experience "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order.") Could an international court of constitutional law, as proposed by Tunisia's president play such a role? (Note that international legal norms can sometimes be enforced through nonjudicial sanctions, such as suspension of trade privileges, or withdrawal of financial aid or participation in coordinated activities.) Is the concept of an original, unconstrained pouvoir constiuant theoretically sustainable given the changing role of international law and international institutions and the development of nonconsensual norms in international law through *jus cogens*?

### *NOTE: TRANSITIONAL JUSTICE AND CONSTITUTIONALISM*

When constitutional regimes change, some existing body of law is likely to continue in effect, even though changes are made to the constitution and to other particular laws. Consider here the views of Judge Aharon Barak of the Israeli Supreme Court, expressed in his 1988 opinion in a free speech case involving whether certain censorship was permitted by Defense Regulations originally enacted by the British in 1937 when they controlled Palestine and which became part of the State of Israel's legislation under the Law and Administration Ordinance of 1948. According to Barak, "This change from Mandatory law to Israeli law was not a purely technical matter. A change in the framework brings in its wake, by the nature of things, a change in content. . . . A colonial rule was replaced by political independence. Autocratic rule was replaced by democracy. . . ." This change, he argued supported a change in the interpretation of the Censor's authority, in light of the values of the Israeli Declaration of Independence.[z]

Sometimes a regime replaced after a constitutional transition is seen as illegitimate and as having perpetrated injustices. A central problem in this setting, not so easily solved by changed interpretation of past laws, is how to develop a commitment to constitutionalism and rule of law while addressing past injustices that may have been "legal" under the prior regime's law. Claims to restoration of private property improperly taken, and efforts to identify and/or punish government officials who committed bad acts, are two major areas in which problems of justice, nonretroactivity, and the limits of law in constitutional transitions recur.

There is now an extensive literature on questions of transitional justice, and the materials in this Note merely introduce some of the most pervasive problems. For general treatments, see Ruti G. Teitel, TRANSITIONAL JUSTICE (2000); Post-Conflict Justice (M. Cherif Bassouni ed., 2002). (For a skeptical view of the argument that there is something distinctive about transitional justice, see Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 761 (2004).)

[z] *See* Schnitzer v. Chief Military Censor (1988), 42 P.D. (4) 617, reproduced in 9 Selected Judgments of the Supreme Court of Israel, 1977–90 at 77, 85–89 (1995) (issuing order preventing Censor from interfering with publication of an article critical of the outgoing head of the Mossad). Another perspective emerges from Argentina, which has had several periods of "de facto" governments that seized power through means not set forth in its Constitution. Once a constitutional government is established, what is the status of the prior regime's "de facto" laws? *See* Tim Dockery, *The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 Fordham Int'l L. J. 1578 (1996) (arguing that legislative ratification of de facto laws best reconciles the need to protect expectations based on those laws and the idea that laws become laws only through constitutional processes).



1. *Establishing the rule of law.* Actions taken by the regime displaced by a constitutional transition might have been—in some sense—lawful when taken. Many would have been authorized by the laws in place at the time. Some of those actions, such as confiscations of property or arrests of dissidents (or worse), might nonetheless be seen after the transition as deeply unjust. Can the post-transition regime rectify such injustices without undermining the basic rule-of-law value that strongly counsels against retroactive legislation?

a. Hungary, Legal Certainty and International Law: One possible recourse lies in international law, and in particular in what are called the peremptory norms of customary international law. Such norms are "non-derogable," meaning that a nation may not lawfully exempt itself from complying with these norms by enacting domestic laws inconsistent with the norms. The Hungarian Constitutional Court invoked this solution in its early-1990s decisions on legislative efforts to punish participants in the suppression of the attempted Hungarian revolution in 1956. In 1991 the Hungarian parliament enacted a statute purporting to eliminate the statute of limitations for treason, premeditated murder, and aggravated assault. This would have allowed prosecutions for crimes committed in 1956, which would have been barred by the prior statute of limitations. The Constitutional Court invalidated the statute, invoking the principle of "certainty of the law," from which followed "the criminal law's prohibition on the use of retroactive legislation." (Our presentation of the case, and the quoted material in this paragraph, is drawn from László Sólyom, *The Hungarian Constitutional Court and Social Change,* 19 Yale J. Int'l L. 223 (1994).) Parliament responded with a resolution that purported to interpret the existing statutes of limitation to exclude the period 1944–90 so as to allow prosecutions. The Constitutional Court held this resolution unconstitutional, on procedural and substantive grounds: "Since an authoritative parliamentary resolution does not qualify as a legislative act, it cannot regulate citizens' basic rights, and it violates the principles of legality, legal certainty, and judicial independence. Substantively, the Court found the resolution unconstitutional because it sought to make retroactive criminal prosecution possible." After another round between Parliament and the Constitutional Court, Parliament enacted a statute focused specifically on crimes committed during the 1956 revolution. The Constitutional Court upheld the statute, saying, that "crimes defined by international law can be prosecuted without regard to domestic laws, including statutes of limitations."

b. Germany and Material Justice: German courts confronted a similar problem after the nation's reunification, in prosecutions of people who had served as guards on the border between the former East and West Germany. Some of those guards, following the directions of their superiors, shot and killed people attempting to cross the border. One major decision allowed the prosecutions, rejecting the *ex post facto* objection because "[j]ustice and humanity were portrayed as ideals also in [East Germany]." This analysis appears to be that, taking the law of East Germany as a whole as it existed when the border guards acted, a court could conclude that that law did not in fact protect the guards from prosecution. Invoking

the "experience of the National Socialist regime in Germany," the court also noted, though, that "it must be possible in extreme cases to value the principle of material justice more highly than the principle of the certainty of the law." Quoted in Ruti Teitel, *Paradoxes in the Revolution of the Rule of Law*, 19 Yale J. Int'l L. 239, 244 (1994).

The German Constitutional Court upheld the convictions of former GDR officials who had helped hand down the shoot-on-sight policy that resulted in the deaths of 260 people trying to cross the border between East and West Germany, or East and West Berlin, between 1949 and 1989, rejecting the defense argument that the German constitution's provision that "[a]n act may be punishable only if it constituted a criminal offense under the law before the act was committed," Basic Law article 103, para. 2, prohibited such prosecutions. This article, the Court found, did not apply to a case when a state (East Germany) had used its law to try to authorize clear violations of generally recognized human rights. *Id.* at 241.

c. Czech Republic, Readiness to Prosecute and Tolling: The Constitutional Court of the Czech Republic upheld the suspension of statutes of limitations for crimes not prosecuted "for political reasons incompatible with the basic principles of the legal order of a democratic state." Czech Republic Constitutional Court Judgment, 1993/12/21 – Pl. US 19/93 (1993) (translation by the Czech Republic Constitutional Court, at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=613&cHash=4b0aefbdd1833ddb38627d8bb12ea1fa). Compare its analysis with that of the Hungarian and German Constitutional Courts, described above.

> [In first rejecting a constitutional challenge to a provision, in the "Act Concerning the Lawlessness of the Communist Regime and Resistance To It," declaring unlawful the political regime that existed from 1948 to 1989, the Court said:]
>
> 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. The Czech Constitution accepts and respects the principle of legality as a part of the overall basic outline of a law-based state; positive law does not, however, bind it merely to formal legality, rather 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 and also measures the application of legal norms by these values. This means that even while there is continuity of "old laws" there is a discontinuity in values from the "old regime".
>
> This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state. . . . [N]o regime other than a democratic regime may be considered as legitimate. Any sort of monopoly on power, in and of itself, rules out the possibility of democratic legitimacy. . . .
>
> A political regime is legitimate if, on the whole, the majority of citizens accepts it. Political regimes which lack democratic substance avoid empirical verifications of legitimacy in favor of ideological arguments, primarily from the perspective of formal-rational legality. In this they are facilitated by the fact that consolidated governmental power is not just a fact of political power, but at the same time of legally organized power. . . . It cannot be asserted that every act or all conduct, so long as it does not cross over the line given by law, is legitimate, because, in this way, legality becomes a convenient substitute for an absent legitimacy.
>
> The legitimacy of a political regime cannot rest solely upon the formal legal component because the values and principles upon which a regime is built are not just of a legal, but first of all of a political nature. Those principles of the Czech Constitution, such as the sovereignty of the people, representative democracy, and a law-based state, are principles of the political organization of society. . . . Positive law proceeds from them. . . .
>
> For these reasons, on the basis of the substantive rational starting point of the Czech Constitution, the petitioners' concept, that the political regime during the years from 1948 to 1989 was legitimate, must be rejected. . . .
>
> [Turning to the provision tolling the statute of limitations:] [T]he Constitutional Court proceeds from the recognition that the constitutional law texts of the communist regime merely formulated a principle of legality that was general and equally applicable to all (or the so-called socialist legality). As early as the Constitution of 9 May (No. 150/1948 Coll.), the duty to uphold the constitution and laws (§ 30) was imposed on every citizen regardless of office or official position. . . .
>
> However, these legal norms became fictional and hollow whenever the party recognized such to be advantageous for its political interests. Its monopoly on political and governmental power and the bureaucratically centralized organization of them were constructed upon this simple expedient . . . .
>
> The authorities in charge of the protection of legality thus became instruments of the central monopoly power. . . .
>
> [The challenged statute] itself does not alter the regulation of the legal institut[ion] of the limitation of criminal prosecutions. According to § 67, para. 2 of the Criminal Act No. 140/1961 Coll., as subsequently amended, periods of time when it was not possible to bring an offender before a court due to legal impediments, as well as periods when he remained abroad, are not counted as part of the limitation period. Nor does the length of the limitation period set down in § 67, para. 1 of the Criminal Act change. . . .
>
> . . . Therefore, in assessing § 5 of Act No. 198/1993 Coll.4) we are not concerned either generally with the institute of the limitation of actions as such, or with the introduction of a new statutory impediment to the running of the limitation period, rather with the question whether the institute of the limitation of actions should be viewed as real or as fictional for a period when the infringement of legality in the entire sphere of legal life became a

component of the politically as well as governmentally protected regime of illegality. Paragraph five of Act 198/1993 Coll.4) is not a constitutive norm, rather a declaratory norm. It is merely a declaration that during a certain stretch of time and for a certain type of criminal act the limitation period could not run, as well as the reasons therefor. It is well-known that, apart from those areas of societal and individual life where the legal order from 1948 to 1989 retained a certain real significance and was based on legality, there were also spheres of the ruling class' political interest in which a condition of legal uncertainty existed and which the regime maintained as a measure of preventive self-defense and as an instrument for the manipulation of society.

The criminal behavior of persons in political and governmental positions, inspired or tolerated by the political and governmental leadership, was a component of this peculiar regime when . . . the governing class found it expedient to contravene even its own laws. The [challengers are] not at all credible in [their] arguments that the limitation period was running during that era even for this category of governmental and political criminal behavior, that carried out entirely by the state. . . . The state became . . . a guarantor of . . . their actual criminal law immunity. . . .

An indispensable component of the concept of the limitation of the right to bring a criminal prosecution is the intention, efforts and readiness on the part of the state to prosecute a criminal act. Without these prerequisites, the content of the concept is not complete, nor can the purpose of this legal institute be fulfilled. That happens only if there has been a long-term interaction of two elements: the intention and the efforts of the state to punish an offender and the ongoing danger to the offender that he may be punished, both giving a real meaning to the institute of the limitation of actions. If the state does not want to prosecute certain criminal acts or certain offenders, then the limitation of actions is pointless: in such cases, the running of the limitation period does not take place in reality and the limitation of actions, in and of itself, is fictitious. Written law is deprived of the possibility of being applied. In order for a criminal act to become statute-barred, it would be necessary for the process involved in the running of the limitation period to proceed, that is, a period of time during which the state makes efforts to criminally prosecute the offender is necessary. An action is barred at the end of the limitation period, only if at that time the ongoing efforts of the state to prosecute a criminal act remain futile. This prerequisite cannot be met for the category of politically protected offenses from 1948 until 1989. The condition of mass, state-protected illegal activities was not the consequence of individual errors, blunders, negligence or misdeeds, which would have left open some possibility for criminal prosecution, rather it was the consequence of the purposeful and collective behavior of the political and state authorities as a whole, which ruled out criminal prosecution in advance. By these means, the protection of offenders became as universal as the system of power.



. . .

This "legal certainty" of offenders is, however, a source of legal uncertainty to citizens (and vice versa). In a contest of these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state. Some other solution would mean conferring upon a totalitarian dictatorship a stamp of approval as a law-based state, a dangerous portent for the future: 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 so empowered by the state. That would mean the loss of credibility of the present law-based state, as well as the current infringement of Article 9, para. 3 of the Constitution of the Czech Republic ". . . legal norms may not be interpreted so as to justify eliminating or jeopardizing the foundations of a democratic state." . . .

. . . A requirement for a law-based state is the maintenance of a state of trust in the durability of legal rules. The perpetrators of this type of criminal activity do not have the continuity of written law in mind, rather that of unwritten practices. It would be an infringement of the continuity of written law, if the violation of law, which was committed under the protection of the state, could not even now be criminally prosecuted.

All of these individual points of view gain significance in direct proportion to the considerable extent to which this form of state protected or tolerated political criminal behavior was committed. In forced labor camps and in the so-called auxiliary technical battalions alone, over 200,000 persons were held during this period of time. As is known, nearly a quarter of a million persons have already been rehabilitated on the basis of the statute on court rehabilitation.

. . . [In many] of these cases of rehabilitation, the power apparatus' violation of its own legal principles was an important, if not the principal factor. . . .

d. Law and Morality: Problems of transitional justice, as Teitel has observed, underlie the well-known debate between H.L.A. Hart and Lon Fuller over the relationship of morality to law and between positivism and natural law:

Fuller rejected Hart's abstract formulation of the problem and instead focused on postwar Germany. The "nature of the dilemma confronted by Germany in seeking to rebuild her shattered legal institutions," he wrote, was "to restore respect for law and respect for justice. . . . [P]ainful antinomies were encountered in attempting to restore both at once. . . ." In a now well-known hypothetical, *The Problem of the Grudge Informer,* Fuller questioned whether a new government can bring a collaborator to justice if doing so would necessitate tampering with the laws in effect at the time when the acts were committed. Arguing that Hart's opposition to selective tampering elevates rule-of-law

considerations over those of substantive criminal justice, Fuller justified selective tampering to preserve the morality of the law. . . .

Teitel, *Paradoxes*, *supra* at 241–242. Consider Teitel's comment, *id.* at 241–243, on the role of judges in the GDR and Hungarian cases:

> [T]he Hungarian court interpreted the rule of law to require certainty, whereas the Berlin court interpreted it to require substantive justice. . . .
>
> The judges in the two cases . . . saw the problem as the pursuit of successor justice threatening certainty of the law. Their approach suggested that "procedural justice" has become detached from a more substantive understanding of the rule of law. Yet what is the independent content of the principle of prospectivity? How are we to make sense of a commitment to these principles separated from some other rule-of-law ideal?. . . .
>
> In a democracy, a prospectivity requirement can be viewed as a way to make operational a principle of equal justice. The Greeks viewed majority lawmaking as a way to promote equal treatment under the law. But the tyranny or unequal justice problem is not entirely remedied by democratic lawmaking: a majority may still tyrannize a minority. Here, a role for prospectivity arises: prospectivity is not an autonomous rule-of-law ideal, but rather a constraint designed to promote the rule of law understood as equal justice. . . .
>
> . . . By framing the rule of law/justice dilemmas as ex post facto problems in ordinary constitutional times, the opinions avoid addressing the larger question of the authority of a transitional judiciary to decide the extent of legal continuity of a prior regime.* What is the role of the judge and of judicial review where the regime itself, and not merely one piece of legislation, is of questionable legitimacy?. . . .

How would the judges of the Czech Court respond to Teitel's question?

**2.** *Truth and Reconciliation Commissions*. Another approach taken after transitions is the Truth and Reconciliation Commission, the most prominent of which has been the South African TRC. Such commissions are designed to expose the actions taken under the prior regime, and often focus on actions taken both by the regime and its opponents, in an effort to lead both sides to acknowledge the wrongfulness of some of their actions. Typically, those who appear before TRCs and acknowledge their wrongdoing are given some degree of immunity from prosecution and civil liability. The South African Constitutional Court upheld the constitutionality of that nation's TRC in Azanian Peoples Organization (AZAPO) v. The President of the Republic of South African, 1996 (4) SALR 671 (CC). AZAPO argued that the provisions for amnesty in South African's TRC process violated the constitutional guarantee that "justiciable disputes" would be "settled by a court of law or . . . other independent or impartial forum." The Constitutional Court held that the TRC's amnesty provisions were a justifiable limitation on that right, in light of the Constitution's Epilogue, which deals with "National Unity and Reconciliation." Without amnesty, offenders would lack an incentive to disclose the truth about the past, whereas disclosing the truth would help the process of reconciliation and reconstruction. The Court also observed that amnesty was "a crucial component" of the compromises that led to the adoption of the Constitution itself.

One concern about TRCs is that, in the hope—which might not be realized—of bringing a violent period in a nation's history to a close, they might paper over real injuries and fail to dissipate a continuing sense in the nation's population that nothing had been done to rectify injustice. For a variety of views on questions about TRCs, see Martha Minow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000).

**3.** *Some Aspects of U.S. Constitutional History*: (a) After the Revolutionary War. Those faced with drafting a constitution for the newly independent "United States" of America had the advantage that the prior regime was controlled from abroad. Once overthrown, its leaders were at some distance. Yet loyalist portions of the population with "tory" sympathies did remain. Many loyalists fled to Canada, but some remained in the United States. One of the difficulties encountered under the Articles of Confederation was the inadequacy of the national government's means to enforce obligations under the Treaty of Paris of 1783 applicable to the states. These included, for example, the provisions of Article VI of the Treaty, intended to prevent further "confiscations . . . [or] prosecutions . . . against any person or persons for, or by reason of the part which he . . . may have taken in the present war," and further providing "that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property. . . ." Treaty of Peace with Great Britain Art VI (Sept. 3 1783), reprinted in Henry Steele Commager, I DOCUMENTS OF AMERICAN HISTORY 117, 110 (7th ed. 1963). Virginia's resistance to these portions of the treaty, and its refusal to recognize property rights held through British citizens, led to two landmark Supreme Court decisions: Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (Virginia's actions of escheating property of Lord Fairfax after 1783 violated Treaty and thus title remained in Fairfax and his devisees as against claims of those whose title derived from escheat to state); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (upholding Supreme Court's jurisdiction to have reviewed question of title on appeal from Virginia state court in Fairfax's Devisee case).

(b) After the Civil War. Following the Civil War, the U.S. was again confronted with the problem of reconciling constitutional order with the misdeeds of and antipathy to those with whom it had battled, this time in the more complex situation of an unsuccessful secession effort. The southern states were governed for several years by federal military governors under "Reconstruction," whose constitutionality was placed in issue by the decision in Ex parte Milligan, discussed in more detail in Chapter VIII below. The case held that where civil courts are open, civilians cannot be tried by military tribunals, and thereby suggested that military Reconstruction might be unconstitutional. Congress essentially ignored the implications of this decision for Reconstruction, and deprived

* [Editors' Note: Note that the Hungarian and Czech constitutional courts were newly established in 1989 and 1991, respectively.]

the Supreme Court of jurisdiction to hear a challenge to Congress's power to establish military government in the south. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). In addition, Congress addressed the problem of whether to permit those involved in the Confederacy to hold office following the war. *See* U.S. Const. Amend. XIV (Sec. 3) (disqualification from federal office for those who, having "previously taken an oath. . . . to support the Constitution of the United States," took part in "insurrection or rebellion against the same, or [gave] aid or comfort to the enemies thereof."). At the same time, the Fourteenth Amendment, in Section 4, took the position that certain losses suffered by secessionists did not deserve to be and were not compensable. *See* Amend. XIV, Sec. 4 (making void and nonpayable any debt incurred in aid of the rebellion or based on claim for loss from emancipation of slaves). Questions of qualification for office, and compensation for property taken by the Union armies, came before the Supreme Court. *See* Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867) (invalidating law of Congress forbidding practice before Supreme Court unless lawyer could swear that he had never fought against the United States, as applied to a lawyer who had received a full presidential pardon); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (invalidating attempt to restrict jurisdiction of federal court so as to deprive pardoned claimants of compensation for property taken during the war). Both cases turn, at least in part, on interpretations of the President's pardon power; both uphold that power in the face of contrary or limiting legislation, and both, perhaps coincidentally, affirm a "conciliatory" approach to former "enemies."

**4.** *The Pinochet case in Chile.* The case of Augusto Pinochet of Chile raises important questions about transitional justice. The details of the "case," which involved many separate actions within Chile and in the courts of other nations, are too complex to summarize here. Among the issues that arose were these: whether immunity in domestic law for past human rights violations can be a prerequisite for moving away from authoritarian to democratic rule, whether the need for such domestic immunity can diminish if the transition to democratic rule appears to have been successful (and if so, how to evaluate the effects of constitutionalizing such an immunity), whether national actors such as Pinochet can be liable in international law for human rights violations, and whether the international legal response to authoritarian rule after it has ended can affect subsequent domestic responses to issues of transitional justice. For discussions of the Pinochet case, see Jorge Correa Sutil, *"No Victorious Army Has Ever Been Prosecuted . . .": The Unsettled Story of Transitional Justice in Chile,* in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997), which deals with many details of the case in Chile, and Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 Geo. L.J. 1057 (2004), which deals with the international human rights issues in the case.

**5.** *"Lustration."* Both Germany and the Czech Republic undertook a process of "lustration" to identify, and eliminate from important government positions, supporters of the old regime. Some advocate this as a relatively mild method (as compared with criminal prosecutions) of identifying the truth about past regimes, trying to assure that past abuses will not be repeated, and preventing wrongdoers from continuing to benefit from their wrongs by retaining their positions. Yet lustration may confront



what Stephen Holmes calls "a socially diffuse sense of complicity," in which cooperators with the prior regime were pervasive. Stephen Holmes, *The End of Decommunization*, in I TRANSITIONAL JUSTICE (Neil Kritz ed., 1995), 116, 118. As he and others point out, lustration raises other difficulties: the problem of judging people unfairly by applying today's standards to the past; the high potential for inaccuracies in the secret police files relied on to carry out lustrations of those believed to have been "collaborators"; the pain of guilt by association and incorrect accusation; the inevitable discrimination between those who are and are not "lustrated"; and the need to devote attention to the future, not to purging the past. *See* Herman Schwartz, *Lustration in Eastern Europe*, in I TRANSITIONAL JUSTICE, *supra*, at 461. Consider how these arguments for and against lustration relate to the process of moving towards a constitutional regime, and how what Carlos Santiago Nino calls "retroactive justice" may be affected by the degree of continuity between displaced and new regimes.

**6.** *Questions About Transitional Justice.* Is adherence to rules against *ex post facto* laws necessary to establish a rule of law? Is the problem one of a slippery slope, that there are no ready principles to distinguish one type of retroactive legislation from others? Is the Hungarian Constitutional Court trying to "have its cake and eat it too" (as the U.S. Court arguably did in *Marbury*) by voiding as unconstitutional a law while at the same time permitting the government to proceed against those involved in suppressing the 1956 uprising? Are the Czech and German courts doing much the same, attempting to achieve material justice while seeming to preserve the "rule of law" ban on retroactive liability?