Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past

Luc Huyse

The author looks at one component of transitions to democracy: the strategies successor elites develop to deal with injustices committed by the previous, authoritarian regime. He compares post-transition justice in Belgium, France, and The Netherlands after World War II and in Eastern Europe after the fall of communism. He discusses several factors that influence policy choices. Among the most influential are the legacy of the past regime, the international legal context at the time of the passage to democracy, and the mode of transition and its ensuing impact on the balance of power between the old and the new order.

Coping with the past during the transition from repressive regime to democracy has taken a wide variety of forms.[1] Strategies have ranged from

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1. Political science publications on regime change often disregard the problem of transitional justice. That is true for, among others, such well-known work as Juan Linz & Alfred Stepan, eds., *The Breakdown of Democratic Regimes* (Baltimore: Johns Hopkins University Press, 1978). Guillermo O'Donnell, Phillipe Schmitter, & Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Prospects for Democracy* (Baltimore: Johns Hopkins University Press, 1986), has a few, but quite insightful, pages on "settling a past account." An exception is Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) ("Huntington, *Third Wave*"). There is a vast sociolegal literature on the interlocking of politics and courts, but it almost never deals with the role of the judicial system in regime transitions. Two exceptions: Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, N.J.: Princeton University Press, 1961), and H. & E. Hannover, *Politische Justiz* (Frankfurt: Fischer Verlag, 1966).

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massive criminal prosecution of the supporters of the previous order to unconditionally closing the book. All policy choices involve answers to two key questions: whether to remember or forget the abuses—the issue of acknowledgment—and whether to impose sanctions on the individuals who are co-responsible for these abuses—the issue of accountability.[2]

By far the most radical interpretation of acknowledgment and accountability is to be found in the outright *criminal prosecution* of the perpetrators. This has been the official policy toward collaborators in all West European countries which during World War II were occupied by the Germans. A recent example is Ethiopia where some 3,000 officials of the fallen Mengistu regime have been named for trial. By contrast, as a strategy for dealing with the past, criminal prosecution has encountered almost no support in post-1989 Eastern and Central Europe and in the post-authoritarian regimes of Latin America.

Lustration or disqualification of the former elites, of the agents of the secret police and their informers, or of civil servants is a second way to address the questions of acknowledgment and accountability. Sometimes disqualification, including the loss of political and civil rights, accompanies a criminal conviction, as occurred in postwar Belgium, France, and The Netherlands. In other instances, as in most of the postcommunist countries of East and Central Europe, lustration is a way to sidestep criminal prosecution.

The granting of unconditional *amnesty* to those who committed politically based crimes is at the other end of the spectrum.[3] In some instances the unrestricted pardon is the result of the self-amnesty that the outgoing elites unilaterally award themselves before the transition gets underway. In other instances, impunity is the outcome of negotiations between old and new leaders. In Uruguay, for instance, the government that succeeded the military dictatorship enacted, under pressure from the military, an amnesty law (1986). Post-Franco Spain is an example of a third route toward impunity: almost all democratic forces agreed to confer immunity to individuals who committed crimes defending or opposing the Franco regime.

Amnesty, but not amnesia, is the substance of a fourth strategy. Its usual format is the *Truth Commission*. The first goal of such a commission is

2. The distinction between acknowledgment and accountability was made at the Salzburg meeting (7–10 March 1992) of the Charter 77 Foundation's Project on Justice in Times of Transition. For more on the Project on Justice see note 9.

3. Amnesty, granted by the executive or the legislature, removes the punishability of certain acts; amnesty thus abrogates crime and punishment; it can be used to foreclose prosecutions but also to cancel the sanctions already imposed. Pardon is, according to *Black's Law Dictionary*, an "executive action that mitigates or sets aside punishment for a crime." The dictionary adds: "The distinction between amnesty and pardon is one rather of philological interest than of legal importance." Impunity (or immunity) is a de facto situation that is the result of amnesty or pardon. I use here the terms "amnesty," "pardon," "impunity," and "immunity" as synonyms.

to investigate the fates, under the preceding regime, of individuals and of the nation as a whole. Its aim is not to prosecute and punish.[4] A truth-telling operation, including full disclosure of all human rights abuses, must ensure that "the facts" are not forgotten but remain alive in the memory of the collectivity. Well-known examples are the Chilean National Commission on Truth and Reconciliation (1990) and the UN-sponsored Truth Commission in El Salvador (1991). For some, however, general knowledge of the truth is not enough. An official recognition of the injustices that have been suffered is necessary. According to Thomas Nagel, professor of philosophy and law at New York University, it is the difference between knowledge and *ac*knowledgment that counts. "It's what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene."[5] Further steps on that path may include compensation by the state. Lloyd Vogelman, director of the Johannesburg-based Centre for the Study of Violence and Reconciliation, writes: "For the families of victims and survivors, such accounting serves as immediate public recognition of their pain and trauma."[6] And he adds: "The most concrete form of reparation is monetary compensation. Although financial constraints may not permit large-scale payments, it is still important to provide financial compensation in other forms—such as free or subsidised medical and psychological treatment, reduced interests on loans for education, home building and the establishment of new businesses." He also favors the establishment of permanent reminders of the legacy of the past, such as monuments, museums, public holidays, and ceremonies. Together with the activities of support groups, these will "provide a channel for the non-violent expression of pain, frustration and anger." In addition, restitution by the state does not preempt civil compensatory justice.

This article examines the considerable divergence in the strategies democratic successor elites develop in dealing with the past.[7] I first discuss

4. Post-1983 Argentina is a rare exception. After the report of the National Commission on the Disappeared was released, the chiefs of the three successive juntas were brought to trial.

5. Cited in Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* 4 (New York: Pantheon Books, 1990) ("Weschler, *Miracle*").

6. Lloyd Vogelman, "It's Hard to Forgive—Even Harder to Forget," *Work in Progress*, Aug. 1993, at 16.

7. In the literature, multiple terms are used synonymously to label the activities through which justice after transition is performed: *backward-looking* or *retrospective justice*, *retroactive* or *ex post facto justice*, *retributive justice*, *post-authoritarian justice*, *transitional justice*. Some of these terms are equivocal, among them "backward-looking" or "retrospective" justice. As an anonymous referee noted, justice is always meted out *after* a crime. Thus these terms are not specific enough. The problem with the labels "retroactive" or "ex post facto justice" is that they refer to a very special type of justice: one that does not respect the principle of nonretroactivity. Not all criminal prosecutions following the demise of an authoritarian regime violate that rule. "Retributive justice" is justice with the aim to give (mostly material) retribution to the victims of the old regime. This term has a very circumscribed meaning and should not be pressed into service for a grander purpose. I prefer the labels *post-transition justice* and *justice*

(in part I) the pros and cons of each of the available policy options. I then move to a comparative description (in part II) of the course justice after transition took in two groups of countries: (*a*) Belgium, France, and The Netherlands at the end of World War II and (*b*) postcommunist Czechoslovakia, Hungary, and Poland.[8] Part III deals with the specific factors these new elites take into consideration. I also assess there three potential causes of policy. The first is the legacy of the past. Authoritarian or totalitarian regimes differ in many aspects, for example, in their scope and the crimes' nature and duration. The second is the international context at the time of the transition, that is, the absence or presence of supranational legal norms on human rights and of institutions to implement such norms. The last is the mode of transition and its ensuing impact on the balance of power between the old and the new order. This list of causes is derived from the literature on regime transitions and from the pool of experiences discussed at various meetings and conferences.[9] In my conclusion I support the proposition that there are no miracle solutions to the question of how to deal with a repressive past.

I. TO PUNISH OR TO PARDON: THE ARGUMENTS

In the ongoing public debate over post-transition justice, political leaders, academics, and journalists are divided on numerous points.[10] But by far the most divisive question is how to balance the demands of justice against

after transition, because these descriptive phrases are at the same time broad and specific. I use these two terms synonymously, together with the more general term *purge*. Other appropriate phrases are *post-authoritarian justice* or *post-totalitarian justice*.

8. The choice of the two groups is based on a mixture of theoretical and practical considerations. Both groups of countries differ considerably in their dealing with the crimes of the previous regime and with respect to the legacy of the past, the presence of an supranational legal order, and the balance of power between old and new elites. As a consequence, a comparative approach seems appropriate. Belgium, France, and The Netherlands have been singled out since information on purges in other occupied countries is scarcer or less accessible because of language barriers. The selection of Czechoslovakia, Hungary, and Poland is prompted by the fact that these countries have much in common in the area of post-transition justice (East Germany being in a class by itself) and because information on these countries is more available than it is for Albania, Bulgaria, or Romania. Here and throughout, references to "Czechoslovakia" are intended to cover the period from late 1989 until the formal separation of that country into two nations on 31 December 1993.

9. The Project on Justice in Times of Transition (sponsored by the Foundation for a Civil Society—formerly the Charter 77 Foundation) has initiated discussions between political leaders, judges, journalists, and academics. So far five meetings have been held: an inaugural meeting in *Salzburg*, 7–10 March 1992; *Budapest*, 30 Oct.–1 Nov. 1992, on truth and justice: the delicate balance; *San Salvador*, 11–12 Jan. 1993, on reconciliation in times of transition; *Venice*, 14–15 Nov. 1993, on disqualification measures in Eastern and Central Europe and the former Soviet Union; and *Cape Town*, 25–27 Feb. 1994, on truth and reconciliation in South Africa).

10. A. Boraine, J. Levy, & R. Scheffer, eds., *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: IDASA, 1994) ("Boraine, *Dealing*"), is a very useful summary of the political and academic debate. See also Huntington, *Third Wave* 211-32 (cited in note 1).

the many, mainly political, constraints that make prosecution a major risk to the new regime.

The Case for Prosecution and/or Lustration

Those who emphasize the beneficial effects of prosecution bring forward two crucial reasons. First, punishing the perpetrators of the old regime advances the cause of building or reconstructing a morally just order. The second reason has to do with establishing and upholding the young democracy that succeeds the authoritarian system.

1. Putting back in place the moral order that has broken down requires that "justice be done," the proponents of prosecutions argue. They believe that the successor government owes it, first of all, as a moral obligation to the victims of the repressive system. Post-authoritarian justice serves to heal the wounds and to repair the private and public damage the antecedent regime provoked.[11] It also, as a sort of ritual cleansing process, paves the way for a moral and political renaissance.[12] Abolishing the monuments of the past (the statues of the Lenins and the Stalins) is one way to cleanse a society; evicting those who are held responsible for yesterday's crimes is another. A country in which such cleansing remains unfinished will, it is said, be plagued by continuous brooding and pondering. Asked by Adam Michnik, a leader of the Polish opposition to communist rule and co-editor of the Warsaw daily newspaper *Gazeta*, what he thought of lustration, the German writer Jürgen Fuchs answered: "If we do not solve this problem in a definite way, it will haunt us as Nazism did. We did not denazify ourselves, and this weighed on us for years."[13] The French historian Henri Rousso labels the case of postwar France, where the "collaboration d'Etat" was not fully tried, as a never ending neurosis.[14]

2. A second argument in favor of a judicial operation against the advocates of the old regime is that it strenghtens fragile democracies.

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11. According to Huntington, *Third Wave* 213, this is one of the main arguments of those in favor of prosecution. See also Aryeh Neier, former executive director of Human Rights Watch: "As a civilised society we must recognise the worth and dignity of those victimized by abuses of the past." Cited in Boraine, *Dealing* 3 ("Neier, in *Dealing*").

12. That is exactly what the term *lustration*, according to *The Oxford Concise Dictionary*, evokes: "purification by expiatory sacrifice, ceremonial washing."

13. Fuchs, cited by Adam Michnik, "Justice or Revenge?" 4 *J. Democracy* 20, 25 (Jan. 1993).

14. Henri Rousso, *Le syndrome de Vichy de 1944 à nos jours* (Paris: Seuil, 1990) ("Rousso, *Syndrome*"). The uneasiness was revived when in June 1993 René Bousquet, the French secretary general of police under the Vichy regime, was murdered by a psychotic. Many felt that the killing of Bousquet, whose expected trial might at last have brought the wartime state before the courts, was "justice denied." Rumors of the reluctance at the highest level to effectively put the Vichy regime on trial were amplified. See "Le dossier Bousquet," *Libération* (Special Issue), 13 July 1993, at 1-52.

In the first months after the transition, it is said, the survival of the successor regime depends on swift and firm action against pro-authoritarian officials and their following. Such action is seen as a necessary protection against sabotage "from within."[15] Moreover, if the prosecution issue remains untouched, other forms of social and political disturbance may be triggered, with perhaps a risk of vigilante justice with summary executions, or unbridled screening of political personnel, journalists, and judges may be instigated as happened in Czechoslovakia in 1991 and in Poland more recently.[16] It may also give birth to conspiracy theories in which the leaders of the successor regime are labeled as the hidden agents of the old order that they are treating in a too soft and ambiguous way.

What a new or reinstated democracy needs most, however, is legitimacy. Prosecution, Huntington writes, is seen as "necessary to assert the supremacy of democratic values and norms and to encourage the public to believe in them."[17] Failure to prosecute and lustrate, conversely, may generate in the populace cynicism and distrust toward the political system. Belgium in late 1944 provides a good illustration of the importance of action against the members of the outgoing regime. The political elite who returned to power in September 1944 had many reasons to organize the elimination of the Germanophile collaborators as efficiently as possible. The legitimacy of the reinstated leadership partly depended on the speed and the thoroughness with which the unpatriotic governors of occupied Belgium and their following were ousted from the political and public forums.[18] But the returning elite also knew that its authority and legitimacy were challenged by a new and unquestioned power, the resistance movements. It had to avoid every political move that could push the resistants in the direction of revolutionary action.[19] Any suggestion of weakness in the government's handling of the collaborators would certainly have been an affront and a provocation in the eyes of the resistance movements. Impu-

15. Vaclav Benda, an active dissident under the communist regime and in 1992 chairman of the Christian Democratic Party, described the main aim behind the Csechoslovak Screening Act as "self-protection considered from the viewpoint of Czechoslovak democracy and from the viewpoint of the evolution towards a market economy and a state of law." Interview, 5 *East Eur. Rep.* 42, 42 (March-April 1992).

16. See Janusz Obrman, "Laying the Ghosts of the Past," *Rep. E. Eur.*, 14 June 1991, at 12.

17. Huntington, *Third Wave* 213. According to Juan Mendez, general counsel of Human Rights Watch, "The ability of institutions to deal with such difficult and touchy subjects will instill confidence in the citizenry about the country's capacity to build reliable and trustworthy democratic institutions." Cited in Boraine, *Dealing* 92.

18. A complicating factor was that many collaborators belonged to political movements (VNV in Flanders, REX in Francophone Belgium) that had won between 15% and 20% of the parliamentary seats in the prewar national elections of 1936 and 1939. These movements had thus long been redoubtable competitors for power. See William Brustein, "The Political Geography of Belgian Fascism: The Case of Rexism," 53 *Am. Soc. Rev.* 69 (1988).

19. See Geoffry Warner, *La crise politique belge de novembre 1944: Un coup d'état manqué?* (Brussels: CRISP, 1978).

nity, moreover, allows "people to move into leadership positions whose involvement in the former regime makes them liable to blackmail through the threat of exposure."[20]

Some analysts believe that prosecutions also advance long-term democratic consolidation. Unless the crimes of the defeated are "investigated and punished, there can be no real growth of trust, no 'implanting' of democratic norms in the society at large, and therefore no genuine 'consolidation' of democracy."[21] Opponents of impunity argue that amnesty also endangers the inculcation of codes of conduct based on the model of the *Rechtsstaat*.[22] They claim that a discriminatory application of the criminal law, privileging certain defendants (such as military leaders), will breed cynicism toward the rule of law. Prosecutions, finally, are seen as the most potent deterrent against future abuses of human rights.[23]

The Case against Punishment

Other participants in the debate have argued that prosecuting those alleged to bear responsibility for the crimes of the past is not without considerable ambivalence. There is no guarantee, they say, that its effects will be merely beneficial for democracy and for the Rechtsstaat. Some, like Ralf Dahrendorf, feel that the ghosts of the past cannot be chased away if feelings of revenge prevail. Dahrendorf cites the Italian communist Sergio Segre, who "was quite right when he attacked East Germans for arresting their former leader Erich Honecker: 'Will you never learn from history? Is the era of the trials of the 1930s and 1950s going to start all over again? . . . [D]o not begin the old stories again. Otherwise one will never start anything new.' "[24] The Spanish writer Jorge Semprun told Adam Michnik: "If you want to live a normal life, you must forget. Otherwise those wild snakes freed from their box will poison public life for years to come."[25] Raoul Alfonsín, Argentina's first elected president after the collapse of the military regime, wrote: "In the final analysis, punishment is one instrument, but not

20. Claus Offe, "Coming to Terms with Past Injustices," 33 *Arch. Eur. Soc.* 195 (1992).

21. Laurence Whitehead, "The Consolidation of Fragile Democracies: A Discussion with Illustrations," *in* Robert Pastor, ed., *Democracy in the Americas: Stopping the Pendulum* 84 (New York: Holmes & Meier, 1989).

22. The term *Rechtstaat* is used to refer to a constitutional state or one based on rule of law principles.

23. Diane Orentlicher writes: "The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression. By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence." See her "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," 100 *Yale L.J.* 2537, 2542 (1991).

24. Ralf Dahrendorf, *Reflections on the Revolution in Europe* 101 (London: Chatto & Windus, 1990).

25. Jorge Semprun, *cited by* Michnik, 4 *J. Democracy* at 24 (cited in note 13).

the sole or even the most important one, for forming the collective moral conscience."[26]

Those who oppose prosecutions argue chiefly that partisan justice, rule of law infringements, or human rights abuses always lurk in the background and that prosecutions can have highly destabilizing effects on an immature democracy.[27]

1. Young democracies affirm that they highly value the rule of law and human rights. But post-transition justice involves a number of decisions that may trespass on those very legal principles. Dealing with the past by prosecutions, some analysts argue, therefore holds a sizable risk. It may force the successor elites to violate the codes of the Rechtsstaat today while judging the undemocratic behavior of yesterday. This can, as a consequence, considerably weaken the legitimacy of the new regime.

A human rights problem arises when the behavior the courts must judge is of a purely political nature, such as membership in a pro-authoritarian movement or publicly advertised approval of totalitarian ideas. The problem can be illustrated by looking at the Belgian case. Prewar treason legislation did not cover the many forms of political action that only in the context of the total warfare of World War II took on a collaborationist dimension. Simple extension of the scope of penal law was not self-evident, since part of the political behavior in question could be seen as falling under the constitutional right of freedom of opinion, speech, or association. How could a person who before the war became a member of a party that participated in the Belgian parliamentary game but joined forces with the German occupation be punished if he stayed a member after May 1940? Was a man whose only political activity had been subscribing to a collaborationist journal culpable of a crime? With the country still occupied, the Belgian government in exile defined membership in pro-German movements and similar forms of political action as ordinary crimes. The result was that tens of thousands of Belgians were punished for what was strictly political behavior. Since then, the choice the Belgian government made has been a source of controversy: Is not one of the core values of democracy that no one

26. Raoul Alfonsín, " 'Never Again' in Argentina," 4 *J. Democracy* 15, 19 (Jan. 1993).

27. While generally in favor of tolerance in the handling of past abuses, most participants in the debate agree that two exceptions must be made. The first is that self-amnesties are illegitimate. Second, states have the duty to prosecute violations of international law relating to human rights. Such crimes, it is argued, cannot be unilaterally forgiven. Jose Zalaquett, a member of the Chilean Truth Commission, has said: "society cannot forgive crimes against humanity. The perpetrators must be brought to trial." *Venice* conference report, at 15 (cited in note 9). The idea that crimes against humanity must always be prosecuted is also behind the trial of Paul Touvier, a French collaborator who in 1994 was brought before a criminal court, 50 years after the end of the war. See *Le Monde* (Special Issue), 17 March 1994, and, in this issue, Leila Sadat Wexler, "Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France," 20 *Law & Soc. Inquiry* 191 (1995).

should be excluded from the benefits of modern citizenship because of his/her political opinion?[28]

The principles of the separation of powers and of judicial impartiality are at stake when answering the question of who will be the judges of the supporters of the authoritarian regime. The problem, as it presented itself in July 1944 in France, was clearly formulated by the Commissioner of Justice: to reconcile two preoccupations "on the one hand, respect for legal forms and the traditional guarantees of republican justice; on the other hand, the desire to judge rapidly and allow the Resistance to play its role in the judicial punishment of collaboration."[29] Political pressure, time constraints, and the unavailability of sufficient judicial personnel may incite the post-transition elites to create special tribunals in which lay judges play a prominent role. This, the opponents of prosecutions argue, makes lapses from important legal norms almost unavoidable. Such special courts can, indeed, become instruments of partisan vengeance since nonprofessional judges are easier targets for pressure by the executive, the media, and public opinion. Fidelity to legality and the rule of law, if it is imbued in the minds of members of the judiciary, is a strong safeguard against political and partisan use of the judicial process. Abel and Lewis write: "There is some evidence that professional identity strengthens the 'independence' of the judiciary and its willingness to defy or at least obstruct grossly illegal acts by the more political branches."[30] It is not clear where and how such fidelity originates. But it appears plausible to hypothesize that lay judges, particularly in the context of a regime transition, are poorly equipped in their activities as prosecutors to resist the intrusion of the executive and of other societal forces.

Justice after transition must take place within a temporal frame. This frame, Offe writes, consists of the answers to two questions. "First, from when on are acts that occurred in the past liable to corrective action?"[31] In other words, do we accept ex post facto criminal legislation? It is the *nullum crimen sine lege, nulla poena sine lege* principle which is at stake here.[32] The

28. The South African case proves that a similar discussion arises when offenses of a much more serious nature (assault, robbery, public violence, etc.) are labeled by some as political. When the question of the release of political prisoners emerged on the agenda of the negotiations between the De Klerk government and its negotiating partners, a key issue was the distinction between offenses that are political and those that are not. For a general discussion, see Raylene Keightley, "Political Offences and Indemnity in South Africa," 9 *S. Afr. J. Hum. Rts.* 334 (1993).

29. De Menthon, cited in Peter Novick, *The Resistance versus Vichy: The Purge of Collaborators in Liberated France* 150 (New York: Columbia University Press, 1968) ("Novick, *Resistance versus Vichy*").

30. Richard L. Abel & Philip S. C. Lewis, "Putting Law Back into the Sociology of Lawyers," *in* Abel & Lewis, eds., *Lawyers in Society*, vol. 3: *Comparative Theories* 478, 482 (Berkeley: University of California Press, 1989).

31. Offe, 33 *Arch. Eur. Soc.* at 197 (cited in note 20).

32. This principle of legality means that no conduct may be held punishable unless it is precisely described in a penal law, and no penal sanction may be imposed except in pursuance of a law that describes it prior to the commission of the offense. See also European Conven-

second question, according to Offe, is "up to which future point in time is legal action to be taken?"[33] This involves the problem of eventually lifting or upholding the existing statute of limitation. Those who disapprove of prosecutions assert that post-transition trials ultimately will result in changing the rules of the game after the fact, either by applying retroactive legislation or by recommencing the statute of limitation once it has run out.

One potential source of retroactive justice is the post-transitional conflict between legal systems, between the legal legacy of the past and the laws and regulations of the new or reconstructed democracy. A major discussion in France, during and just after the war, was precisely on the legality of the Vichy regime and of the acts of those who, believing Vichy to be the legal and legitimate government of France, obeyed its laws.[34] That is a crucial problem, too, in postcommunist East and Central Europe. As Tina Rosenberg has written: "People can only legally be prosecuted for crimes that were illegal at the time of the commission. The truly hated acts of eastern European regimes—the secret police shadow, the censorship, the political criteria for all decisions—they were the very basis of the system."[35] A defendant might argue, Offe writes, "that he was unaware of the now alleged criminal nature of the acts of which he is accused; given the fact that he has been brought up in a regime that pardons and in fact mandates acts (now deemed criminal) for the sake of higher political purposes, he had no reason to doubt the rightfulness of what he had been doing."[36] If the courts follow the substantive criminal law of the former regime, prosecutions will be scarce and most perpetrators will escape punishment. Only those officials who acted under what even the old order would have defined as illegal can be brought before the courts. This problem can, as Offe notes, be overcome "by applying standards of natural law, international law or 'general principles of law recognized by civilized nations.' "[37] The German case illustrates how intricate such endeavor is. It was decided that, to avoid ex post facto justice, the substantive criminal law of the German Democratic Republic would be applied in the prosecution of the former leaders of the GDR. But at least in one area (the East German policy toward attempts to cross the borders), the West German courts ruled that basic human rights, which

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tion of Human Rights art. 7(1): "No one shall be held guilty of any criminal offence on account of any act or ommission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

33. Offe, 33 *Arch. Eur. Soc.* at 197.

34. Novick, in *Resistance versus Vichy* 140–56 (on the purge of collaborators in liberated France), devotes an entire chapter to the *nullum crimen sine lege* problem.

35. Tina Rosenberg, *cited in* Boraine, *Dealing* 95 (cited in note 10) ("Rosenberg, in *Dealing*").

36. Offe, 33 *Arch. Eur. Soc.* at 199. Political surveillance, for example, is not an illegal act in repressive regimes and to, in the context of transitional justice, make criminal charges against such behavior will prove to be difficult.

37. *Id.* at 195–96.

were laid down in the GDR constitution as well as in international treaties, had been violated. Blankenburg, who discusses this development, argues that the courts reinterpreted GDR law "like it had never been practiced in its history. They actually created their own, ideal 'GDR law.'" He adds: "On the basis of such an ex post facto interpretation of GDR law, not only East German border guards were charged with manslaughter but also the head of state for instigating them to do so."[38] The clash between two legal systems is not the only possible source of retroactive justice. Novick, after comparing the retroactivity question in postwar Belgium, France, The Netherlands, Denmark, and Norway, concludes: "All of the Western European countries found their existing treason legislation inadequate to deal with the unanticipated phenomenon of lengthy occupation and widespread collaboration. All had to repair this lack by one form or another of retroactive legislation."[39] In each of these five countries, legislative, administrative, and judicial tricks were used to camouflage the reality of retroactive justice.

A second way to change the rules of the game after the fact is the modification of the statute of limitations. This question is particularly acute in the postcommunist countries. Atrocities against the life and property of men and women took place mostly in the late 1940s and during the 1950s. In most cases, as in Hungary where a 30-year statute of limitations exists, criminal proceedings for the most reprehensible human rights abuses are thus precluded by reason of lapse of time. Judging the past here means de facto the extension or reopening of the statute. Those opposed to such operation formulate both legal and practical objections. One was that it is extremely difficult to establish the precise facts for crimes committed some 30 years earlier.[40]

A countering argument of those who disapprove of prosecutions is that post-transition justice tends to be emergency justice—particularly if it comes in the early phases of the transition. The climate is then seldom well suited for a scrupulous sorting out of all the gradations in responsibility for the abuses of the past. Even when emergency justice is avoided, problems with regard to the definition of responsibility inevitably arise. Borderline cases abound. The question has been clearly evoked by Vaclav Havel when speaking of the Czechoslovakian situation: "We have all become used to the totalitarian system and accepted it as an immutable fact, thus helping to perpetuate it. . . . None of us is just its victim; we are all responsible for it."[41] In addition, one Polish participant in a recent debate, held in Warsaw by the Stefan Vatory Foundation, said: "I believe that we all like to think of

38. Erhard Blankenburg, "The Purge of Lawyers after the Breakdown of the East German Communist Regime," 20 *Law & Soc. Inquiry* 223 (1995).

39. Novick, *Resistance versus Vichy* 209.

40. See A. Dornbach (Speaker of the House in the Hungarian Parliament) as cited in "Retroactivity Law Overturned in Hungary," 1 *East Eur. Const. Rev.* 8 (Spring 1992).

41. Havel, cited in Huntington, *Third Wave* 214 (cited in note 1).

ourselves as having been born in 1989 and that we regard it as a way of closing the past. . . . but . . . we too are co-responsible in that we did not take all the counter-actions that we could have."[42]

Some opponents of punishment not only reject criminal prosecutions, they also object to lustration as a policy of settling accounts with the past. They argue that with lustration the right to defense becomes extremely fragile. That is precisely what the experience of liberated Belgium and The Netherlands demonstrates. In both cases people were disqualified, considered not one by one but for their membership in a collaborationist group. In The Netherlands, all members of pro-German military movements (and their spouses) automatically lost their Dutch citizenship. Their numbers amounted to several tens of thousands. The Belgian government decided to strip the rank and file of pro-German organizations collectively of their political and civil rights. Offe notes that in such case the defendants "are not—or only marginally—given a legal chance to invoke excuses that might exonerate them individually." Even if they are given this chance, they will be forced to collect evidence to prove their innocence, so that the burden of proof is reversed.[43] Another problem is that such lustration operations tend to become highly politicized. Sometimes, the eagerness to purge society results from the political calculation of parties and factions.

2. A new or reinstated democracy is a frail construct. For that reason some analysts argue that impunity or, at least, tolerance in the handling of past abuses is a prerequisite for the survival of the democratic process. Criminal prosecutions can, they say, jeopardize the democratic transition.[44]

There is, first, the risk of a destabilizing backlash. Military leaders who feel threatened by projected prosecution may try to reverse the course of events by a coup, a rebellion, "or other confrontations that could weaken the authority of the civilian government. . . . In these circumstances, prosecutions could reinforce the military's propensity to challenge democratic institutions."[45] This problem especially haunts the young democracies of Latin America.[46] Most governments, Rosenberg writes, "have made the call

42. Aleksander Kwasniewski (chairman of the Parliamentary Club of the Alliance of the Democratic Left), 5 *East Eur. Rep.* 48 (March-April 1992). The expression "having been born in 1989" is close to the name given the Dutch "resistants of the eleventh hour" (those who very belatedly, mostly in May 1945, became patriots). They were, in the months following the war's end, mockingly called "maybeetles."

43. Offe, 33 *Arch. Eur. Soc.* at 199.

44. See Huntington, *Third Wave* 214. Huntington also quotes President Sanguinetti of Uruguay: "What is more just—to consolidate the peace of a country where human rights are guaranteed today or to seek retroactive justice that could compromise that peace?" See also Jamal Benomar, "Justice after Transitions," 4 *J. Democracy* 3, 14 (Jan. 1993). Talking of the lustration project in his country, Vaclav Havel warns that it "is a time bomb that could go off at any moment and ruin the social climate." Havel, "Justice or Revenge?" 4 *J. Democracy* 20, 22 (Jan. 1993).

45. Orentlicher, 100 *Yale L.J.* at 2545 (cited in note 23).

46. For a discussion of the dilemma as it presented itself in Latin America and Southern Europe, see Guillermo O'Donnell & Phillipe Schmitter, *Tentative Conclusions about Uncertain*

that to leave the past alone is the best way to avoid upsetting a delicate process of transition or to avoid a return to past dictatorship. The attitude is that there is a dragon living on the patio and we had better not provoke it."[47]

A prolonged physical and social expulsion, based on criminal court decisions, of certain sections of the population may obstruct democratic consolidation in yet another way. It could drive the supporters of the previous regime into social and political isolation. This in turn could result in the creation of subcultures and networks, which in the long run will become hostile to democracy. Criminal prosecutions may also preclude the reconciliation needed for a democracy to function. The need for closing the ranks is one of the main arguments of advocates of amnesty laws.[48]

The viability of a young democracy also depends on its efficacy. A far-reaching purge of administrative and managerial manpower can be counterproductive as it endangers the badly needed political and economic development of the country. Prudent considerations of the problematic consequences of dismissals from civil service jobs are heard in East and Central Europe today.[49] When a bill on lustration was discussed in the Bulgarian Parliament, Virginia Veltcheva, one of those working on the draft, said: "It is unthinkable that the law should directly affect more than one hundred people. We cannot deprive ourselves of specialists, though they may have worked for the previous regime."[50] Poland's President Walesa has repeatedly opposed lustration with the argument that "it would deny skilled profession-

Democracies 28–32 (Baltimore: Johns Hopkins University Press, 1986) ("O'Donnell & Schmitter, *Tentative Conclusions*"). The next continent where the problem will manifest itself is Africa. South Africa and Ethiopia, among others, must decide how to settle a past account without upsetting a present transition. (On South Africa, see in this issue Lynn Berat & Yossi Shain, "Retribution or Truth Telling in South Africa? Legacies of the Transitional Phase," 20 *Law & Soc. Inquiry* 163 (1995).) A general introduction to this issue can be found in Ali Mazrui, "Conflict Resolution and Social Justice in the Africa of Tomorrow: In Search of New Institutions," 127–128 *Présence Africaine* 308–28 (1983), and *id.*, "Towards Containing Conflict in Africa: Methods, Mechanisms and Values" (presented at Organization of African Unity workshop on conflict management in Africa, Addis Ababa, May 1993) ("Mazrui, 'Towards Containing Conflict' ").

47. Rosenberg, in *Dealing* 66 (cited in note 35).

48. See Uruguayan President Sanguinetti's justification of an amnesty law pardoning abuses of a previous military regime: "The Uruguayan government has decided to take measures of magnanimity or clemency using a mechanism provided for in the Constitution of the Republic. The 12 years of dictatorship have left scars which will need a long time to heal and it is good to begin to do so. The country needs reconciliation to face a difficult but promising future" (cited by Orentlicher, 100 *Yale L.J.* 2545). The same argument has been used by South African President Mandela in defense of his amnesty proposals.

49. Offe, 33 *Arch. Eur. Soc.* at 198. Offe also noted that East Germany is special in this regard "as it can afford the replacement of large numbers of former officials and professionals given the supply of such personnel of at least equal skills that can be imported from the West."

50. Cited in Veneta Yankova, "Democracy's First Steps," 5 *East Eur. Rep.* 44, 44 (1992). Yankova, a Bulgarian journalist, adds, "those demanding purification of public life have no idea of the social cataclysm they might be provoking."

als a chance to contribute to the nation's reconstruction."[51] Furthermore Pavel Dostal, a member of the Czechoslovak Federal Assembly, in a comment on the October 1991 Czechoslovak Screening Act, saw the fate of the communist administrative and managerial elites as follows: "Providing we are not blind with hatred, we must incorporate these people, since among them are specialists and experts whom we will need if we really want to join Europe."[52]

Meeting Ethical Requirements and Political Constraints

Dealing with the past is an inescapable task for new democratic regimes. Successor elites may be put off by the many delicate and explosive aspects of such assignment. But there is no way out. Choices must be made, even if each alternative presents grave problems. O'Donnell and Schmitter suggest that for Latin America, this problem remains insoluble. But the worst solution here, they write, would be to try to ignore the problem; the costs of such coverup are simply too big.[53] And as Jose Zalaquett warns, "leaders should never forget that the lack of political pressure to put these issues on the agenda does not mean that they are not boiling underground, waiting to erupt. They will always come back to haunt you. It would be political blindness to ignore the fact that examples of this abound worldwide."[54] The time factor is important, too:

> [I]f issues about the past are not dealt with soon after a transition, they can go into a hiatus for six months, a year, even two years before returning in perverse forms. In Poland certain issues were not dealt with at the outset and there was subsequently a situation in which the Minister of the Interior started dumping the political equivalent of toxic waste into the system. The message is: Be careful. Just because things look all right does not necessarily mean that they are.[55]

A major problem for decision makers is that some of the arguments in the debate on pardon versus punish are quite contradictory. As said earlier here, reconciliation is seen as a crucial prerequisite for the consolidation of a young democracy. To some analysts reconciliation can only be produced if the successor elites refrain from prosecuting the officials of the previous regime. Others, however, argue that impunity precludes the coming of rec-

51. Louisa Vinton, "Walesa and the Collaboration Issue," 2 *RFE/RL Res. Rep.*, 5 Feb. 1993, at 10, 16.

52. Pavel Dostal, "Are They Colour-blind?" 5 *East Eur. Rep.* 43, 43 (March-April 1992).

53. O'Donnell & Schmitter, *Tentative Conclusions* 30.

54. Zalaquett *in* Boraine, *Dealing* 14–15 (cited in note 10).

55. Weschler in *id.* at 58.

onciliation.[56] The same ambiguity surrounds the argument that criminal prosecutions can seriously threaten the viability of a new democracy because of their undesired political consequences, such as a military counterrevolution or rebellion. The thesis that the dragon on the patio should not be awakened is widespread among participants in the debate. But some opponents of impunity have argued that, on the contrary, the survival of a new or reestablished democracy depends on prosecutions as the ultimate insurance against future state-sponsored abuses.

Most political leaders, journalists, and academics who discuss the pardon versus punish issue seem to agree that the crucial challenge is to strike a balance between the demands of justice and political prudence or, in other words, to reconcile ethical imperatives and political constraints. This is no easy enterprise. It entails a difficult and, on occasion, torturous cost-benefit analysis. All costs and gains, political and moral, of pardoning and punishing must be balanced against each other.[57] The need to meet ethical requirements and political constraints also rises for each option. If priority is conferred to prosecutions, for example, the challenge is to give justice as much political and moral impetus as possible while still conforming to the rule of law. Novick, in his essay on the purge of French collaborators, recounts the inner conflict of many resistants. There was, on the one hand, "the thirst for retribution on the part of men who for years had been hunted down, imprisoned, and tortured by the followers of Pétain and the agents of Germany." But at the same time, "side by side with this passionate longing was the attachment of *résistants* to those principles of justice and equity which distinguished them from the rulers of Nazi Germany and Vichy France."[58] Tipping the balance in favor of politics and the thirst for retribution, as happened in postwar Belgium, can lead to political vengeance and partisan trials.[59] Undiluted respect for the rule of law may, on the other hand, considerably weaken the political and moral effects of the purge.

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56. See Rosenberg *in id.* at 66–67: "If the victims in a society do not feel that their suffering has been acknowledged, then they . . . are not ready to put the past behind them. If they know that the horrible crimes carried out in secret will always remain buried, . . . then they are not ready for reconciliation." She adds: "The kind of reconciliation that lets bygones be bygones is not true reconciliation. It is reconciliation at gunpoint and should not be confused with the real thing."

57. Successor elites have demonstrated the tendency to emphasize the political costs of criminal prosecutions. Juan Mendez (*in id.* at 91), general counsel of Human Rights Watch, has criticized this inclination for its defeatism: "While we have to recognise the political limitations to prosecutions, we must also not take them for granted. We should not provide a way out for successor democratic governments and should not simply assume that they are inherently powerless." Rosenberg (*id.* at 68) warns us that the "desire for maintaining short-term equilibrium can have great long-term costs. It can damage the legal system, the rule of law and future civilian control of security forces."

58. Novick, *Resistance versus Vichy* 140 (cited in note 29).

59. "Partisan trials . . . proceed according to a fully political agenda with only a façade of legality (although the legalism might be turgid." Ron Christenson, *Political Trials: Gordian Knots in the Law* 10–11 (New Brunswick, N.J.: Transaction Books, 1986). For a description of

A government's choice is a function of a number of circumstances. Before I discuss these contextual factors (in part III), I first compare the strategies the successor regimes developed in Belgium, France, and The Netherlands and in Czechoslovakia, Hungary and Poland.[60]

II. DIFFERING POLICIES

Dealing with the past in Czechoslovakia, Hungary, and Poland today contrasts sharply with what happened 50 years ago in Belgium, France, and The Netherlands.[61] The differences relate to the size and scope of the operation, the range of the sanctions accompanying it, and the degree of respect for the rule of law.

1. A striking similarity in the policies of Belgium, France, and The Netherlands was the outspoken desire, especially evident in the months before and after the Liberation, to expel the collaborators. A much heard expression in political speeches was that "there was no place left for those who had betrayed their country." The political risks which such en masse expulsion could in the long run provoke were not taken seriously. A second resemblance lies in the tendency—especially in the early stages—to judge the population under absolute standards of good and bad. Sensitivity to the many shades of gray between black and white was very low indeed. The

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the partisan aspects of post-transition justice in Belgium, see Luc Huyse & Steven Dhondt, *La répression des collaborations 1942-1952: Un passé toujours présent* (Brussels: CRISP, 1993) ("Huyse & Dhondt, *La répression*").

60. Data on postwar purges in Belgium are based on Huyse & Dhondt, *La répression*. Important publications on France are Novick, *Resistance versus Vichy* (cited in note 29), and Rousso, *Syndrome* (cited in note 14). For Holland see Gerhard Hirschfeld, *Nazi Rule and Dutch Collaboration: The Netherlands and German Occupation, 1940–1945* (Oxford: Berg, 1988); A. Belinfante, *In plaats van bijltjesdag: De geschiedenis van de Bijzondere Rechtspleging na de Tweede Wereldoorlog* (The History of the Purge in Postwar Holland) (Assen: Van Gorcum, 1978) ("Belinfante, *In plaats van bijltjesdag*"); and Peter Romijn, *Snel, streng en rechtvaardig. Politiek beleid inzake de bestraffing en reclassering van 'foute' Nederlanders, 1945–1955* (Swift, Severe and Fair Justice: The Problem of Collaboration and Collaborators in Dutch Politics, 1945–1955) (Amsterdam: De Haan, 1989). For a more general overview of lustration after World War II, see Klaus-Dietmar Henke & Hans Woller, eds., *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg* (München: Deutscher Taschenbuch Verlag, 1991). Literature on backward-looking justice in postcommunist Eastern and Central Europe is scarce. Articles have appeared in *Eastern European Constitutional Review*, in *Journal of Democracy*, in *East European Reporter*, in *East European Politics & Societies*, in *Eastern Europe Newsletter*, in *Carolina, Students' E-mail News from the Czech Republic*, and in *Report on Eastern Europe* (since Jan. 1992 *RFE/RL Research Report*; both are publications of Radio Free Europe and Radio Liberty).

61. For the purge of former communists, the picture of post-totalitarian Europe would look considerably different if East Germany were included. There, large numbers of supporters of the old regime have been removed from the civil service, the judiciary, the bar and the universities. But, as noted in our introductory remarks, East Germany requires a special approach. There are, on the other hand, good reasons to distinguish between Belgium, France, and The Netherlands. Although their policies in handling collaborators diverged in more than one aspect, the many similarities allow us to treat them as belonging to a single category.

result of those policy choices was that the purge affected extremely large numbers of citizens and that severe sanctions hit them.

The number of unpatriotic citizens who suffered punishment in one or another form was about 100,000 in Belgium, 110,000 in The Netherlands, and 130,000 in France. The figure is particularly high for the first two countries, as they are relatively small (Belgium had, in 1945, a population of 8.3 million, The Netherlands of 8.8 million). The number of death penalties was 6,763 in France, 2,940 in Belgium, and 152 in The Netherlands.[62] Receiving prison sentences were about 53,000 in Belgium, 49,000 in The Netherlands, and 40,000 in France. However light the sentence, imprisonment was almost always accompanied by other sanctions: a fine, confiscation of personal goods, police supervision after the end of the prison term, the obligation to reside in a specific town. In Belgium, damages had to be paid to the state, out of the marital goods or from the heirs if necessary. Tens of thousands of Dutchmen suffered the loss of nationality. These countries also introduced some form of "national indignity," which implied a series of civic disqualifications and a prohibition on some kinds of professional activity.[63]

By contrast, post-1989 events in Czechoslovakia, Hungary, and Poland have run a very different course. The velvet revolutions have not been followed by a massive physical and/or social removal of the exponents of the old order. Calls for a permanent expulsion of compromised members of the society are almost absent. To be noted also is the explicit *prise de conscience* with regard to the many nuances that must be taken into account when judging the pre-1989 behavior of the population. As a consequence, many fewer men and women have been affected by criminal charges or other sanctions than was true in Belgium, France, and The Netherlands after World War II. Prison sentences are very rare. Disqualifications, if applied, are limited in scope and in time.

Poland is still preparing a lustration law. A draft law has been on the Sejm's agenda for four years without leading to a final version. The Hungarian Parliament enacted screening legislation just before the elections of May 1994, four years after a first draft bill was submitted. The Act on Controlling Certain Persons in Important Positions will, by some estimates, cover 10,000–12,000 individuals. The screening will be conducted by committees, each composed of three judges appointed by Parliament. If a committee finds corroborative evidence, the person in question will be asked to resign within 30 days.[64] The Hungarian government also drafted two laws that make prosecution of communist officials possible. A Justice Ministry

62. France had a much higher number of extrajudicial killings: some 9,000 men and women were executed outside the legal process. The parallel figures for Belgium and The Netherlands are about 35 and 30.

63. Novick, *Resistance versus Vichy* 211 (cited in note 29).

64. See 3 *East Eur. Const. Rev.* 10–11 (Spring 1994).

official involved in preparing this legislation estimated that fewer than 100 people might be held responsible for crimes related to the crushing of the 1956 uprising.[65] Czechoslovakia could have become an exception. This country had a relatively severe lustration law between October 1991 and November 1992. High functionaries of the Communist Party, state security agents, informers, together with members of the People's Militia and students of some schools of higher learning, were to be automatically banned from assuming certain specified posts for five years. Figures on the size of the population it could have covered vary. One observer wrote: "The law . . . could affect hundreds of thousands of people."[66] Vaclav Benda, chairman of the Christian Democratic Party and a supporter of the law, was more specific: there are between 60,000 and 80,000 former agents of state security; about as many are former members of the militia; and about 50,000 sat on purge committees after the 1968 revolt. He added that not fewer than 300,000 people might come under the jurisdiction of the legislation.[67] Such figures—Czechoslovakia having had a population comparable in size to those of the Low Countries—predicted a purge operation the scope of which could have gone even beyond what happened in postwar Belgium and The Netherlands. It is, however, extremely difficult to judge the real impact of the Czechoslovakian Screening Act. In its original form it lasted only for one year.

2. In their confrontation with the problem of how to choose between full respect for the rule of law and the requirements of a firm and swift purge, the political and judicial elites of Belgium, France, and The Netherlands gave priority to firmness and efficacy. *Force majeure* and intense time pressures have been invoked to justify dubious procedural techniques. Retroactive criminal legislation was introduced through interpretive modifications of prewar laws. Shortly after the liberation of the country, the Belgian high court (Hof van Cassatie) ruled that all the legislative measures taken by the government in exile had full legality, including the law that in December 1942 had changed the scope of criminal legislation on collaboration. The argument was that the government had not created new rules but had only interpreted an existing body of penal arrangements. In France, Novick writes, despite "the breadth of the existing statutes, and the desire to avoid retroactivity, there was general agreement concerning the need to 'interpret' some of the provisions of the prewar Code. Accordingly, legislation was enacted by the Comit'e Français de la Libération Nationale 'to facilitate the Court's interpretation of [the prewar] texts.' "[68] In The

65. Cited in Edith Oltay, "Hungary Attempts to Deal with Its Past," 2 *RFE/RL Res. Rep.*, 30 April 1993, at 6, 7.

66. Jiri Pehe, "Parliament Passes Law on Vetting Officials," *Rep. E. Eur.*, 25 Oct. 1991, at 4.

67. Benda, interview, *East Eur. Rep.* (cited in note 15).

68. Novick, *Resistance versus Vichy* 143.

Netherlands, retroactivity was clearly present in the reintroduction of capital punishment. The three countries also espoused the principle of collective guilt through the disqualification of people because of their membership in collaborationist movements. In addition, curtailing the right of defense took place through restrictions of access to appeal courts and of contacts between lawyers and their clients and in the form of arbitrary arrests and of prolonged internments.[69] Lay judges participated in the activities of the tribunals that tried the collaborators. France included members of the resistance movements in two of the newly created key institutions of the purge, the Cours de Justice and the Chambres Civiques. The Dutch set up some 35 Special Courts, with two of the five judges being army officers; for lesser cases of collaboration, tribunals were created which were staffed by two patriotic citizens and one professional judge. The Belgian government in exile and its immediate successors turned to the already existing military courts and made them competent for the trial of collaborators. Three of five members in each court were army officers.[70]

Rule of law considerations have received a much more marked attention in Czechoslovakia, Hungary, and Poland. This has been clearly visible in the public debates that accompanied the drafting of screening acts and the eventual lifting of the statute of limitations. The latter problem has been vigorously debated in Hungary where a law, passed 4 November 1991, lifted the 30-year statute of limitation for offenses of treason, voluntary manslaughter, and fatal injury committed between 21 December 1944 and 2 May 1990, if the communist authorities had not prosecuted for political reasons. The law was particularly aimed at making prosecution possible against the men who were involved in the bloody suppression of the 1956 uprising. Opposition to the law was heavy, both in political and academic circles. Legal scholars, who fought the law, based their reasoning on such concepts as legal certainty, nonretroactivity of criminal law, and the new Hungarian constitution and found no reason to lift the time-based limitation on the state's right to punish.[71] After the bill was passed in Parliament, the Hungarian president asked the constitutional court to rule on the law's constitutionality before it was promulgated. The court rescinded the law, citing eight specific counts of unconstitutionality.[72] But in February 1993,

69. These infringements were particularly numerous in the case of The Netherlands. See Belinfante, *In plaats van bijltjesdag* 105–8 (cited in note 60).

70. In May 1944, three months before the Liberation, the Belgian government in exile decided to revoke its decision to include members of the resistance in the military courts. It did so after vigorous protests by the auditeur-général (the magistrate in charge of the military court system).

71. See the Professional Opinion, prepared for the Prime Minister by six professors of Lorand Eötvös University's Law Faculty (document sent to the office of the Prime Minister on 12 Aug. 1991 and presented at a Prague Conference on Restitution and Retribution, Dec. 1991).

72. See interview with Laszlo Solyom, president of the constitutional court, in *East Eur. Rep.*, March-April 1992. Confronted with the objection that the court's decision did not take

the parliament voted two new laws, one dealing with crimes committed immediately after the 1956 uprising and another with crimes against humanity, committed by communist leaders between 1944 and 1989. In both cases the legislation stipulated that the courts must decide whether the statute of limitations applies in a specific, individual case. The Hungarian president then again called on the constitutional court to review the new laws. It ruled that only the article referring to war crimes and crimes against humanity as defined by the Geneva Convention was not unconstitutional and that only in that case did retroactivity have to be accepted.[73] In Czechoslovakia the so-called lustration law of October 1991 introduced disqualification on a group basis. The law was criticized because it ascribed collective guilt and because it did not include a clause allowing disqualified people to seek redress before an independent appeals commission.[74] Opponents of the lustration procedures also blamed the fact that the files of the State Security Agency (StB) were used as the principal evidence in determining who had collaborated. These files, they said, were totally unreliable. Tens of thousands of names of "candidates for collaboration" were circulated, causing great damage to individuals and organizations, without delivering hard proof.[75] After the dissolution of the country, however, the Czech parliament voted a new, much more restrictive law. In Slovakia, too, lustration has slowed down considerably. Respect for the rule of law also shows in the prominent role the constitutional courts have had in reviewing the constitutionality of recent legislation on communist crimes. The Czechoslovakian Constitutional Court has asked to jettison some parts of the screening act. In Hungary, the Court declared the legislation on lifting the statute of limitations unconstitutional. In Poland, the Constitutional Tribunal suspended the implementation of the Sejm's resolution of 19 June 1992 that the lists of secret service collaborators should be revealed.

Postwar Belgium, France, and The Netherlands reacted to the challenges that post-authoritarian justice brings with it in a very straightforward way: full priority was given to what made a severe and swift purge possible, even if this involved neglecting rule of law principles and political risks. By contrast, postcommunist countries like Czechoslovakia, Hungary, and Poland have tended much more to a balancing act. Such differences need explaining, which is the subject of the next section.

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account of justice for the masses, Solyom responded: "Taking into account the public mood is a political task, not one for the Constitutional Court."

73. See 3 *East Eur. Const. Rev.* 10 (Spring 1994).

74. Pauline Bren, "Lustration in the Czech and Slovak Republics," 2 *RFE/RL Res. Rep.* 16, at 17. See also Jiri Pehe, "Toward the Rule of Law: Czechoslovakia," 1 *RFE/RL Res. Rep.*, 3 July 1992, at 10.

75. For a general discussion of the reliability of state security files in judging prior regimes, see the report of the 30 Oct.–1 Nov. 1992 Budapest meeting (cited in note 9). The Kafka-like dimensions of lustration based on state security files are well described in Lawrence Weschler, "The Velvet Purge: The Trials of Jan Kavan," *New Yorker*, 19 Oct. 1992, at 66–96.

III. HOW ACCOUNT FOR POLICY DIFFERENCES?

In their confrontation with the many questions and dilemmas that dealing with the past poses, political and judicial elites have limited freedom of action. Several factors restrict the number of available politicolegal strategies. I discuss three of these contextual circumstances by comparing their impact first on Belgium, France, and The Netherlands and then on Czechoslovakia, Hungary, and Poland. The legacy of the past is the first variable. The second is the international context at the time of the transition. The balance of power between the forces of the old order and the new elites is the third factor.[76]

The Legacy of the Past

Authoritarian or totalitarian regimes differ in their genesis, the nature of their crimes, and their course of life. The repressive order in Czechoslovakia, Hungary, and Poland was imported by domestic leaders under strong foreign pressure.[77] It remained in place for some 40 years. In Belgium, France, and The Netherlands, the totalitarian model was imposed by military occupation and lasted only 4 years. Each of these elements partly explains the tactics and strategies the new elites take in dealing with the past.

1. Communist Czechoslovakia, Hungary, and Poland are examples of what the French call *une collaboration d'Etat:* a state apparatus of a domestic origin accepting an imported or imposed order. Judging such a regime is a troublesome chore for the successor elites. It permeates large segments of the political and civil society, both in terms of the institutions and of the

76. There are, outside this list of three, other factors that can be of considerable importance. The way a community deals with a repressive past is intimately linked with some of its more general mores and customs. One of these relates to the structure and content of the collective memory. A society can demonstrate a sort of natural inclination to forgive and forget the injustice inflicted on it in the past by domestic or foreign forces. In other instances societies have displayed a strong aversion to letting bygones be bygones. African countries are said to belong to the first category. In his analysis of the transitions in Kenya, Zimbabwe, and South Africa, Mazrui writes that the memory of hate of Africans is remarkably short (Mazrui, "Towards Containing Conflict" (cited in note 46)). European groups seem to have longer memories of bad times. The former Yugoslavia is only one, be it powerful, demonstration. Policy choices also depend on the origin of politically based crimes under earlier regimes. Sometimes, gross violations of human rights have been committed not only by the leaders of the repressive order but by its opponents too. If that is true, the successor elites may be ready to accept some form of (negotiated) amnesty for both sides or they may restrict their explorations of the past to the establishment of a truth commission. These two factors—the length of the memory of hate and the origin of human rights abuses—have a very limited value for our study of postwar Belgium, France, The Netherlands, and the three postcommunist countries. But as soon as one extends the comparative analysis of transitional justice to Latin America or Africa, these elements become very relevant.

77. Hungary and Czechoslovakia could be called, in some ways and during some periods, occupied countries, as was true after the 1956 Soviet invasion of Hungary and the 1968 invasion of Czechoslovakia by the Warsaw Pact armies.

population. A full purge of the country would cause, in the words of Claus Offe, "a veritable witch-hunt, thus creating permanent and bitter cleavages rather than healing the wounds the past has left behind."[78] The judiciary, too, has been wholly or in part closely associated with the outgoing regime. Thoroughly cleansing of this body would probably cripple the criminal justice system. In addition, the nature of the totalitarian system in the countries of Eastern and Central Europe tended to diffuse responsibility for abuses. "Hundreds of thousands of people," Neier stated, "were implicated in the administration of repression and similar numbers were victims of repression. It was often the case that people simultaneously implemented and were victims of repression."[79] All these circumstances may explain in part why dealing with the past in Eastern and Central Europe is slow in operation and ambiguous in content. A totally different situation was created in postwar Belgium and The Netherlands.[80] The authoritarian regime was imposed after a military defeat. Collaboration with the foreign invader was the work of movements and individuals. The parliament, the judiciary, and many other institutions did not join forces with the Germans. Exile governments contested the constitutionality of the occupation regime. Facing the collaborators—however numerous they might have been—was thus a state apparatus that was more or less intact. In particular, a judiciary loyal to the prewar regime was available at the time of Liberation. The effect of all this was that post-transition justice developed on the basis of a clear-cut division between good and bad, between friend and foe.

2. Many collaborators in Belgium, France, and The Netherlands were responsible or co-responsible for a wide array of serious crimes: tracking down Jews and resistants, killing hostages, serving in the German army, producing arms for the occupier. The severe reaction of the population, politicians, and the judiciary toward them is therefore understandable, especially because the memory of these abuses was very vivid at the time of Liberation. The crimes of the communists, on the other hand, are of a distinct kind. These regimes were extremely repressive, especially before 1970. The passage of time may have blurred the memories of what happened. In addition, during the past two decades the violence was more psychological than physical. "The main instruments of control over society," W. Osiatynski (a constitutional lawyer associated with the university of Warsaw) has said, "switched from terror and repression to primarily economic control, control of the media, control of association and of rights."[81] This may have led to a more moderate attitude toward those held responsible. Moreover, the com-

78. Offe, 33 *Arch. Eur. Soc.* at 197 (cited in note 20).

79. Neier in *Dealing* 4 (cited in note 11).

80. Wartime France is a case apart. Its Vichy regime belongs to the category of state collaborations. This may partially explain why post-transitional justice in France has been relatively less extensive than in Belgium and Holland.

81. Wiktor Osiatynski *in* Boraine, *Dealing* 60.

munist regimes were not seen as completely negative. Their policies with respect to education and health care, for example, were viewed positively by many. Antecedent regimes thus differ in their actual performances, but so also do the perceptions and interpretations of them.

3. A most important feature of an authoritarian regime is its duration.[82] If the life of a criminal regime is short, questions about statutes of limitations (and the hesitation they stir up) are unlikely to arise. A second consequence relates to the survival of pre-totalitarian, democratic structures. This is clearly visible for Belgium, France, and The Netherlands. Prewar institutions and their personnel were shattered but not eliminated. They were, once the war was over, revived very quickly. Moreover, four years of occupation and collaboration were insufficient time for the authoritarian regime's legal culture and codes to take root. All these circumstances may, together with other factors, explain the speed of initiating prosecutions.

The communist regimes in Central and Eastern Europe lasted 40 years. As we have seen, judging their abuses makes the lifting of the statute of limitations almost inevitable and the production of firm proof troublesome. This leads to discussion and debate and slows down decision making on crime and punishment. In addition, almost none of the institutions of the precommunist past survived. The legal culture created by communism was firmly established and has proven hard to eradicate. Furthermore, complicity or, at least, accommodation pervaded most of the population and did so for several generations. Communist society was gradually accepted because of the workings of socialization, isolation, and a system of rewards and punishments.[83] The result is that drawing the line between good and bad citizens became extremely difficult.

4. The legacy of the past not only resides in the attributes of the predemocratic order. It is also embedded in the experiences a society has had with the various strategies of dealing with a previous regime. For Belgium, the perception of World War II collaboration was affected by the memories of what had happened in the aftermath of World War I. Many Belgians who between 1914 and 1918 collaborated with the German occupier and were granted amnesty afterward repeated the offense in 1940. To many of their co-citizens, leniency had led to recidivism. This circumstance made understanding and clemency for the collaborators of 1940–44 less probable. Such a negative legacy of the pre-authoritarian past is absent in the postcommunist countries. They have, on the contrary, had the frightening experience of the political trials of the 1950s. It seems plausible to hypothesize

82. See Henri Rousso, "Säuberungen gestern und heute" (Lustration Yesterday and Today) Transit. *Eur. Rev.* 187, 188 (1991).

83. I am indebted to an anonymous referee for this argument.

that this episode in the history of their countries has made the post-1989 elites somewhat allergic to post-transition prosecutions.

International Context at the Time of the Transition

Retrospective justice in Belgium, France, and The Netherlands came at a time when supranational codes with respect to human rights and the rule of law were either weak or absent. This has changed considerably since then. The Council of Europe published its Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. Later came the International Convention on Civil and Political Rights and the Helsinki Accords. Surveillance and monitoring bodies, ranging from supranational courts to the International Helsinki Committee, have become operational.[84] This new legal framework has been and still is of great importance in decisions dealing with the past in Czechoslovakia, Hungary, and Poland. Czechoslovakia's Screening Act has been critized by three international agencies: the Council of Europe, the International Helsinki Committee, and the International Labor Organization (because the law violated article 111 of the ILO convention on discrimination in the workplace).[85] It is not clear if and how these criticisms have affected the further course of lustration in that country, but they certainly have been used in the domestic debate by the law's opponents. More significant is that, apart from any reference to international censure, governments, parties, judges, and legal scholars in Czechoslovakia, Hungary, and Poland have regularly invoked international conventions on human rights when preparing or reviewing criminal or lustration laws. In Poland, for example, a local Helsinki Committee has been set up and its proposals for procedural guidelines have received great attention in the debate on screening.[86] The Hungarian president has asked the constitutional court to review two articles of the February 1993 law (on the lifting of the statute of limitations) for their conformity with article 7.1 of the European Convention of Human Rights and with article 15.1 of the International Convention on Civil and Political Rights. A strong motive for not neglecting the signals coming from abroad is the possibility that violations of rule of law codes might compromise the country's membership of the Council of Europe.[87]

84. For a general introduction to the role of international organizations in transitions to democracy, see the *Journal of Democracy*'s special issue on the subject (vol. 4, no. 3, 1993).

85. Bren, *RFE/RL Res. Rep.* at 21 (cited in note 74).

86. See Andrzy Rzeplinski, "A Lesser Evil?" 1 *East Eur. Const. Rev.* 33, 33 (Fall 1992).

87. In the postcommunist countries, international supervision of transitional justice leads to procedural guarantees for those who are subjected to prosecution and lustration. In other circumstances, such as in transitions to democracy in Latin America and in Africa, the international legal environment can also ensure that grave violations of human rights do not remain unchallenged. Various ways are open here. One is illustrated by the U.S. Torture

Mode of Transition and the Resulting Balance of Power

Many analysts argue that of the factors affecting the direction of post-authoritarian justice, the determining one is the balance of power between the forces of the past and the successor elites at the time of the transition. It lies behind many of the differences between Belgium, France, and The Netherlands and Czechoslovakia, Hungary, and Poland.

Huntington has set forth a typology of power relations at the time the transition toward democracy starts.[88] First is the violent overthrow or the collapsing of the repressive regime. There is then a clear victory of the new forces over the old order. This is the way redemocratization occurred in Belgium and its neighboring countries. Democracy can arrive, second, at the initiative of reformers inside the forces of the past: "those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system."[89] Czechoslovakia and some of the other postcommunist countries belong to a third category: democratization resulted from joint action by and the negotiated settlement between governing and opposition groups. Huntington labels the three cases *replacement*, *transformation*, and *transplacement*. His distinctions are useful, but his nomenclature is too formal; following Rustow's review of Huntington's book,[90] I prefer the plain words *overthrow*, *reform*, and *compromise* as alternatives to Huntington's terminology.

How do differences in the type of transition affect efforts to deal with the past? One contrast lies in the way criminal and lustration laws are prepared. In Belgium, France, and The Netherlands, the overthrow of the collaborating movements and individuals was mainly planned by governments in exile. They also devised the legal instruments under which the collaborators with the Germans would be judged and punished. Those governments

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Victim Protection Act, in which national legislation offers victims of oppressive regimes the legal right to sue their torturers for civil damages before U.S. courts. For a discussion of this development see Robert F. Drinan & Teresa T. Kuo, "Putting the World's Oppressors on Trial: The Torture Victim Protection Act," 15 *Hum. Rts. Q.* 605 (1993). A second opportunity lies in international law requiring punishment of human rights crimes. Both the Genocide Convention and the Torture Convention are examples of such transnational legislation. Orentlicher, 100 *Yale L.J.* at 2549 (cited in note 22), writes that mobilization of international law in dealing with the past has two advantages: it can provide a counterweight to pressure from the elites of the previous order seeking impunity and, further, "when prosecutions are undertaken pursuant to international law, they are less likely to be perceived—and opposed—as political revanchism." Such supranational legal obligations can be implemented by domestic or international tribunals. In some cases only the latter procedure can guarantee that "justice be done." That is precisely the reason why the U.N. Security Council has created the International Criminal Tribunal for the former Yugoslavia and intends to amend the statute of this tribunal so that it can consider crimes under international law committed during the armed conflict in Rwanda.

88. Huntington, *Third Wave* 114 (cited in note 1).

89. *Id.* at 124.

90. David Rustow, "The Surging Tide of Democracy," 3 *J. Democracy* 119, 119 (Jan. 1993).

were, because they were outside their country, considerably handicapped by lack of information and of a realistic assessment of the situation in their homeland. One source of misjudgment was the notion that absolute standards of good and bad could be used in sorting out the population. The result was that the legislation constructed made severe prosecutions and punishment almost inevitable. Events in Czechoslovakia, Hungary, and Poland ran a different course. Purge legislation was and is being put together *after* the transition and in a continuing dialogue between government, parliament, constitutional court, and other societal groups. This process leaves ample room for compromise and bargaining on the form and content of dealing with the past.

When a regime ends violently because of a war against an occupying army or a civil war, anomia is inescapable. That is what happened just before, during, and shortly after the final stage of World War II. It resulted in a mass of summary executions (as in France), some abuses in the camps where suspected collaborators were interned (especially in The Netherlands), or unbridled screening. In Czechoslovakia, Hungary, and Poland, where the communist regimes and the opposition compromised in tracing the routes the country had to take, the twilight zone between old and new was of a very different character. Nightmare scenarios involving brutal witch-hunts did not have a chance.

But probably the most important consequence of the mode of transition is the density of the political constraints it generates. The widest scope for prosecutions and punishment arises in the case of an overthrow. Almost no political limits exist. Full priority can be given to the thirst for justice and retribution. But a totally different situation comes up if the transition is based on reform or compromise. In that situation the forces of the previous order have not lost all power and control. They are to a certain degree able to dictate the terms of the transition. The new elites have only limited options. They may be forced to grant the outgoing authorities a safe passage in return for their total or partial abdication. The need to avoid confrontation becomes the rationale for exchanging criminal prosecution and severe lustration for a policy of forgiveness. The successor government and its democracy is too vulnerable to discard clemency.

Kadar Asmal, chairman of the ANC commission on reconciliation in South Africa, has summarized the differences between the various types of transition by saying that the postwar policies with regard to the repressive past rested on a material condition that is absent in most of the transitions of the 1980s and 1990s: "The war criminals who were brought to trial did not lose power through political means but through a complete military defeat. The victors did not have to worry about the balance of forces where the military, economic and state power of the losers was largely left un-

touched."[91] The new democracies of recent times, in contrast to the victorious regimes in Belgium, France, and The Netherlands, have to grapple with this crucial issue: how to settle a past account without upsetting the present transition.

CONCLUSION

Many of the policy suggestions, mentioned in part I, depart from the premise that post-authoritarian elites can actually make choices. However, the first lesson of our comparative analysis of Belgium, France, and The Netherlands and the three postcommunist countries is that the actions of such elites is a function of the circumstances of the passage to democracy.

The second conclusion is that there are no miracle solutions for dealing with a repressive past. Postwar Belgium, France, and The Netherlands had the widest opportunities to prosecute and punish. Now, a half-century has gone since these countries tried to free their societies from the legacy of the German occupation. Surprisingly, the passage of time has not fully exorcised the ghosts of this past. Collaboration and the purge that followed still haunt the nation's collective memory. In The Netherlands, the emotion reappears like malaria: years of silence alternate with periods of high tension. Belgium is a case of chronic fever. Discussions on what happened during and shortly after the war are never far away. In France this element of the past is, according to historian Henri Rousso, the source of an almost incurable neurosis.[92] These three cases demonstrate how consequential transitional justice as a political assignment is. They also teach us that the swift and rather severe purge option the Belgian, French, and Dutch postwar elites chose does not guarantee an unproblematic relationship with the past. They deliver firm proof that, in the words of Jose Zalaquett, "complete victors generally hand out a tremendous amount of punishment, but not necessarily justice."[93] Serious procedural irregularities occurred. Today many men and women view the trials of the late 1940s as a contravention of the most fundamental principles of the Rechtsstaat. They want to keep the memory alive as a warning against new legal transgressions.

Political constraints considerably reduce the freedom of action of the postcommunist elites. Their dealing with the past is slow in its operation and ambiguous in its content. The positive side of such policy is that, when it comes to prosecutions and lustration, respect for the rule of law is more or less guaranteed. But, on the other hand, too much forgiveness undermines the respect for the law, induces the anger of those who suffered, and is an

91. Kadar Asmal, "Coping with the Past," *Mayibuye*, Feb. 1994, at 27.

92. Rousso, *Syndrome* (cited in note 14).

93. Zalaquett *in* Boraine, *Dealing* 103 (cited in note 10).

impediment to an authentic reconciliation and an invitation to recidivism. That is why most analysts argue that if the balance of forces at the time of the transition makes a negotiated mildness inevitable, a truth-telling operation with full exposure of the crimes of the former regime is the least unsatisfactory solution. As one Prague professor of law wrote: "We may eventually decide to offer amnesty to some or all of our former oppressors, but before we forgive, we should know what evil we are forgiving, and who caused it."[94] "Memory," says Roger Errera (member of the French Conseil d'Etat), "is the ultimate form of justice."[95] The truth is both retribution and deterrence. In his book on settling accounts with torturers, Lawrence Weschler writes:

> Retrospectively the broadcasting of the truth to a certain extent redeems the suffering of the former victims. At least to a degree, it answers and honours the scream after all, it upends the torturer's boastful claim that no one will ever know. Prospectively, the broadcasting of truth has an effect that is at once more subtle and perhaps more momentous. For . . . it is essential to the structure of torture that it take place in secret, in the dark, beyond considerations of shame and account. . . . [The torturer] needs to be certain that no one will ever know; otherwise the entire premise of his own participation would quickly come into question.[96]

Telling the truth about the past undermines the mental foundation of future human rights abuses.

94. Vojtech Cepl (professor of law at Charles University in Prague), "Ritual Sacrifices," 1 *East Eur. Const. Rev.* 24, 25 (Spring 1992).

95. Roger Errera, "Dilemmas of Justice," 1 *East Eur. Const. Rev.* 21, 22 (Summer 1992).

96. Weschler, *Miracle* 245–46 (cited in note 5). For a general discussion of truth commissions, see Priscilla Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Study," 16 *Hum. Rgts. Q.* 597 (1994).