court are perhaps the best examples: frequently there is a depth of reflection on democracy and on the relationship between law and core socio-political values that one could never find in an established western court—indeed which no western court *has ever* undertaken. One good example in the case on the constitutionality of the statute *Regarding The Lawlessness of the Communist Regime and Resistance to it*[3] which I discuss later.[4] A case less commonly analyzed is the Court's (retrospective) validation of the 1945 Benes decree, from October 1945, "On the Confiscation of Enemy Property and the Funds of National Renewal."[5] The case arose because of a challenge to the legality of the confiscation of property belonging to German citizens and Czech sympathizers the end of the Second World War. It could have been handled by a short and technical demonstration of the constitutional status of the interim government in 1945, and indeed the court did give such an answer. But far more of the judgment is dedicated to answering the plaintiffs claim, hopeless in terms of positive law, that the Benes decrees "violated the legal canons of civilized European societies and that, therefore, they must be considered not as acts of law but of force." In answering this, the court made a series of assertions which characterize the way it looks at the past, and at the foundations of a democratic legal order. In particular, the sense of the primacy of the political base for the legitimacy even of procedural law comes across clearly.

The constitutional requirement laid down in the 1920 Constitutional Charter that the Czechoslovak state have a democratic character, is rather a concept of a political science character (and which is juristically definable only with difficulty) which, however, does not mean that it is a meta-legal concept, hence not legally binding. On the contrary, the constitutional principle mandating the democratic legitimacy of the governmental system was a basic characteristic feature of the constitutional system which as a result meant that, in the 1920 Constitutional Charter of the Czechoslovak Republic, this principle *was ranked above and prior to requirements of formal, legal legitimacy.*[6]

It is, of course, possible to make the argument that any court which does indeed think that any principle can rank above "formal, legal legitimacy" does not understand the rule of law, and it is arguable the Hungarian Court, for one, would take that position. I believe, with the Czech court, that the rule of law, or the idea of a "state under law", especially in a transition period, actually requires this politically informed depth of analysis. Much is made in this ruling of the nature of human

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3 Act No 198/1993 Sb.

4 This has been very ably analyzed elsewhere by another contributor to this book, Jiri Priban, to whom I owe a great debt in my understanding of this entire topic, and whose work I admire without, necessarily, actually agreeing with it. See Jiri Priban, "Moral and Political Legislation in Constitutional Justice: A Case Study of the Czech Constitutional Court," *The Journal of East European Law*, 8:1 (2001), pp. 15–34.

5 Pl. US. 14/94—Benes Decree No. 108.

6 *Ibid.*

political responsibility, in a way which is vital for the other decisions where the rule of law has to be interpreted in relation to dealing with the past.

This decree has a more general scope and can be considered as one of the documents reflecting the age-old conflict between democracy and totalitarianism. The dividing line was drawn according to which side of the conflict a person chose to support.[7]

Similarly the very nature of human political society can be seen to be based on a human political and moral obligation:

> It is mankind's fate that human beings are placed into power relations, and this situation gives rise to their responsibility to champion the forces which will make human rights a reality. The grounds for social, political, moral, and in some cases even legal, responsibility is thus precisely the person's neglect to make a contribution in the structuring of power relations, his failure, during the struggle for power, to act in the service of right.[8]

A court which thinks in this way is unlikely to produce the sort of formalistic application of the idea of the rule of law which might please some—it is equally a court which cannot easily be accused of indifference to the deepest moral and political questions of legal legitimacy.

It must be said as a general comment that it would be odd if the jurisprudence of the CEE courts was deficient in respect for the rule of law, because of a special feature of their work. These courts all show very considerable commitment to a comparative methodology. It is important to each of them that the solutions used elsewhere to the special problems of transition states are taken into account. But equally constitutional law from a wide range of countries is cited in aid of developing the local rule—not only other CEE states and Germany, though the latter looms very large, but other western countries, for example France, and when possible common law constitutional jurisprudence from North America.[9] The exact way in which they use external jurisprudence is more controversial. Some commentators seem to think there was more of an automaticity about the process than do the leading jurists themselves. On the one hand, for example, we have the powerful and detailed analysis of the Hungarian court's debt to Germany given by Catherine Dupré which only partially coincides with the account the court's chief legal

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7 *Ibid.*

8 *Ibid.*

9 The mere fact that Germany allowed a potentially retroactive prosecution in its "Border Guards" case might lead one to wonder why the CEE countries were peculiarly thought to lack respect for the rule of law. For a good discussion of this in the context of transition law, see Manfred J. Gabriel, "Coming to Terms with the East German Border Guards Cases", *Columbia Journal of Transnational Law*, 38 (1999), pp. 375–417. A more theoretical treatment is Peter E. Quint, "The Border Guard Trials and the East German Past-Seven Arguments", *American Journal of Comparative Law* 48 (2000), pp. 541–571.

architect, László Sólyom himself gives. Sólyom is more prone to stress the differences in actual results, Dupré the reliance on German reasoning.[10] Sólyom is however also our best source for how influential foreign law in general and German law in particular has been for other CEE national constitutional courts.[11] If constitutional law, so heavily influenced by Western Europe, is deficient in respect for the rule of law, something very strange must have happened in the process of legal borrowing. From their beginnings all of these courts show every sign of working towards something that can be seen as a comparatively constructed common understanding of democratic constitutionalism.

A final important characteristic may only be noteworthy to those used to looking through common law eyes, and with an Anglo-American perspective on constitutional rights. This is the extent to which at least some of the courts take are to spin a coherent web of rights jurisprudence, rather than treating each case and each issue as largely free standing. There is a surprising degree of reference to a court's own decisions wherever analogies can be made even though at such an early stage in curial history there are seldom other cases so directly relevant that they must be brought to bear. Even where precedent like references are not made, we need to be clear that much of what shapes an interpretation of what "the rule of law" requires in one case is the use a court hopes or needs to put the concept to in some likely future application to a different question. One way to interpret the Hungarian Courts very narrow and positivistic interpretation of "legal certainty" on the retrospective punishment issue is-to note the very far from narrow and positivistic use they made of the concept in striking down social security reductions, as discussed later. In the same way the entire Czech "methodology of constitutional interpretation" in the Benes degree case is clearly connected to the approach in the earlier lustration case before the Czechoslovakian court and the later decision on retroactivity of the Czech court. Again the Hungarian court, in the eyes of its interpreters,[12] was very conscious of shaping tools of general utility in its constitutional interpretations.

I proceed by examining three sets of cases, covering different aspects of the problems of dealing with the past. Especially in the first section I pay close attention to the arguments made by the justices—these are the building blocks, both for the CEE and for the rest of Europe, of twenty-first century constitutional law, rather than the decisions themselves.

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[10] Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing 2003). Contrast the account given by Lászlo Sólyom himself, in "The Role of Constitutional Courts in the Transition to Democracy", *International Sociology*, 18:1 (2003), pp. 133–161.

[11] See also, *Bulletin on Constitutional Case Law* 1996, *op. cit.* n. 1.

[12] This is a major theme in Dupré, *op. cit.* n. 10.

3. Retroactivity, Legal Certainty and Substantive Justice

I have used, and largely continue to use, the word lustration in a rather broad sense, mainly to avoid the cumbersome but more appropriate "problems arising from dealing with the past." What is not often fully appreciated is that these cases, whether they be technically lustration, or retroactive punishment or property compensation or whatever, are about the past in two rather different ways. They are, as is obvious, about the constitutionality of attempts to deal with injustices past and present arising from the previous ruling political ideology and system. But they involve questions of the *legal* impact of the past, and indeed generally of the passing of time in a more abstract sense.[13] This is because courts have chosen, or been unable to avoid, dealing with these issues partly in terms of the doctrine of legal certainty. It is a question of some interest whether this was an avoidable route. Certainly the insistence of all the courts, but especially the Hungarians, that legal certainty is at the very core of the idea of "a state governed by law" involves a stance which in many eyes marks their doctrine out as a very "legalistic" approach. To many, "legal certainty" is the lawyer's value par excellence, and too often used by conservative judges to restrict innovations by their brethren. It is also the hallmark of a constitutional jurisprudence favoring procedural over substantive values, favoring a traditional continental European formalism. Yet to the extent that a major problem of the past regimes in central and Eastern Europe was not the imposition of cruel law but the failure to obey existing law, a common theme in the judicial arguments in these cases, it may not be possible to take a more relaxed attitude to legal certainty. Compounding this problem is the difficulty arising from the story the new regime tells about its birth. New CEE regimes vary a good deal about how much they wish to see their origins in a revolution. It is no accident that the court which most stresses legal certainty as the corner stone of a democratic constitution is the one which has most tried most ardently to tell a story about the essentially unrevolutionary and *legal* nature of the transition—Hungary. László Sólyom makes a strong defense of the Hungarian decision about retroactive punishment, which rested on making "legal certainty" a prime constitutional virtue under the aegis of rule of law. His claim is that Hungary before the revolution had been a very mild regime in which much freedom was allowed to the citizens. To mark the difference under the new regime, where "permissions" were replaced by "rights", required a firm commitment to procedural values in order to establish that the constitution now really was the sole source of legal authority.[14] If this was really the motivation the presumed contrast with the Czech Republic must be that Czechs, because they had had a rougher experience of the last days of communism could be trusted to value their new constitution highly enough to allow it to

[13] The best analyses I know of the entire nature of the problem of the past is Jiri Priban, *Dissidents of Law*, (Aldershot: Ashgate-Dartmouth 2002), especially Chap. 4.

[14] Sólyom 2003, *op. cit.* n. 10.

be interpreted in a more substantively just manner. Oddly one country with good institutional grounds for such an account, the only one whose constitutional court pre-dates transition, Poland, is much less likely to tell itself that story and to cite legal certainty as core.

The issue above all in which legal certainty has mattered most is that of retroactive punishment. One of the problems of comparative constitutional law is finding cases from two or more jurisdictions sufficiently similar to make comparison effective. We are thus very lucky that this issue has arisen in so similar a way in two countries, the Czech Republic and Hungary to be, in old lawyer language, "on all fours" with each other. We are even luckier that the two constitutional courts gave completely opposed decisions, and luckiest of all that they discussed almost exactly the same issues in coming to these radically opposed understandings of how to deal with the past under democratic constitutions. The cases both involved an attempt by the respective legislatures to make open to prosecution people who had committed crimes under the communist regime but had not been prosecuted precisely because their criminal behavior was carried out on behalf of the regime. Many such offenders were, by the early nineties, immune from prosecution because the statute of limitation written into the law at the time of the commission of their crimes, had run its course. In both cases, the statutes attempted to treat such offenders as though the clock had stopped for the whole or part of the period of the previous regime, thus giving the new regime time to deal with the cases. But also in both countries it was decided not to make all alleged criminals from that period who had not been tried, face renewed legal vulnerability. Instead only those whose prosecutions had not taken place for "political reasons" were to be vulnerable to a re-started clock.

The Hungarian President declined to promulgate the act *On the Prosecution of Serious Criminal Offences not previously prosecuted for Political Reasons*[15] and addressed a series of questions to the Constitutional court. Essentially these alleged that a recommencement of the statute of limitations "conflicted with the rule of law, an essential component of which was legal certainty", and secondly, that it was based on "overly general provisions and vague concepts", which also offended against legal certainty, and finally that distinguishing "between perpetrators of the same offence on the basis of the State's reason for prosecuting such offences" was in violation of a constitutional prohibition on arbitrariness and of the equal protection clause of Article 70/A(1) of the constitution.[16]

The Hungarian court did find the act unconstitutional on all of these grounds; in doing it developed further a doctrine it had enunciated since its beginning, that the change of system in Hungary in 1989 had been fully legal by the predecessor

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[15] Act (IV/1991).

[16] László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press 2000), pp. 214–216.

system's own law, and that this very fact imposes an even stronger obligation to obey the new constitution than might otherwise have been the case.[17]

The change of system has been carried out on the basis of legality. The principle of legality imposes on the state under the rule of law the requirement that legal regulations regarding the legal system itself should be abided by unconditionally. The politically revolutionary changes adopted by the Constitution and all the new fundamental laws were enacted, in full compliance with the old legal system's procedural laws on legislation, thereby gaining their binding force. The old law retained its validity. With respect to its validity there is no distinction between "pre-Constitution" and "post-constitution" law.[18]

This sense of legal continuity is somehow or other found compatible with a clear sense of how the new system differ from the past—"The Republic of Hungary is an independent democratic state under the rule of law"—is taken to have "conferred on the State its law and the political system a new quality, fundamentally different from that of the previous regime." But this difference is seen as potentially fragile, requiring great purity of legal purpose to preserve it:

> That Hungary is a state under the rule of law is both a statement of fact and a statement of policy. A state under the rule of law becomes a reality when the Constitution is truly and unconditionally given effect. For the legal system the change of system means, and the change of the legal system is possible only in that sense, that the whole body of law must be brought into harmony—and new legislation kept in harmony—with the new Constitution. Not only must the legal provisions and the operation of state organs comply strictly with the constitution but the constitution's values and its conceptual culture must permeate the whole of society. This is the rule of law, and this is how the Constitution becomes a reality. The realization of the rule of law is a continuous process.[19]

This is, in effect, a highly legal equivalent to the oft heard cry from those inside CEE countries who are opposed to lustration that "We are not like them!" The need to be perfectly consistent in following the rule of law arises simultaneously from the fact that the old system was not law abiding, and that the new system has its origin in abiding by the old procedural laws. It does not follow from any of this, of course, that legal certainty is quite so crucial an element of the rule of law, but this second move is stated more than justified. Having defined legal certainty as requiring, *inter alia*, the protection of vested rights, and non-interference with legal relations already executed, the primacy of legal certainty is made almost tautologous—and a very powerful tautology at that:

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[17] Though Priban makes the point that the continuity of the pre and post transition Hungarian system is largely a legal fiction, *op. cit.* n. 4.

[18] Sólyom, *op. cit.* n. 16, p. 200.

[19] *Ibid*, p. 219

> . . . individual legal relations and legal facts become independent of the statutory sources from which they emerge and do not automatically share their fate. Were this otherwise, a change in the law would necessitate in every instance a review of the whole body of legal relations. Thus, from the principle of legal certainty, it follows that already executed or concluded legal relations cannot be altered constitutionally by enactment of a law or by invalidation of a law by either the legislature or the Constitutional Court.[20]

Whether the Court really believes the last sentence, there is no doubt left about the role of legal certainty in constitutional definitions of the rule of law. Citing an earlier case,[21] the court insists "the consequences of the unconstitutionality of a law must be evaluated primarily with reference to their impact on legal certainty."[22]

I cannot stop at this point if I am fully to draw out the nature of this decision, because the Court was fully aware of the pragmatic arguments from the epical nature of the pre-transition crimes, and develops here an almost chillingly formalistic view of the constitution which occurs elsewhere as well, especially in the economic compensation cases. Shortly after these statements, they say quite bluntly that "the unjust result of legal relations does not constitute an argument against the principle of legal certainty"; this develops into "the requirement of the rule of law as to substantive justice may be attained within the institutions and guarantees ensuring legal certainty. The Constitution does not and cannot confer right for substantive justice", and finally:

> The basic guarantees of the rule of law cannot be set aside by reference to historical situations and to justice as a requirement of the state under the rule of law. A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice.[23]

The arguments go on like this—further quotation though hard to resist would add very little to the point. Throughout, an intensely fierce commitment to procedural principle is shown, often in language making the demands of this principle greater than the justices themselves can really have believed. We are told that legal guarantees can *never* be denied by a state under the rule of law, that criminal law

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20 *Ibid*, p. 220.

21 The earlier case was Decision of 10/1992.

22 This case occurred after the first two "compensation" cases [Sólyom, *op. cit.* n. 16, pp. 108, 151] in which past legal relationships had been protected and before the Social Security case [Sólyom, *op. cit.* n. 16, p. 322] where legal certainty was used to strike down benefit reductions. As such one can see the way in which a concept can take on an unavoidable constitutional importance in some contexts, beyond the point, perhaps, the court might wish because of its importance as a tool in other contexts.

23 Sólyom, *op. cit.* n. 16, p. 221.

constitutional provisions cannot even be restricted or suspended in "a state of national crisis, a state of emergency or a state of danger." There is real fear of the risk of law being misused permeating the judgment—while admitting that the criminal law is not merely an instrument but "protects and embodies values", it turns out that the values it protects are "the principles and guarantees of constitutional criminal law." More importantly, "though criminal law protects values, as a guarantee of freedom it cannot become an instrument for moral purges in the process of protecting values." Quite simply, under the law in place at the time, ruthless criminals killing people to serve the political masters of the state were entitled to become free of risk of prosecution a set number of years after their crime, and the constitution of the new republic would be put at risk denying them their entitlement. It must be stressed that this supremacy of legal certainty has been extensively used by the Hungarian court, often in quite brave ways—it was the basis, for example, on which they struck down important budgetary policies which trimmed too far, in their eyes, legitimate expectations of welfare payments. It may be for this reason that the court refused to look at all at the logic of limitation rules, and consider whether the values they sought to protect were in fact the sort that legal certainty is actually intended to promote. Statutes of limitations are rather low on the scale of basic human rights—they vary enormously from jurisdiction to jurisdiction, and have their main justification from the fact that a very long delayed criminal trial may produce evidentiary problems. It would have been an easy task to support the challenged legislation on the grounds that the normal reasons for such limitations did not apply, and that evidentiary questions could always be handled by trial judges. But to open up the question of why and when legal certainty needed to be seen as a high constitutional value would have weakened the court's ability to use it in other contexts.

It might not be worth spending as much time as I have in showing the nature of the thought processes in this judgment, which is, in its own way, a flawless development of a purely procedural orientation to constitutional law, but for one fact. The fact is that another court in another country with a similar history looked at the same issue and came out totally the other direction. But before discussing the Czech case, a further chapter in the Hungarian story is worth mentioning, because it under scores the formalism of the court. A year later the parliament, still determined to wield some substantive justice in this area took another and highly creative tack. It attempted to pass an act *On the Procedure of Certain Criminal Offences committed during the 1956 October Revolution and Freedom Struggle* which got round the statute of limitations problem by applying international laws against war crimes and crimes against humanity, which by a 1968 agreement to which Hungary was signatory, had no statute of limitations. This act was also found to be unconstitutional, largely because of bad draftsmanship. But the court was so eager to show that Hungary now *had* found a way to proceed against some of the worse offenders of the past regime in a way which was procedurally proper that it not only set out how the act could be remedied, but went even further and essentially

announced that the relevant international law had direct effect in Hungary and did not need statutory support! What this does to legal certainty in a substantive sense is anyone's guess.[24] Nonetheless the decision, based on a very strong interpretation of the constitution's recognition of the supremacy and automatic incorporation of international law, demonstrates the typical openness of the new democracies' constitutional judiciary to foreign and international jurisprudence. It would certainly have been possible to avoid granting direct effect which, given the failure of the parliament to draft adequately, would have continued the immunity of communist era criminals.[25]

4. Hard Lustration

The contrast between the Czech and Hungarian approaches—as in general with lustration issues—is enormous. To start with, the context within which the Czech case arises is vastly different. The issue of extending the date at which prosecutions become time barred was buried in a very strange statute, probably unique amongst CEE nations. The statute itself, *Regarding The Lawlessness of the Communist Regime and Resistance to it*,[26] was primarily concerned with making a statement about collective moral and political guilt for the past, and condemning the Communist Party and its members. By the terms of the act itself most of the language, even when cast in pseudo legal terms of criminal law, was not intended to create any criminal liability, though it was attacked as doing just this, as well as for many other things. However, the Court used its answer to objections about the general unconstitutionality of such a statement to set a context within which it became much easier to uphold the really controversial aspect, which was the prolongation of the prosecution period for politically protected crime. So completely different is the Czech view on legal continuity that one wonders whether it was in part written with an eye to the Hungarian case which had been decided a year earlier—though there is no reference at all to it in the Court's opinion.[27]

This section of the opinion requires explication because it is at least as important in helping us draw conclusions about our topic as the more legally concrete later section. The group of 41 Czech deputies who brought the action claimed that the statement in s.2 of the act whereby the previous regime was declared illegitimate

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[24] Described, with his own commentary, in Sólyom, *ibid.*, pp. 281–283.

[25] One interpretation of why the court decided the second version of the limitations issue this way is that throughout the 1990s it was involved in a negotiation process with the Hungarian parliament so that it usually gave them part of what they wanted in return for the parliament accepting their authority by demanding less a second time around. See Kim Lane Scheppele, "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe," *International Sociology* 18:1(2003), pp. 219–238.

[26] Act No 198/1993 Sb.

[27] Pl US. 19/93, taken from the Court's Website: http://www.concourt.cz

must be unconstitutional because the new republic was a successor state in which inherited statutes, rules and other legal obligations remain in force. As the court put the claimant's case "this 'substantive continuity of domestic and international rights' is . . . an indication of the legitimacy of the governmental and political regime during the period 1948–1989." In fact the claimants argument in part could have been taken directly from the Hungarian judgment:

> If the statutory statement concerning the illegitimacy of the government and political system during the period . . . were correct and remained in effect, then the legal acts adopted during the stated period would no longer have been valid as of 1st August 1993; naturally this did not occur, for legal certainty is one of the basic characteristics of a law-based state, and that certainty depends on the constancy of legally expressed principles in particular areas of the law, on the constancy of legal relations.[28]

The Czech court clearly had a problem in answering this, but it was a problem they seem to have relished, and the answer, which depends on a trenchant rejection of some forms of legal formalism, has real implications for constitutional law throughout Europe. The Court asserts that the positivistic legal tradition that pre-dated the early development of post 1918 democracies in Central Europe, though it had strengthened legal certainty and the stability of laws had, in its later development "many times exposed its weaknesses. Constitutions enacted on this basis are neutral with regard to values." They argue such positivism lead directly to Hitler's ability to claim legality for his destruction of Weimar. They cast early post 1945 Czechoslovak history as the victim of such legal positivism in a resounding paragraph:

> After the war this legalistic conception of political legitimacy made it possible for Klement Gottwald to "fill up old casks with new wine." Then in 1948 he was able, by the formal observance of constitutional procedures to "legitimate" the February Putsch. In the face of injustice, the principle that "law is law" revealed itself to be powerless. Consciousness of the fact that injustice is still injustice, even though it is wrapped in the cloak of law, was reflected in the post-war German Constitution and, at the present time, in the Constitution of the Czech republic.[29]

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[28] *Ibid.*

[29] *Ibid*. The fact that Germany has allowed a similar prolongation of the statue of limitations for East German alleged politically protected criminals is important later in their argument. But it is noteworthy that the Hungarian court, usually close to German thinking does not cite it at all, whereas the Czech court gives this distinctly non-positivistic reading to the German constitution. An extremely interesting account of the German situation, which also suggests some ways of squaring the circle between the Hungarian and Czech positions is James McAdams, *Judging the Past in Unified Germany*, (Cambridge: CUP 2001).

But note the way, as we saw earlier, this historically informed style of argument was used to legitimize the Benes decrees, which occurred in the brief period between Nazi and Communist regimes. It is certainly a fine line one walks if one is to pick and choose between substantive and procedural constitutional legitimacy. The court goes on to spell out the way that the Czech constitution is not value neutral, is not "merely a demarcation of institutions and processes", but is suffused with the core values of democracy which must be used in legal interpretation. It becomes an important interpretative point—one initially developed earlier in the first lustration case as I shall go on to discuss. Here the point is made in words that require full quotation:

> The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception 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 discontinuity in values from the "old regime."*[30]

In other words, the old laws must be interpreted via the new values, and not as a value free procedural system. What this ends up as is the idea that in order actually to be faithful to the values of a modern democratic state something akin, in the terminology of commercial law, to a "piercing of the corporate veil" is required. Ironically it is the specifically Hungarian stress, borrowed from the Italians, on looking at the "living law", though here the living law of the past, that is needed and used. This has to be the case because, as both the complainant deputies here and the Hungarian court point out, mere anarchy would follow from a generalized removal of legal certainty. This becomes clearer when the Czech court turns to the issue of stopping the clock on the statute of limitations for the whole duration of the previous regime. Doing so in general is justified by the now statutory illegitimacy of the past, but somehow it is necessary to show that no real violence is done to legal certainty, but rather, a very ambitious aim, legal certainty actually *requires* such a move. The argument they use is essentially one of empirical common sense. No one really believes that the state had any intention of prosecuting its own agents for illegal behavior—"Political power founded on violence should, in principle, take care not to rid itself of those who carrying out its violence." They then define the actual legal condition for a statute of limitations—it depends on the state actually wishing and trying to prosecute. Without this the concept of limitation is empty and the very purpose of the legal institution is beyond fulfillment. A statute of limitations can only exist:

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[30] Pl US. 19/93.