt, which establishes a diffuse collective responsibility. To be sure, many crimes are bureaucratized in content and form so that clear individual responsibilities are hard to measure, but if a person cannot even be linked to an identifiable act, any criminal conviction would be based on the premise that ‘this man has to go’ rather on convictions about their actions. There are, of course, borderline cases, in which the evidence is missing. From the inevitable ‘letting go’ of some culprits, some draw the conclusion that nobody should be punished (Elster 1992:15). Although the image of guilt after transitions as “a sea of confusion,” (17) is convincing, there are some cases sticking out from the mud of petty corruption and party clientelism—and these culprits should be punished. While we cannot hope to try all who should be tried or even all who ‘deserve’ it, summary impunity would send a wrong message about law (Hampton 1992:1684). In the same context, political decision-makers and the perpetrators at the bottom end of the chain of command need to be held to different standards of responsibility. The high-ranking officials are much more likely to know about violations of international law, and people setting up a wicked legal system should not be allowed to base their excuse on the fact that this was a legal system—unlike people executing orders under these laws.

Finally, Constitutional Court decisions in political transitions are vulnerable to the usual criticism of judicial activism as the overruling of democratically elected branches of government. Political trials are likely to deliver broad and value-laden
judgments. Yet, the courts’ mandate for interpreting constitutions is limited. They should leave space for decisions by the democratically elected branches. During the immediate transition, this concern loses some of its force since then the courts often face parliaments that have not been freely elected, and presidents that are negotiating their own downfall (Teitel 2000:24). When democratic branches exist, in contrast, courts should be aware that the legal and political construction of the transition is not up to them alone: it is a project that involves society as a whole, and all branches of government. During a time when political principles are still being contested and constitutional principles can still be shaped, the role of the Constitutional Courts in reviewing transitional justice measures should consequently be limited to striking out measures that are plainly unreasonable or too much tainted by the self-interest of the majority. The strong value-affirming potential of political trials makes such judicial activism as exercised by the Hungarian Constitutional Court suspicious: The construction of a new landscape of political principles should be a joint process in which the courts play a role, but not necessarily the lead role.

This short list of requirements for better political trials cannot be exhaustive for evaluating political trials in transitions. It is an attempt to go beyond the positions that either political trials are the worse the more they depart from legal procedures, or that they need to be evaluated according to “our view of the ends they serve, not [to] their ‘betrayal’ of justice” (Shklar 1964:148). If it is established that political trials may advance political ends in condemning acts, affirming political principles and establishing an account of the recent past, there are obviously better and worse trials according to the politics they serve, and according to how they arrive at the judgments.

Conclusion

“A trial, the supreme legalistic act, like all political acts, does not take place in a vacuum. It is part of a whole complex of other institutions, habits, and beliefs” (Shklar 1964:144); and the political context of a trial determines which legal arguments can be successfully employed. The cases of the extensions of statutes of limitations in the Czech Republic and Hungary, and the German border guards cases illustrate how courts draw upon particular notions of justice and legality when deciding transitional justice cases. The background of these cases is a long
past of undemocratic rule, followed by a rapid change in the basis of political legitimacy. How can courts translate this normative change into legal principles without appearing arbitrary or opposed to the rule of law? In the examined cases, the courts have taken distinct paths to constructing notions of legality and justice from the countries’ past experiences. The Czech Constitutional Court emphasizes the Communist regime’s practice of putting power before justice and emphasizes that the new Constitution is based upon democratic values first and foremost. The Hungarian Constitutional Court, in contrast, takes the “security of law” to be the primary legal value in a state based on the rule of law. It stresses the need to discontinue the practice of giving legal protection according to the political affiliations of the defendants—even if this leads to morally unjust outcomes.

The German Constitutional Court, in turn, simultaneously emphasized the primacy of formal legality and the need to break with this principle in exceptional cases. The often unconvincing decisions of German courts illustrate a dilemma of transitional justice. Transitional justice is foundational justice for a new political regime. In this particular situation, legal principles that work in contexts of legal continuity might suddenly seem unjust. For example, the prohibition on retroactive lawmaking loses its normative appeal after periods of mass injustice and lawlessness. Courts can therefore have good reasons for choosing reinterpretations of standard legal principles. Yet the courts cannot simply embrace the project of exceptional justice and postpone normal rule of law, since they must simultaneously lay the groundwork for a legal and political system that will work in normal times.

Consequently, we can evaluate political trials during democratic transitions, but we have to understand them in their political context. Minimal requirements of procedural justice have to be met, but beyond that there is room for societies to construct their visions of justice from the injustice they have experienced.

References

Court Decisions

Czech Republic:

Germany:


Hungary:


Literature


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**Notes**

1 Quoted from Wesel 1994:66. The whole defense speech is reprinted in Wesel 1994:64-83. All translations from German are mine, unless indicated otherwise.

2 Quoted from Wesel 1994:67.

Until 1996, only two border guards who had employed excessive force in killing escapees that were already captured actually served prison terms, see McAdams 2001:45.


See Reichel 2000:100 for further details.

Quoted in Reichel 2000:105.

See Halmai and Scheppelle 1997:180. The Court has reportedly struck out roughly one in three laws since 1990.