Retribution and Reparation in the Transition to Democracy

The contributions in this volume offer a comprehensive analysis of transitional justice from 1945 to the present. They focus on retribution against the leaders and agents of autocratic regimes preceding democratic transitions and on reparation to victims. Part I contains general theoretical discussions of retribution and reparation. The essays in Part II survey transitional justice in the wake of World War II, covering Austria, Belgium, Denmark, France, Germany, Hungary, the Netherlands, and Norway. In Part III, the contributors discuss more recent transitions in Argentina, Chile, Eastern Europe, the former German Democratic Republic, and South Africa, with a chapter on the reparation of injustice in some of these transitions. The editor provides a general introduction, a brief introduction to each part, and a conclusion that looks beyond regime transitions to broader issues of rectifying historical injustice.

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Preface and Acknowledgments

Most of the chapters in this volume originated in a seminar on retroactive justice (the now-standard term *transitional justice* had not yet taken hold) held at Columbia University in 1998–99. To improve the balance of the volume, two additional contributions have been included. The chapter by David Cohen on transitional justice in Germany after 1945 was specially written for this volume. To cover the trials and purges that took place in France after the Liberation in 1944, there was no better solution than to translate the most up-to-date essay by the foremost specialist on the topic, Henry Rousso. My own editorial contributions have been kept relatively brief, to reduce the overlap with my monograph *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004). Because I thought the present book should also be able to stand on its own, however, some redundancy was inevitable.

My thanks go first to the Mellon Foundation for its generous support of the Columbia seminar and of other related activities. I am also grateful to the Research Council of Norway for offering a subvention to cover the costs of translating Henry Rousso's essay and other publishing expenses. I would also like to thank the anonymous referees of Cambridge University Press, who pointed out the need for the chapters on Germany and France, as well as making a number of other valuable comments. Monika Nalepa offered superb research assistance. Finally, I would like to offer thanks to my collaborator over four decades, Hans Fredrik Dahl, who joined me in this effort as in so many others.

J.E.
Villiers-Nonains,
September 2005

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Introduction

Jon Elster

After the fall of Baghdad in April 2003, the issues of the "de-Baathification" of Iraq and of compensation to the victims of the previous regime were immediately raised. Historical analogies with denazification and decommunization abounded. For observers and actors who want to learn from the past, and to avoid the mistakes of the past, the contributions to the present volume should provide useful food for thought. As the Iraqi regime was hardly the last surviving dictatorship, the lessons may remain useful in the indefinite future.

In a change of political regime, incoming leaders often want to punish or neutralize agents and leaders of the previous regime. In a transition to an authoritarian or totalitarian system, these measures are usually taken by executive fiat. The purges of the German judiciary after 1933 (Müller 1991, ch. 8) or of German schoolteachers in the Soviet occupational zone after 1945 (Welsh 1991) were not constrained by democracy or the rule of law. After transitions to democracy *from* an authoritarian or totalitarian regime, however, the new leaders usually want to demarcate themselves from the practices of their predecessors. Sometimes, to be sure, they will claim that their former oppressors have no grounds for complaining if they are treated by their own lawless procedures (for an example see Woller 1996, pp. 140–41). More frequently, however, the return to democracy is accompanied by the desire to see transitional justice done in an orderly manner, to prove that "We are not like them," as Vaclav Havel said. In practice, nevertheless, this desire may yield to the even stronger desire for punishment of the obviously guilty. This tension is so common as to be almost constitutive of transitional justice.

Retribution against wrongdoers, including dismissal of compromised officials from public service, is one aspect of transitional justice. The other main aspect is reparation to victims – restitution of property, compensation for suffering, and more symbolic measures such as the cancellation of unjust legal convictions. In the present volume, most of the contributors focus on the retributive component. Issues of reparation and compensation are the topic of the chapter by Tyler Cowen, who addresses the conceptual problems inherent in the

idea of "undoing past wrongs," and of Chapter 12, in which Aviezer Tucker offers an overview of measures of rectification in recent episodes of transitional justice. Wrongdoers and victims do not, however, exhaust the set of agents of transitional justice. One might also want to address the moral and legal status of those who, while not themselves wrongdoers, were *beneficiaries of wrongdoing* (Mamdani 1996). Other relevant categories are *resisters* to wrongdoing, *helpers* of victims of wrongdoing, and *neutrals* who did not engage in, benefit from, or oppose wrongdoings. By and large, the fate of these individuals after the transition has not been systematically studied, an exception being the survey of resisters in Lagrou (2000). The recent negotiations involving Swiss banks, Italian insurance companies, and German firms that benefited from Nazi wrongdoings (Authers and Wolffe 2002, Eizenstat 2003) involved institutions rather than individuals.

Retribution and reparation are knowledge-based processes, since wrongdoers and victims have to be identified on the basis of evidence. The gathering of evidence may also become an end in itself, as in some of the recent truth commissions (Hayner 2001) that have investigated human rights violations carried out under authoritarian or totalitarian regimes. (I write *under* rather than *by*, since several of these commission have also examined human rights violations carried out by opponents to the regime.) With the exception of the South African Truth and Reconciliation Commission discussed by Alex Boraine in his chapter of this book, these commissions have usually not identified any wrongdoers. In some cases, though, the names of perpetrators have been leaked to newspapers, exposing them to informal social ostracism. In some countries, notably Chile (see Chapter 12) and South Africa, the findings of the truth commissions have provided the knowledge base for the reparation process.

THE UNIVERSE OF CASES

The present volume focuses on *transitions to democracy in the twentieth century*. Although this choice makes for greater homogeneity of cases, it entails the cost of ignoring otherwise interesting episodes, such as the English and French Restorations or the two instances of transitional justice that occurred after the overthrow of the Athenian oligarchs in 411 and then in 403 B.C. For a discussion of these episodes, the reader is referred to my 2004 monograph (Elster 2004) and to some brief comments in the Conclusion to the present volume.

The twentieth century offered some thirty-odd cases of transitional justice, in five geographical and chronological clusters: Western Europe and Japan after 1945, Southern Europe around 1975, Latin America in the 1980s, Eastern Europe after 1989, and Africa from 1979 to 1994. The chapters in Part II of the present volume discuss transitional justice after 1945 in Austria, Belgium, Denmark, France, Germany, Hungary, the Netherlands, and Norway. While broad, the coverage is not complete. For the purges and trials in Italy, the reader is referred to the outstanding study by Woller (1996). For the Japanese war trials and purges, Taylor (1981), Harries and Harries (1987), Dower (1999), Cohen

(1999), and Minear (2001) provide comprehensive analysis and criticism. For other cases not discussed in the present volume – and for several of those that are covered herein – Kritz (1995) is an invaluable sourcebook.

The next cluster of transitions to democracy occurred in the mid-1970s, with the fall of the dictatorships in Portugal, Greece, and Spain. Whereas the 1945 transitions all stemmed from the same cause, the end of World War II, the temporal coincidence of these South European transitions seems to have been an accident. From a comparative point of view, the Spanish transition (Aguilar 2001) is the most interesting. Spain offers in fact the only example in the universe of cases of a consensual decision to *abstain* from any form of transitional justice. Although often held up as a model, notably in the Polish and Hungarian transitions after 1989, the Spanish example did not find any imitators. Other countries have refrained from purges and trials through self-amnesties granted by a dictatorial regime before the transition, as in Brazil and Chile, as part of a negotiated package with the incoming democratic leaders, as in Uruguay, or as a condition imposed by a third party, as in Rhodesia.

A third wave of transitional justice, owing to a domino effect beginning in Poland and ending in Bulgaria, occurred in a number of ex-Communist countries after 1989. In Chapter 9, Aviezer Tucker offers a survey of trials and purges in East and Central Europe. He does not deal with the former German Democratic Republic (GDR), which is the topic of the contribution by Claus Offe and Ulrike Poppe. Except for the Baltic states, there has been no transitional justice in the former USSR – not because of any consensual, negotiated, or imposed decision to abstain, but because of the lack of an organized demand for justice. The closest analogue to decommunization in the USSR may have been the earlier process of de-Stalinization (Smith 1995, Adler 2001). It is noteworthy that among the countries subject to decommunization in the 1990s, several had already been subject to denazification after 1945. As Offe and Poppe note, after 1990 some Germans argued that "this time we are going to do it right," as if a rigorous reckoning with communism could redeem the laxist practices after 1945. In Poland, the newly created Institute for National Remembrance is authorized to investigate crimes committed under Nazi as well as under Communist rule.

In Latin America, the 1980s saw transitions to democracy in Argentina, Bolivia, Brazil, Chile, and Uruguay. Members of the military dictatorship were put on trial in Argentina (Chapter 10) and Bolivia (Mayorga 1997). Reparations were initiated in Argentina, Brazil, Chile, and Uruguay. In the last three countries, therefore, it might appear as if compensations were paid to victims of perpetratorless crimes. In Argentina, too, the number of convicted officers was a small fraction of the actual wrongdoers, most of whom benefited from the "Due Obedience" law that the military extracted from President Alfonisín in 1987. In both Chile and Argentina, however, there are recent signs that the amnesties and self-amnesties might be canceled, whence the appropriateness of the title of Acuña's chapter, "Transitional Justice in Argentina and Chile: A Never-Ending Story?"

On the African continent, the most important cases of transitional justice are those of Ethiopia (Haile 2000) and South Africa (Chapter 13). The former is an extreme case of "protracted transitional justice." The previous (Dergue) regime fell in 1991; trials began in 1994 and were still continuing in 2005. In 2001, the special prosecutor announced that they would end in 2004. In South Africa, the Truth and Reconciliation Commission created incentives for wrongdoers to come forward if they could show that their acts had been motivated by political goals rather than by malice or desire for gain (Chapter 13). A similar procedure was adopted in Poland (Chapter 9), where candidates for high elective or appointive office have to declare whether they were "conscious collaborators" between 1945 and 1990. If they admit it, no further action is taken, except that the record is made public. Voters or hierarchical superiors then decide how to respond to the information. Candidates who falsely deny that they collaborated are banned from public office for ten years. An early precedent of this "incentive-based mechanism" (Nalepa 2003) was a proposal (not implemented) made in August 1944 by Mauro Scoccimarro, the Communist responsible for purges in the Italian administration. He proposed that all officials above a certain level should be retired with generous pensions, with the possibility of appeal. If they won the appeal, they would be reinstated; if they lost, they would lose not only their job but their pension (Woller 1996, pp. 191–92).

CLASSIFYING THE CASES

In classifying these episodes we can pay attention to the nature and duration of the autocratic regime, and to the nature and duration of the process of transitional justice itself. The regime as well as the process may be endogenous or exogenous. They may also be of short or of long duration. The place of a given episode of transitional justice on these dimensions can affect the political and emotional dynamics in a number of ways.

The autocratic regime that preceded the transition to democracy may either have originated within the nation itself or been imposed by a foreign power. The process of transitional justice may either be initiated by the new regime or carried out under the supervision of a foreign power. Combining the two dichotomies, we may classify the episodes as follows:

Some cases are ambiguous or may require some comments:

- Italy and Austria might have a place in all four cells of Table 1.1. In Italy, the Germans imposed the harsh and detested Salò regime after the fall of Mussolini. Although the Anschluss of Austria was technically an invasion, the ensuing regime had strong national support. In both countries, purges and trials were carried out by the allied military government as well as by the national one (see Deák's chapter).
- Over time, transitional justice in Germany after 1945 became increasingly endogenous and, as a result, increasingly lenient.

TABLE 1.1

	Endogenous Transitional Justice	**Exogenous Transitional Justice**
Endogenous autocratic regime	Latin America South Africa Bulgaria Romania Ethiopia Ethiopia Hungary 1945 Greece Italy Spain	Germany 1945 Japan Austria Rhodesia
Endogenous autocratic regime	Poland Hungary 1989 Czechoslovakia Countries occupied by Germany during World War II	Former GDR

- Bulgaria was unlike other East European countries in that the Soviets were not seen as an occupying force, because of the positive image of Russia as having liberated the country from "the Turkish yoke" in 1878.
- Romania, too, was special. Once a faithful member of the Communist bloc, the country later gained full independence.
- Transitional justice for the former East Germany is the most complex case. The transition itself was endogenous: the regime collapsed from within. The reunification treaty, too, was a voluntary agreement between two sovereign states. The former East Germany, although not coextensive with the regime that was to judge it, was at least included in it. Yet in practice, the former East Germans were judged by former West Germans and within the legal and constitutional framework that unified Germany inherited from West Germany. In one sense, nevertheless, the trials were endogenous, since the Unification treaty laid down that any acts to be tried had to be defined as crimes according to the penal codes of both countries.

Pretransition regimes as well as the process of transitional justice under the new regime may be of variable duration. Consider first the pre-transitional regime (or regimes). At one extreme, the USSR endured for almost 75 years. At the other extreme, the puppet Nazi governments in World War II lasted for 5 years. Intermediate cases are Mexico (70 years), GDR (57 years), the apartheid regime in South Africa (45 years), Portugal (44 years), Eastern Europe (ca. 40 years), Spain (40 years), Chile (26 years), France before the First Restoration (25 years), Italy (23 years), Brazil (20 years), Bolivia (18 years), Ethiopia (17 years)

Uruguay (12 years), West Germany (12 years), England before the Restoration (11 years), Argentina (7 years), and Greece (7 years).

Consider next the temporal dimension of transitional justice itself. In *immediate transitional justice*, proceedings begin shortly after the transition and come to an end within, say, five years. There are three contrasting cases: (i) In *protracted transitional justice* the process starts up immediately but then goes on for a long time until the issues are resolved. This pattern is found in Bolivia, Ethiopia, Germany after 1945, and most post-Communist countries. (ii) In *second-wave transitional justice* we can distinguish three stages. After the processes are initiated and completed in the immediate aftermath of the transition, there is a latency period during which no action is taken, until, decades later, new proceedings are undertaken (Rousso 1990). The Papon and Bouvier trials in France, as well as the recent process of compensating Jewish bank account holders and slave workers, fall in this category. The reopening of cases against Argentinean officers also provides an example. It is not fanciful to imagine that South Africa may eventually offer another. (iii) In *postponed transitional justice*, the *first* actions are undertaken (say) ten years or more after the transition. The prosecution of Pinochet is a paradigmatic example.

DEPENDENT VARIABLES

The contributors to the present volume are mostly social scientists and historians rather than lawyers, hence their approach tends to be explanatory rather than normative. We may try, therefore, to identify the main dependent variables or explananda of transitional justice, as well as the main independent or explanatory variables considered later.

The dependent variables may be conceptualized as a series of *decisions*. The most fundamental is the decision whether to address the wrongdoings of the past at all, or rather draw a "thick line" through the past. If the former option is chosen, the new regime may weigh the options of *justice* or *truth*. The latter alternative includes not only establishing truth commissions, but also giving individuals access to their security files, so that they can learn what they were suspected of and even who informed against them. Prospective employers, too, may have the right to inspect the file of an individual before he or she is hired. Hence, as Offe and Poppe argue in their chapter, the German Gauck agency "can best be described as a hybrid of a public archive (distributing information) and an investigative agency triggering punishment." The extreme solution is to put the information in the public domain. Thus on March 20, 2003, a list identifying seventy-five thousand spies and informers who had denounced friends and neighbors to the Communist regime was posted on the Web site of the Czech Ministry of the Interior and was also made available in print. In February 2005, a Polish journalist obtained a list of 240,000 alleged collaborators that was subsequently leaked onto the Internet. In Argentina, Brazil, and Chile, the lack or low level of prosecution was to some extent offset by the publication of

the names of wrongdoers. In Brazil, for instance, the Archdiocese of Sao Paulo published a list of 444 torturers in 1985.

Once a regime decides to move toward retributive or reparative justice, it has to decide which individuals to target and how to deal with them. The task of retribution has two aspects: criminal trials (including plea bargaining) and administrative sanctions. There is great variation in the ways new democracies address these questions. In Latin America and South Africa, a handful at most of those who ordered, facilitated, or carried out human rights violations have been brought to trial. There have essentially not been any purges in the administrations. At the other extreme, countries that had been occupied by Germany during World War II imposed some kind of legal punishment on large number of individuals, up to 2 percent of the population (Norway). Extensive purges of the administration were also carried out. In France, for instance, about 10 percent of the judges were sanctioned in one way or another, half of them by discharge from the service (Bancaud 2003, p. 191).

Germany after 1945 and the ex-Communist countries fall somewhere in the middle. Although the number of executed death penalties (per million of population) in Germany after 1945 exceeded that of any German-occupied country, the percentage of the citizens who were tried and convicted was quite small (see Cohen's chapter). In West Germany, the purging of the administration was an utter failure; the Nazi judiciary, for instance, was preserved intact (Müller 1991). In East Germany, trials and purges were more extensive but also more ambiguous, as they tended to target anti-Communists as well as Nazis. In the former Communist countries, there have been very few convictions of major political or military figures, and only a sprinkling of convictions of lower-level officials. The statistic cited by Offe and Poppe in their chapter on transitional justice in the former GDR is stunning: "As of March 31, 1999, 22,765 investigations were opened, leading to the opening of just 565 criminal court cases. Verdicts were reached in 211 cases, of which just 20 cases resulted in actual prison sentences." Here, at least, purges were more effective. By 1992, for instance, fully 50 percent of the former GDR judges and prosecutors had lost their jobs (Offe 1997, p. 95). Other countries in the region, however, saw minimal de facto changes in the administration, in spite of seemingly harsh legislation (see Tucker's Chapter 9).

A further issue concerns the public measures taken to reintegrate and resocialize convicted wrongdoers once they had served their sentence. In his chapter, Huyse makes a pioneering contribution to this often-neglected question. His discussion concerns Belgium and the Netherlands, where collaborators were in a minority and had to confront the hostility of the population at large. In Germany, by contrast, convicted war criminals did not suffer from much opprobrium. In fact, "The fewer the number of war criminals sitting in Allied prisons, the more uncompromising the solidarity being expressed for them" (Frei 2002, p. 207). To my knowledge, there has been no systematic comparative study of the long-term consequences of transitional justice, be it on the wrongdoers themselves or on their children. Anecdotal evidence suggests that the informal

social ostracism to which they were exposed could be deeply hurtful. As Dahl asserts at the end of his chapter, the bitterness felt by the children of Nazi collaborators has led them to demand compensation for the way in which, for no good reasons, they were treated by "good Norwegians" after the war. I suspect that as in many similar cases, those most active in persecuting them had themselves been passive at best during the occupation.

The patterns of reparation do not correspond in any direct way to patterns of retribution. In Latin America, victims of the dictatorships have received substantial compensations even when the agents of the regime have gone free. West Germany, too, has a better, although flawed (Pross 1998), record with regard to reparation than to retribution. It is tempting to see reparations in these cases as "blood money," analogous to the ancient institution of Wergeld. Whether or not these reparations can actually be *explained* as substitutes for retribution, some recipients have viewed them as such and rejected them for that reason. In German-occupied countries, "Aryanized" Jewish properties were returned, or compensation paid when the assets had been liquidated. In South Africa, the mandate of the Truth and Reconciliation Commission had a narrow definition of victimhood, excluding heirs of those who lost their land in the Land Act of 1913 or those who were subject to forcible resettlements during the apartheid era. The only form of suffering that counted as grounds for compensation was that caused by direct physical mistreatment. On April 17, 2003, President Thabo Mbeki announced that the government will pay approximately $85 million in reparations to more than nineteen thousand apartheid victims who testified before the Truth and Reconciliation Commission. In the former Communist countries, restitution of or compensation for confiscated property has taken place at a vast scale (Pogany 1997, Quint 1997). Reparation has also been offered for physical suffering; thus by 1996 Poland had paid out about $125 million to former political prisoners and their heirs.

Procedural choices also enter among the dependent variables. Virtually without exception, trials and purges after the transition to democracy have deviated from normal legal and administrative procedures. Deviations include the use of special courts, political screening of judges and jurors, collective guilt, presumption of guilt (inversion of the burden of proof), lack of adversarial procedures and appeal mechanisms, extension of statutes of limitation, and, especially, retroactive legislation. Often, the retroactive laws have been disguised in various ways. They were frankly acknowledged in Austria, Denmark, and Holland after 1945 but denied, by various implausible subterfuges, in Belgium, France, Italy, and Norway after 1945 and in Czechoslovakia and the former GDR after 1989.

INDEPENDENT VARIABLES

To explain the variation in these patterns of retribution and reparation, we may first appeal to the mode of transition. Broadly speaking, we may distinguish among three main types of transition to democracy: by *negotiation* between an

outgoing and an incoming elite, by the military *defeat* of the autocratic regime, and by its implosion or *collapse*. In addition, there is the unique Chilean case of uncoerced *abdication* from power.

Among the cases discussed in the present volume, the clearest cases of negotiated transitions to democracy are Argentina, Poland, and South Africa. In Argentina, the outgoing military leaders used their control over the armed forces as bargaining leverage to ensure that retribution would be limited in scope (see Acuña's chapter). In Poland, the negotiated agreement did not include the creation of a fully democratic regime. As the Communist leaders (mistakenly) thought the party would gain enough seats in the first partially free elections to stay in power, they did not seek guarantees against prosecution. Observers and participants alike, however, seem to agree that there was a tacit agreement that the Communist elite would be spared (see, for instance, Osiatynski 1991, p. 841). Although the first post-transition government respected this implicit promise, its successors did not. Unlike the Argentinean military, the Communist leaders could not enforce it by a threat of violence. Decommunization in Poland is still proceeding today. In South Africa, the reasons why the amnesty negotiated by the outgoing white elites has so far been respected are their control over the economic resources of the country and the fear that extensive trials and land reform might trigger a "Zimbabwe" scenario.

Although the Polish transition involved genuine negotiations, the regime changes in other Communist countries increasingly approached the collapse mode. In Hungary, what began as genuine bargaining between the regime and the opposition ended with the virtually complete victory of the latter. Although no written documents prove the existence of a gentleman's agreement to spare the Communist leaders from prosecution, many concordant statements suggest that some kind of deal was struck (e.g., Halmai and Scheppele 1997) and largely respected. In East Germany and Czechoslovakia, where the transitions were even closer to the collapse end of the continuum, no deals were made. These regimes were also notable for deploying harsh repressive measures up to the very end of their existence. Moreover, unlike what happened in Hungary and Poland, the ex-Communist parties never got a majority in parliament that they could use to limit the extent of transitional justice. We might expect, therefore, more extensive retributive measures in these countries. Although this expectation is to some extent fulfilled, the level of *successful* trials and purges was nevertheless low. I return to this puzzle later.

In Germany and German-occupied countries, the former elites had no military and little political leverage that they could use to protect themselves from prosecution. In Germany itself, former Nazis did with considerable success lobby the major and especially the minor political parties to halt denazification, enact amnesty laws, and commute the sentences of war criminals (Frei 2002). In German-occupied countries, the collaborators were by and large powerless. If some of them were treated leniently, it had more to with raison d'état than with their bargaining or lobbying power. The diametrically opposed case is that of the Chilean dictatorship, which stepped down after having first enacted a

self-amnesty and then created a semidemocratic constitution that was intended to block prosecution forever through an ingenious arrangement of interlocking appointment powers. As Acuña details in his chapter, this bastion is now beginning to crumble.

Another factor that may explain low levels of retribution as well as reparation is the *scarcity* of money and qualified personnel often found in periods of transition. In Western Europe after 1945 and Eastern Europe after 1989, transitional justice had to compete for resources with, respectively, economic reconstruction and economic transformation. In countries that were devastated by war or by a massively inefficient economic organization, compensation to victims was of necessity severely limited. After 1945, the prosecution of economic collaborators was also limited by the need to rebuild the economy. For the same reason, skilled administrators were often spared. In his chapter, Rousso cites a sibylline statement by the French provisional government in 1944 that in purging the administration, "it is good to show intransigence but only to the extent that it does not interfere with the functioning of the services." Although the same argument has been used to explain the low level of prosecution against the former Communist nomenklatura (e.g., Walicki 1997, p. 195), Tucker argues in Chapter 9 that Communist officials rarely possessed expertise at any tasks beyond that of enriching themselves.

A more compelling explanation of low levels of prosecution in Eastern Europe, as well as in Germany and some German-occupied countries after 1945, is the scarcity of competent and untainted legal personnel. In Eastern Europe, as Tucker emphasizes in Chapter 9, members of the legal profession were nothing more than party hacks. In Germany, judges harnessed their undeniable competence to the task of minimizing the guilt of all members of the Nazi regime, beginning with themselves (Müller 1991). In France, all but one eccentric judge swore the oath to Pétain. After the Liberation, judges were widely suspected of sympathy with the collaborators. Ironically, de Gaulle himself contributed to this state of affairs when he deliberately selected two lawyers who were compromised by their relations with Vichy as president and prosecutor in the High Court of Justice. "Their past errors were for de Gaulle a guarantee of a certain docility" (Roussel 2002, p. 513). As is well known, de Gaulle chose for reasons of state to impose strict limits on transitional justice in France and to create the image that the collaborators were merely "a handful of miserables" (Baruch 2003). To this end, compromised judges were to be preferred to those having roots in the resistance.

In the trials of leaders and agents of the former GDR, however, the (former West German) judges were both competent and untainted. The low level of successful prosecutions remains a puzzle. As Offe and Poppe argue in their chapter, one explanation may be found in the low level of resources allocated to the investigations and to the high level of respect for the rule of law and notably for the clause in the unification treaty that individuals might be tried only for acts that were crimes under both East German and West German law at the time they were committed. It has been argued (Sa'adah 1998, p. 177) but remains

unproved that "this decision may reflect in part the leverage communist elites still possessed as unification arrangements were being negotiated." Whatever the mechanism, the outcome has been summarized in a famous phrase by a former East German dissident, Bärbel Bohley: "We expected justice, but we got the *Rechtsstaat* instead." A deeper explanation, as McAdams (1997, p. 240) notes, may be found in the lack of a politically efficacious demand for justice in unified Germany.

The sheer passage of time may also explain variations in patterns of transitional justice. There are two distinct mechanisms involved. With regard to reparations, John Stuart Mill (1987, p. 220) observed that "even when the acquisition was wrongful, the dispossession, after a generation has elapsed, of the probably *bona fide* possessors, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement." As he goes on to say, "with the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the aftergrowths which would have to be torn up or broken through." Thus, on the one hand, in Norway after 1945, "Jews [and others] could claim their property back regardless of whether the purchaser had acquired it in good faith" (NOU 1997, p. 20). In the former GDR, on the other hand, the unification treaty stipulated that an exception to the return of confiscated property arises when the new owners have acquired it "in an honest manner." In these two cases the question of dual ownership was resolved in favor of the new owners only when the time since the unjust appropriation exceeded one generation, confirming Mill's intuition.

With regard to retribution, the key factor is the decay over time in the intensity of "the retributive emotions" (see my Chapter 3). In German-occupied countries in 1944–45, the worst atrocities were fresh in everybody's memory, notably where harsher regimes were established toward the end of the war or the Germans used scorched-earth tactics when retreating. In Eastern Europe after 1989, by contrast, the worst Stalinist excesses had occurred in the relatively remote past. This difference probably accounts for much of the variation in the level of transitional justice. In addition to the time interval between wrongdoings and transition, that between transition and trials may also affect the intensity of the demand for retribution. Thus in Western Europe after 1945, one almost invariably observed that those tried in 1947 or 1948 received much lighter sentences than those who were tried immediately after the Liberation for the same crime, such as serving in the Waffen SS (see notably Huyse and Dhondt 1993). In Argentina and Chile, however, there are fewer signs of indignation and anger abating, perhaps because the emotions received so little satisfaction in the immediate aftermath of transition.

Although emotions decay over time, the emotional climate immediately after the transition is often intense. In German-occupied countries after 1945 and in some ex-Communist countries after 1989, there was a very strong, emotionally based desire for severe and swift retribution of the agents of the previous regime.

At the same time, the new democratic leaders often harbor a strong desire to demarcate themselves as much as possible from the lawless practices of that regime. These two desires may conflict when, as is often the case, there is no clear legal basis for holding individuals responsible for acts that intuitively seem to be obvious cases of wrongdoing. Usually, as noted earlier, the tension is resolved by subterfuge. The only country that has given unambiguous priority to the rule of law over the desire for retribution is post-1989 Hungary, under the guidance of a very strong Constitutional Court.

Finally, the patterns of transitional justice may result from more or less ordinary political struggles. In Western Europe after 1945 Socialist and Communist Parties competed electorally in being more-retributive-than-thou. The French Communists at one point thought about making the *épuration* (purges and trials) the cornerstone in a revolutionary bid for power (Buton 1993). After 1989 electoral overbidding and tactical accusations of being "soft on Communism" were common in Eastern Europe, notably in Poland (Walicki 1997, Kuk 2001). In Belgium and Austria after 1945, the disenfranchisement of members of the Nazi Party or affiliated organizations certainly had an electoral motivation in addition to the punitive one. After the transition in Argentina, the Peronists, afraid of being overtaken by President Alfonsín, asserted publicly that they were in favor of harsh trials of the officers, while "they pressed for concessions in private" (Nino 1996, p. 111) – not to placate the military but to reduce the popularity of their adversary with an electorate that was impatient for retribution.

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PART I

GENERAL ISSUES

The main topics of the present volume are *reparation* (restitution and compensation) and *retribution* (purges and trial) after the transition to democracy. Part II and Part III present case studies of these processes. In Part I, Tyler Cowen and Jon Elster offer more general conceptual discussions of these two phenomena. Cowen draws on and extends earlier writings (notably Waldron 1992) to bring out some of the paradoxes involved in "undoing the past." Many of these issues turn out to have considerable practical importance, notably when we go from reparations that occur in the immediate aftermath of transition to rectification of historical injustice more generally (see Chapter 14). Elster confronts the practice of retribution in transitional justice with the standard justifications for punishment offered by legal scholars (e.g., von Hirsch 1993). He concludes that the deterrence arguments sometimes offered in defense of severe punishment are defective, and that arguments from desert tend to be indeterminate.

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2

How Far Back Should We Go?

Why Restitution Should Be Small

Tyler Cowen

I. INTRODUCTION

How far back should we go when deciding to restitute? Does a theft or political crime cease to be morally relevant simply because it occurred in the very distant past? Should we care about each link in a long chain of thievery and oppression, should we care only about the most recent link, or should we care only about the first link?

Should the passage of time matter at all for moral claims?

The Hopi charge that their lands were stolen from them by the Navajo. If the United States government returns lands to the Navajo, should it also return some Navajo property to the Hopi?

In the post-Communist and transition economies, should we remedy only the injustices of the Communist era? Or should we go much further back and try to rectify previous injustices as well? Should it matter that the nobles virtually enslaved the Russian peasantry? Should it matter that the Ghenghis Khan sacked Baghdad in 1258?

Everyone living today, if he or she goes back far enough, can find ancestors who were oppressed and victimized. Few land titles have been acquired justly. Subsequent corporate assets have been built on stolen land or generated by investments on originally stolen land endowments.

The choice of time horizon for restitution becomes especially important to the extent we compound past losses at positive interest. For a loss of $1 billion worth of resources two hundred years ago, a 3 percent rate of compounding makes the relevant restitutional award $369.4 billion; the sum jumps to $17.3 trillion at a 5 percent rate of compounding. Marketti (1990, p. 118), in his estimate of the restitution due from slavery, comes up with a figure of over $53 trillion for 1983 U.S. dollars, using a compounding rate of 6 percent. If not

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for various Nazi and Communist injustices, the Czech Republic might today be as rich as West Germany. Is so much owed to victims of past injustices?[1]

II. WHY PURE RIGHTS APPROACHES FAIL

Intergenerational restitution cannot be performed in accordance with strict libertarian or Nozickian standards. Robert Nozick, in his 1974 book *Anarchy, State, and Utopia*, outlined a libertarian theory of distributive justice. In Nozick's account, property is justified by either Lockean "homesteading" from the state of nature or chains of voluntary exchange, starting with original homesteaders. Conversely, property not acquired in these manners is unjustified and should be returned to its original owners.[2] The Nozickian standard fails most clearly in the case of land. As mentioned, few current land titles in the world would satisfy Nozickian criteria. Yet it is obviously impractical and almost certainly unjust to redistribute all of the world's land. Ignorance of previous transgressions offers no escape here. We would not wish to overturn all current land titles, even if we knew exactly who had stolen what from whom.

Defining restitution as a right to physical property also fails in the cases of torture and less tangible historical injustices. Often there is no specific property title available for rectification. Furthermore, the sons and daughters of torturers do not inherit the moral liabilities of their parents, least of all in a Nozickian framework.

Resource constraints further limit the sum available for restitution. If oppression destroys economic value (a plausible assumption), the sum total of claims may exceed the resources available for rectification. In the former Soviet Union, there is not nearly enough to give all people "what they would have had" had Lenin instituted liberal capitalist democracy. Nor can ex-dictators of Haiti give back all the economic value they have destroyed, or even a sizable fraction thereof. According to some estimates, the total national wealth of Hungary was not greater than the value of the assets confiscated from Hungarian Jews during the Second World War (see Pogany 1997, p. 177).

Finally, the Lockean proviso states that property acquisition should harm no one. If we apply a similar standard to rectification – which is simply another means of assigning just property titles – we are back to having no clear answers.

Nozick (1974, p. 231) hedges on these issues and comes close to retracting the antiutilitarian, antiwelfarist tone of his work: "These issues are very complex and are best left to a full treatment of the principle of rectification. In

[1] Waldron (1992) and Sher (1992) have been the two most influential pieces. Other articles of interest include Lyons (1981), Morris (1984), Simmons (1995), Tucker (1995), and Wheeler (1997). Elster (1998) provides a clear survey of the broader issues behind transitional justice; see also Kritz (1995) and Greenfield (1989). Pogany (1997) covers Eastern Europe. Palmer (1978) and Birks (1985) are two leading legal sources on the law of restitution. Cowen (1997) considers relevant issues surrounding compounding and argues for less than full compounding.

[2] For a more recent application and defense of the Nozickian view, see Block and Yeatts (1999). Roemer (1996, chapter six) surveys some of the more general objections to the Nozickian standard.

the absence of such a treatment applied to a particular society one *cannot* use the analysis and theory presented here to condemn any particular scheme of welfare payments, unless it is clear that no considerations of rectification of injustice could apply to justify it." Nozick notes that Rawls's Difference Principle(!) might provide the best operable rule of thumb for rectification.

Understandably Nozick shied away from defending rectification on pure libertarian terms. But for obvious reasons, he was reluctant to admit that a pure process approach to restitution is untenable. In reality, no theory of property can avoid evaluating patterns, as evidenced by Nozick's desire to have real world rectification proceed in line with plausible end-state standards. Furthermore, restitution of the stolen item is impossible in many (most?) cases. Instead, we aim to provide compensation, to "make the victim whole again" or to serve some other "end-state" moral standard.[3]

III. THE ROLE OF COUNTERFACTUALS

Given the untenability of a pure libertarian solution, it is no surprise that restitutional approaches typically start by comparing one end state to another. In the context of past injustices, the obvious comparison is between what has happened and what would have happened had the injustice not taken place. The information portrayed by this comparison is then used, in combination with other moral arguments, to produce a restitutional sum. I refer to this as the counterfactual method.

The counterfactual method provides potential limits on the temporal scope of restitution. Assume, for instance, that $1 million had been stolen from my ancestors five generations ago. But had this theft not occurred, my ancestors might have consumed most of the fortune within a generation or two. The restitution due to me therefore is limited. I am not due the whole sum; I am due no more than what I would have received had the theft not taken place.

With the passage of generations, a given act of injustice may have decreasing relevance for the misery of current individuals (Sher 1992 makes this argument). As time passes, more proximate events and injustices may assume greater importance. I am of largely Irish background, but I do not feel greatly disadvantaged by the British land thefts of the seventeenth century. Those thefts have not hindered my productivity, in large part because my ancestors moved to the United States for a fresh start.

These arguments, however, can increase restitutional sums rather than limiting them. Stephen Dedalus, in James Joyce's *Portrait of the Artist as a Young Man*, asks what is owed if a person steals a pound from another. Does one owe back the pound or owe back the entire fortune made from that pound? What if an ethnic group, such as the Chinese in Southeast Asia, has a strong history of business skill? Are thefts from those groups to be compensated at especially high rates of compounding?

[3] McDonald (1976) argues at length that application of the Nozickian standard requires use of "end-state" and "pattern" considerations. See also Simmons (1995).

Modern economic theory emphasizes increasing returns to scale and hysteresis, or path dependence. Both phenomena suggest that initial advantages and disadvantages, even small ones, can be self-cumulating over time. Ghettoes are centers for violence and crime, not because of their intrinsic locational properties, but rather because of their establishment as problem areas some time ago. For the opposite reasons, resources are especially productive in Beverly Hills. Potential rates of return therefore may be extremely high if the stolen resources would have been used to produce self-cumulating advantages. This pattern can compound intergenerational awards to very high levels.

Sometimes a counterfactual shows that a victim received a net *gain* from oppression, not a net *loss*. Many Western countries have stolen or "removed" art treasures from the developing world and later claimed that the works otherwise would have perished or not been maintained. Some victims of the Nazis, had they not been driven from their home countries, would not have emigrated to America and become millionaires. If we restitute according to the full counterfactual, no sum will be due at all; that is a morally problematic conclusion. A wrong still was done to those individuals, regardless of how well the final outcome turned out for them.[4]

Two conflicting forces influence political practice here. On one hand, if a victimized group subsequently shows an ability to generate high rates of return on their investments, this is commonly viewed as weakening the claim for restitution, not strengthening it. On the other hand, if the victimized group has little wealth, they probably have little political influence and less chance of obtaining anything at all. Both factors played some role in the reparations for the Japanese American victims of World War II incarceration. The political influence of the group created pressures for some award, but their relative wealth meant that not so much was seen as needed.

In the intergenerational case, the problems with counterfactuals are especially severe. Derek Parfit (1984) has pointed out that almost all policies change the identities of those individuals who are born. Had land not been stolen from the New Zealand Maori, the Maori victims would have married different people or at least conceived their children at different times. The entire biographical history of the Maori would be different and no current Maori individual ever would have been born. The land theft therefore has made all the current Maori much better off. No land theft would have meant nonexistence. The application of the counterfactual, if taken literally, yields a restitutional award of zero.[5]

The Parfit thought experiment is not a philosophical "trick," but rather a thought exercise designed to uncover our intuitions about harm. It shows that

[4] On this point, see Tucker (1995, p. 354). Jon Elster has pointed my attention to an analogous question about the Gypsies. A German source from 1945 argued that they should not receive restitution for being denied an education, since they would not have exploited this opportunity anyway.

[5] Morris (1984) stresses the same theme in his discussion of intergenerational restitution. Sher (1992) claims we should compare the current victim to the individual who would have been born had not the aggression occurred. See also the discussion of Simmons (1995, pp. 178–79).

our intuitions are not strictly rooted in individual rights and in what Parfit calls "person-affecting" principles. Instead, we must be placing intrinsic value on entitlement patterns for their own sake, above and beyond the ways the interests of specific individuals are affected. We might, as Sher (1992) suggests, compare the welfare of the person who was born to some equivalent "person who would have been born." But this maneuver, whether or not we find it plausible, accepts the primary point of Parfit's example. We still end up comparing distributional patterns, rather than tracing back all notions of right and wrong to the welfare of specific individuals.

The Parfit argument implies that we can limit restitutional claims by uncovering their microfoundations. If our sense of current injustice is rooted in an evaluation of the resulting distributional pattern, rather than individual rights, restitutional claims must be evaluated in terms of this bigger picture. We must ask whether intergenerational restitution would bring about more desirable distributional patterns or not. Our evaluation of a pattern may depend, in part, on how that pattern came about, but the goodness of the pattern is not reducible to claims about individual rights or individual welfare.

Can Counterfactuals Be Applied?

Counterfactuals are underdetermined. Take the land thefts from the Native American Indians. What do we mean when we refer to "what would have happened if the land had not been stolen"? What do the settlers do in lieu of stealing Indian lands? Do they trade peacefully with the Indians? Do they remain in England and Spain? Do they steal something else? Do they still introduce valuable medicines? "What would have happened" depends on how we define the relevant alternative. Since there are many possible futures, and the only unique history is the one that has happened, the preceding questions about the counterfactual can never be resolved. It is not just a matter of imperfect knowledge; there is no factual answer to the question in the first place. The counterfactual standard therefore cannot produce determinate restitutional sums.[6]

Elster (1998) notes that in Norway, after the Second World War, the authorities decided to compensate Jews for stolen property, but according to an unusual principle. If there was one surviving member of a family of eight, that individual would receive only one-seventh of the property of the head of the family. Had the Nazis not killed the rest of the family, the individual would have received only one-seventh of the bequest. Ordinary legal reasoning, of course, would award the surviving individual the entirety of the family property. Whichever outcome is morally correct, this discrepancy illustrates the lack of a unique answer where counterfactuals are considered.

The importance of choosing a counterfactual is especially clear in the case of American slavery. Most current American descendants of former slaves are

[6] See Waldron (1992), Cowen (1997), and Elster (1993) on related problems. The counterfactual standard also cannot specify a clear end to the calculations. We would, for instance, have to calculate how I would have spent my diamond profits, which merchants would have benefited, how they would have spent their profits, and so on.

better off than the blacks who remain in Africa. One possible counterfactual is to compare the consequences of slavery to what would have happened had the victims and their descendants remained in Africa (I have heard this view attributed to Pat Buchanan). Individuals hostile to slavery reparations typically cite this comparison to show that African Americans are not doing so badly. An alternative counterfactual is to compare slavery to the voluntary importation of free African labor; this is the scenario typically preferred by advocates of slavery reparation.

Counterfactuals also draw our attention to whether the current descendants of the settlers have in fact benefited from the stolen resources. If we ask, "What would today's descendants of the natives have had?" we also might ask "How much did today's descendants of the settlers actually receive?"

Consider two alternate scenarios. In one case, my great-grandfather stole resources from the Indians and promptly squandered the resources. I never profited from the theft. In the second case, my great-grandfather stole resources from the Indians, invested the proceeds at compound interest, and bequeathed the entire sum to me. Today I am a millionaire as a result. The claims of the descendants of the Indians *against current descendants of the thieves* might be weaker in the first case than in the second. Individuals who benefit from a theft may be subject to a greater moral and restitutional liability than individuals who do not benefit from a theft, and we may need to adjust restitution accordingly. In other words, if we attach moral importance to the hypothetical rates of return specified by the counterfactual, we also should attach moral importance to the rates of return actually realized by the beneficiaries of the theft.

The debate over the profitability of slavery has implications for moral questions. The economic historian Robert Fogel created a stir when he argued that slavery was not especially profitable for the American South. If today's southern whites are not enjoying "bequeathed stolen wealth," the case for reparations is presumably weaker. Debates over the profitability of imperialism have similar implications. How much aid the wealthy West owes to the Third World may be linked to how much the West has exploited those countries in the past.

In Defense of Counterfactuals?

The strongest argument in favor of counterfactuals is that it is impossible to do without them. Rights theories, for instance, define aggression relative to a baseline state of affairs of "what would have happened" had the ostensibly aggressive act not occurred. The "multiple causality" problems involved with defining strict liability are well known. If ten marksmen shoot at an innocent prisoner, we do not judge each marksman innocent of murder. Yet if any single marksman had been removed, the prisoner still would have died. What is the relevant counterfactual comparison? If all ten marksmen had been removed? When judging an *individual* for a crime, to how large a *group* should the relevant counterfactual be allowed to extend? Since most issues of transitional justice concern oppression in groups, these issues are especially relevant.

Nor do utilitarian approaches avoid reliance on counterfactuals. Defining the marginal consequences of an act or rule requires a baseline comparison of what would have happened had the act or rule not been implemented. The example of the prisoner and the marksmen can be reformulated in utilitarian terms, with a similar ambiguity about how to define the relevant counterfactual. If a potential marksman is concerned about right action, and an outsider offers to donate a dollar to charity if the marksman partakes in the execution, what does utilitarianism suggest? The "marginal product" of shooting an extra bullet is zero, given the presence of nine other marksmen. But is a utilitarian committed to accepting this offer? Or should the utilitarian somehow consider the total effect of the group action? If so, to how large a group should we make reference when defining the results of actions? In essence, we cannot strictly define the "marginal products" for a given action, whether for rights or utilitarian purposes.[7]

Most generally, there can be no empirical guide to choosing the appropriate counterfactual. By construction of the query, there is no empirical investigation of "what would have happened if X had not occurred." The investigation itself must stipulate what is postulated in lieu of X and its underlying causes. We can ask, "If Y had happened in lieu of X, what would have been the consequences of Y?" But this procedure cannot determine Y as the relevant alternative, as opposed to Z. That remains a matter of stipulation and thus we face an ineradicable indeterminacy.

One approach to end-state restitution is to use moral theory to determine the relevant counterfactual. We might compare an act of oppression to some notion of "doing the right thing" as defined by the appropriate moral theory. This comparison does not commit us to the prediction that "the right thing" would have happened. Rather, it establishes that outcome as a moral benchmark for estimating comparative liabilities. The law engages in this sort of comparison frequently. If a man walks away from a drowning woman in the river, his liability is high if he could have easily thrown her a life preserver, an act he was morally compelled to perform. The liability dwindles if no life preserver is available, the man cannot swim, and no external help is available. In that case, no amount of benevolence can save the woman.

Consider how this method might be applied to the case of American slavery. If the relevant oppressors are the American slave owners, we can ask what is the best action the slave owners could have performed. The likely answer involves freeing each slave upon purchase or receipt; that defines one relevant counterfactual. Under this approach, current African Americans would be owed the difference between how well off they are now and how well off they would have been if their ancestors had been freed upon receipt.[8]

[7] Simmons (1995) makes a similar point in defense of counterfactuals. The literature on rule vs. act utilitarianism discusses some of these ambiguities. See, for instance, Regan (1980).

[8] See late discussion as to whether they would be owed for the suffering of their ancestors.

Yet this view is not without pitfalls. Often moral theory offers no clear guidance on the relevant "best alternative action." Is it buying the slaves and setting them free? Or is it simply ceasing to buy slaves from slave traders? Without knowing how far the relevant moral obligation extends, it is difficult to pin down a single morally relevant counterfactual scenario.[9]

Similarly, the settlers treated the Native Americans very badly, but we may not know what the best alternative would have been. Should the settlers have left the Indians alone or tried to live in harmony with them? The uncertainty here extends beyond knowing how alternative courses of action would have developed. We may, for instance, have fundamental uncertainty about the value of maintaining Indian society intact, as opposed to seeking integration. Furthermore, moral theory may be ambiguous on what positive duties American citizens had to help the Indians.

For these reasons, the law tends to make restitutional awards small and conservative. When the appropriate counterfactual is indeterminate, we know that a wrong was done in the past but its marginal import is undefined.

Restitutional claims have the greatest moral force when the value of the loss or stolen resource is well defined in material or dollar terms. If John steals a hundred dollars from Thomas, it is plausible to believe that John owes Thomas (at least) a hundred dollars. If John steals a diamond from Thomas, but no one knows how much the diamond was worth, the relevant liability is small rather than large. Just as the law takes special care to protect the innocent, it should be especially reluctant to overpunish the guilty.

As the number of generations since the crime increases, and the number of hypothetical counterfactual scenarios increases, the value of the stolen resources becomes less well defined. The concept of restitution as a strict property right becomes inapplicable in those situations. We make a smaller, more symbolic award rather than a larger award rooted in the principles of strict right. The law is conservative by nature and is pushed toward this same end by the muddiness of the underlying rights claim, combined with the practical difficulties of enforcing large-scale restitution.

IV. ARE CLAIMS TO RESTITUTION HERITABLE?

Full restitutional demands for living victims of theft do not imply full rights for the heirs of victims. Even if rights claims are trumps, rights may be temporally more limited than the Nozickian approach to rectification suggests. The time horizon for restitution – at least as a matter of right – may extend only to the victimized generation, as a first approximation.

The logic of this view runs as follows. If A has stolen from B in the previous generation, B has been wronged. But the descendants of B have not been

[9] Furthermore, the preceding standard gives the slave holders a greater liability than the slave traders, a conclusion that is not obviously correct. Presumably the slave holders were obliged to free their slaves into an American labor market, whereas the slave traders were only obliged not to hunt down the slaves in the first place.

wronged in an equivalent manner. True, the descendants of B are worse off, for not having received a bequest (the original victim might have bequeathed some of the stolen property). The descendants of B, however, have not suffered injustice. They simply have failed to receive a windfall gain in wealth. The relevant injustice is the following: B was denied the option to bequeath resources to his or her heirs. This is a violation of the rights of B, not the rights of the descendants of B.

This injustice to B is not restitutable, given that B has passed away. Therefore, no restitution is required *on the grounds of justice*. The relevant wrong, which was done to B, can never be righted. The descendants of B have suffered windfall losses but their rights have not been infringed. They had no intrinsic right to the property of B, as illustrated by the fact that if B had consumed all of the wealth and left no bequest, the descendants could not claim any injustice.

Even if "B would have given them the money," the descendants do not have a full moral right to the resources. Would-have-been hypotheticals do not necessarily create full moral rights. Jeremy Waldron (1992, p. 11) notes, for instance, "It is the act of choosing that has authority, not the existence as such of the chosen option."

An analogy suggests why we might treat the losses of B's descendants as a windfall loss. Assume that I own a diamond and a wealthy man across town is planning to buy the diamond at a very high price, far more than anyone else would pay. A fascist government then comes along and sends the man to a concentration camp and confiscates his wealth. Clearly I, the diamond seller, am worse off. Had the rich man been left alone, he would have bought my diamond, at great profit to me. In the absence of this man, I end up selling the diamond at a much lower price.

Many years after the fact, the fascist government has fallen and a new, more benevolent government seeks to implement restitution. The victimized rich man deserves to receive his money back. But do I, as the would-have-been diamond seller, deserve restitution as well? Although I was made worse off by the fascist government, most observers would regard the case for restitution here as weak. Had the man stayed free, I would have received his funds, but I had no *right* to those funds. What the rich man *would have done* had he kept the money does not have compelling moral force for determining restitution.

Critics may invoke the legal conception of property to distinguish family inheritance from the diamond case. In the family case, we might treat B as acquiring a claim against his oppressors at the moment of the crime. B then holds a property right in this claim. When B dies, that claim passes down to his descendants, just as his other property does. It can be argued that B *did in fact bequeath his wealth* to his descendants. No such claim is passed down in the case of the diamond merchant.

From a legal point of view, restitutional claims are not obviously a form of heritable property. The statutes of limitations on the presentation and collection of debt claims are typically short. While restitution has occurred across longer time horizons (e.g., Maori lands in New Zealand or reparations to the

imprisoned Japanese Americans during World War II), these decisions have been matters of public policy rather than treated as automatic legal rights.[10]

More philosophically, a restitutional claim is not the same kind of property as a piece of land or a bank account. The purpose and justification of restitution are to make the victim whole again; once the opportunity to achieve this end passes, restitutional claims lose moral force as claims to physical property (although restitution may remain desirable for other, consequentialist or symbolic reasons).

Many restitutional claims no longer exist in the form of heritable property. Assume that a poor criminal steals a million dollars apiece from four individuals and then squanders the resources immediately. Those four victims have person-to-person claims against the poor criminal, but they do not own claims to particular pieces of physical property. Therefore, they have nothing to bequeath in the traditional sense. And the heirs of the squandering criminal, who inherit nothing from the theft, hold no property liability.

Consider also individuals who are tortured, murdered, or deprived of self-respect. Restitution may be owed for a variety of reasons, but the assertion that the tortured victim holds a well-defined claim to particular physical assets of the torturer is difficult to argue. If no particular claim to concrete assets exists, heritability is not automatic. And again, the descendants of the torturer inherit no liability.[11]

Or consider a man who steals a duck and then sells the duck to an innocent third party for money. If the choice is to take the money from the thief or to take the duck from the third party, moral intuition suggests taking the money from the thief. Remedying the person-to-person injustice is more important than restoring the physical property of the duck; that again suggests that restitution is a person-to-person claim, rather than a title to concrete assets.

A related issue is whether a third-party payment can extinguish a restitutional claim. Assume that non-German Communists donate money to East German Stasi victims, hoping that those sums relieve former Stasi agents of their restitutional obligations. Can a third-party transfer take on this meaning? The person-to-person view of restitution suggests not. The rectification claim is unique to the parties involved, rather than representing a more impersonal legal obligation such as a debt. A third party typically is allowed to pay off a debt, but not to remedy a moral injustice of this kind.

Similarly, legal systems do not usually allow restitutional claims to be sold to third parties, pending resolution of a dispute. Many aging victims of injustice may prefer an immediate cash payment to an uncertain restitutional award in the future. Again, the failure of legal institutions to allow such sales suggests that

[10] For some philosophical remarks on the doctrine of "prescription," see Margalit and Raz (1990, p. 459).

[11] Or consider the law of the sea, which gives an individual a right to a reward from the person whose property he has saved during a shipwreck (Birks 1985, p. 304). Few individuals would argue that such claims be treated as heritable wealth if the original claimant has received no reward in his lifetime.

restitutional claims do not have the alienability aspects of traditional property. The person-to-person nature of the restitutional claim may prevent heritability for the same reason it prevents alienability.

We might, in pursuit of a literal-minded consistency, argue that restitutional claims are strictly heritable when a durable physical asset; such as land, has been stolen, but otherwise not heritable. Claims to land therefore would last as long as the land did, but restitution for torture victims would cease with the passage of a generation. Note, of course, that this policy would encourage oppressors to substitute torture for land theft.[12]

An alternative and more persuasive approach is to treat *all* restitutable claims as rooted in the desire to make victims whole again, rather than defined across very specific pieces of heritable physical property. This places the land theft and torture on potentially equal footing – an intuitively appealing result – but removes both from the category of heritable property as a matter of strict right.

Restricting the heritability of restitutional claims has legal precedents. The claim to heritable property is in any case one of the weaker property rights. Many democracies tax inheritances at high nominal rates (admittedly the real rate may be lower, given loopholes). The would-be recipient of the inheritance did not create the wealth or earn it with his or her productive labor. The right to bequeath is not regarded as absolute, given that governments must raise revenue through some means.[13]

V. RESURRECTING LIMITED INTERGENERATIONAL CLAIMS

The preceding arguments suggest the extreme conclusion that restitutional claims disappear entirely after the relevant generation dies. Three factors, however, may open up some limited room for restitution across the generations. I consider in turn violations of basic rightful needs, the preferences of the dead, and tribes and groups as legally meaningful entities.

Violations of Basic Needs

Extreme conditions may create room for intergenerational restitution as a matter of right. Assume that the past pattern of theft was so severe and so pervasive that the descendants must live in shacks and cannot afford to educate themselves; many Latin American countries provide examples here. If we believe that individuals have rights to certain "basic needs," the previous pattern of theft arguably *has* violated their rights and they are due restitution. They have

[12] German reparations policy to Nazi victims has been criticized for its focus on documentable material losses, and its corresponding neglect of psychic burdens and costs. The German government has tried to estimate "persecution-induced reduction in earning capacity" (*verfolgungsbedingte Minderung der Erwerbsfhigkeit, vMdE* for short). For a criticism, see Pross (1998).

[13] Lyons (1981) offers some apt remarks on the weakness of the heritability right, with reference to the context of restitution.

not merely lost a windfall; rather they have lost an opportunity to receive their due rights.

I do not wish to push this argument too far. Whether individuals have "rights to basic needs," and what those rights may be, is a matter of contention. Even if such rights can be established, usually a number of forces combine to deprive individuals of those rights. The thefts from older, now deceased indigenous peoples are not the only factor contributing to the misery of current descendants. Current oppressions may be equally or more important. When multiple factors conspire to produce misery, isolating the moral significance of any single factor, when judging the extremity of a rights violation, is difficult. Nonetheless, the basic point stands: the case for rights-based intergenerational restitution is stronger when the previous theft has had extreme and persistent negative effects.[14]

Note that these extreme cases still demand only a limited restitutional sum, rather than full restitution of the stolen amount. The descendants would be due the resources that would enable them to lead a decent life and have their basic positive rights satisfied, but no more. Any amount above that sum would be considered a windfall and thus not subject to demands of right.

The resulting recommendations correspond roughly to some intuitions and real world practices. The first intuition is that intergenerational restitution is due only when the historical crimes have produced persistent and severe negative effects. It is for this reason that the U.S. government restitutes to the American Indians, while ignoring the ancient crimes of the English against the Irish, even though it could arrange transfers between English Americans and Irish Americans.

Second, not all descendants of victims have a claim to restitution. The windfall gains and losses from historic injustices should not be accounted for when the losers now have relatively free and comfortable lives. If I, as an upper-middle-class white male, could demonstrate one-eighth Navajo blood, I would not be entitled to an eighth of a per capita settlement intended for the Navajo. New Zealanders are allowed legally to define themselves as Maori through announcement alone, but this should not (and does not) give them rights to a share of Maori land claims.

Third, for living individuals, *all* victims have a claim to restitution on the grounds of justice alone. All of their losses are matters of strict right and wrong, rather than windfalls across generations.

Remedies for the Dead?

An alternative means of resurrecting intergenerational restitutional claims invokes the preferences of the dead. Under some accounts, the preferences of the dead are morally or legally binding. Western legal systems do not typically

[14] Lyons (1981) argues that intergenerational restitutional rights lie fundamentally in the circumstances of the present, rather than the histories of the past.

overturn wills (although they do not allow trusts in perpetuity either). We (sometimes) heed the wishes of dying parents. I would care if I knew that people would spread scurrilous rumors about me after my death. Economists, who in any case do not rely on psychologistic notions of preference, should not find the idea of the "preferences of the dead" obviously absurd.[15]

Restitution *may* restore the welfare of the dead to some extent (Wheeler 1997), though such language sounds inevitably awkward. The now-dead victims may have had a preference for seeing the original injustice restored, if only through a transfer to subsequent generations. Insofar as we treat this preference as having validity after the death of its origin, restitution does satisfy the preferences of the original victim. The person-to-person account of restitution would not necessarily cut off all rectification at a single generation.

Coherently analyzing the "preferences of the dead" is a difficult task. It is plausible, however, that the relevance of those preferences "decays" over time. I care about what people say about my character immediately after my death. But do I really care what they say about my character two hundred years from now? Even if they damn "Tyler Cowen" commonly, no one two hundred years from now will know that the name Tyler Cowen corresponds to *me*. I may care whether my books will be discussed or care about my surviving descendants, but my character will have become an arbitrary reference point long before that time.

If taken too literally, preference decay can increase rather than limit intergenerational restitution. The original goal of restitution was to "make the victim whole again." If the now-dead victim does not care about his or her descendants very much, a very large award may be needed to restore the lost utility of the dead. Ironically, selfish victims who care the least about their descendants would receive the largest awards. Similarly, the needed award may be larger the longer we wait to restitute. I will not care very much about my great-great-great-great-great-great-great-grandchildren.

More plausibly, preferences decay simply because later generations decide those preferences are no longer relevant. Rather than trying to restore the utility of the dead with post-death transfers, we become willing to accept less than full restoration. In other cases we wish to overrule the preferences of the dead on merit good grounds. The Serbs who lost the 1389 battle in Kosovo may "care" greatly about what is happening in Kosovo today. Or southern slave holders might have had a strong preference that the oppression of blacks survive many centuries. We typically believe, however, that those preferences are imperialistic and thus not deserving of public policy consideration.

Tribal Claims?

A final means of reintroducing limited intergenerational claims invokes tribes and collectivities. If the relevant wrong has been done to a collectivity rather

[15] Callahan (1987) considers some relevant issues.

than to individuals alone, the associated restitutional claims may not expire with the death of any specific persons. Since the law recognizes that tribes, as can corporations, can own property, presumably tribes also can hold restitutional claims. In the case of the American Indian, for instance, it is legally recognized that the original property ownership was tribal in nature, rather than individualistic. Related questions have arisen in the Eastern European context, where restitution to churches has been on the agenda.[16]

Tribal claims are like the claims of the dead because they may decay or expire over time. The Navajo today are not the same tribe as the Navajo two hundred years ago, even though they have kept the same name. The culture has changed, the nature of tribal government has changed, the nature of Navajo property rights has changed, and the Navajo have interbred with other groups. How to weight these factors is far from clear, but in any case tribal restitutional claims need not last forever. If we combine the "decay of the tribe" with the inherent limits on counterfactual reasoning, as discussed, the morally correct degree of restitution to tribes may be relatively small.

Some observers consider the tribal view objectionable for placing victims in tribes on a higher moral plane than lone victims. What counts as membership in a tribe? Can any ethnic group count? Must a descendant still belong to a tribe or ethnic group, or does it suffice that the ancestor belonged? Do individual victims have stronger claims if they belong to more than one tribe or group? What about individuals who join tribes only so that their restitutional claims may survive their death?

These questions have acquired real world relevance. American Indians, for instance, invest great effort in documenting the claims of their tribes to existence. Federal recognition of a tribe means that the members have access to special subsidized business loans, subsidized housing, scholarships, and special health care services. They become exempt from some state and federal laws, and some tribes can run legalized gambling. Only tribe members are allowed to own eagle feathers.

Some (ostensible?) tribes are not recognized by the federal government. The Department of the Interior claims that the Chicora-Waccamaw tribe of South Carolina ceased to exist in the eighteenth century. Chief Harold Hatcher believes the department is wrong. He submitted a several-hundred-page petition to the department, based on five years of work and the investment of hundreds of thousands of dollars. The very possibility of such a dispute suggests that restitution is relying on a distinction that is morally arbitrary to a considerable degree.[17]

Right now there are 554 legally recognized Indian tribes with nearly 2 million members. Yet at least 25 million other U.S. citizens have some Indian blood. Why should the official 2 million tribal members, rather than the others, receive special privileges? Alternative measures of "Indianness" may give very different

[16] On tribes, see, for instance, Simmons (1995). On churches, see Pogany (1997, chapter 9).
[17] On this saga, see Beinart (1999).

answers. Of official tribal members, for instance, over half of the married have non-Indian spouses. More than half of official Indians live in large American cities. And only 23 percent speak a native language at home.[18]

A related question is whether restitution should be given to a tribal government, if one exists, rather than to individuals. The tribal view presumably suggests that the tribal government receive the restitutional payment. In reality, tribal elites receive disproportionate benefits from their control over such funds. For this reason, it may be more desirable to make restitution directly to the tribe members. If we accept this conclusion, however, perhaps the tribe is not the relevant legal entity after all. Following the letter of the law may conflict with achieving effective restitution. Our potential willingness to override the wishes of tribal governments suggests we do not place the tribe on a special moral plane after all.

Finally, we must reckon with incentive problems. If tribes are carriers of intergenerational restitutional claims, aggressors will have incentives to destroy all traces of a tribe.

All of these issues suggest that the tribal account of restitution remains poorly defined. Tribal restitution should not be ruled out, but it does not provide a very firm base for intergenerational restitution. Most typically, we see the law perform tribal restitution only when the policy has symbolic value and serves as a practical means of maintaining or restoring social order.

VI. CONCLUDING REMARKS

I have examined why the time horizon for intergenerational restitution is limited. Restitution may be a matter of right, but those rights carry across the generations only with serious limits. I do not mean, however, to oppose restitution per se. This chapter arguably can be read as a defense of restitution, provided that the sums in question are relatively small. We can entertain restitutional policies without fearing a reductio ad absurdum, and without being forced to try to remedy all previous injustices.

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[18] See Wilson (1998, pp. xxiv, 424).

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3

Retribution

Jon Elster

I. INTRODUCTION

After a transition to democracy, leaders, agents, and collaborators of the predemocratic regime are often punished for their actions or omissions under that regime. The punishment can take several forms. First, there is informal social *ostracism*. It has been estimated, for instance, that during the Liberation of France in 1944–45 about twenty thousand women had their hair cut because they had had intimate relations with Germans (Virgili 2000, pp. 74–78). Second, there are spontaneous *killings* of collaborators (and looting of their property). The number of extralegal executions after World War II in France and Italy, for instance, was around ten thousand in each country (Woller 1996, p. 279; Rousso 2001, p. 501).[1] Third, there are criminal *trials* in forms that range from martial courts to ordinary legal proceedings. Fourth, there are *purges* of professional associations carried out by these organizations themselves. Fifth, there are *sanctions* imposed on civil servants by the public administration. In this category I also include the various forms of lustration introduced in post-Communist countries. Finally, there is the punishment involved in mere *exposure* as a wrongdoer. Although it is not clear exactly how the few truth commissions that named perpetrators (Hayner 2001, Ch. 7) harmed these individuals, they would presumably have preferred their deeds to remain outside the public domain. Opening the files of informers to those who were informed

[1] A separate category is that of *officially authorized private killings,* as a result of declaring certain individuals outlaws who can be killed on sight. Although never to my knowledge implemented in any transitions, it was proposed in France at the end of World War II (Noguères 1949, p. 43). Prior to the decision to hold the Nuremberg trials, Churchill wanted to deal with the major war criminals (on a list to be established by the Allies) by having them shot at sight by any officer who came across them. Although U.S. Secretary of State Henry Stimson asserted that "the British have . . . popped out for what they call political action which is merely a euphemistic name for lynch law" (Bass 2000, p. 190), it does make a difference whether killings are authorized and restricted to legally declared outlaws.

upon is another modality of exposure. By 1997, 3.4 million citizens of the former East Germany had asked to see their files (Koehler 1999, p. 21).

The focus in the present chapter is on trials and sanctions. These cannot always be neatly separated from the other categories. In South Africa, exposure may lead to trial of those who fail to satisfy the conditions for amnesty. In Belgium, a decree law of September 19, 1945, made loss of civil rights, which normally were supposed to be the outcome of a trial, the automatic consequence of purges or sanctions (Huyse and Dhondt 1993, pp. 55, 120). In many countries that had been occupied by Germany, civil servants found guilty in a criminal trial were automatically dismissed. Also, ostracism can obviously be caused by any of the other punishments. These are cases in which one form of punishment leads to another. It has also been argued that imposing one kind of punishment makes the imposition of others *less* likely. It is often asserted, for instance, that cutting the hair of women who had collaborated with the enemy acted as a safety valve for pent-up emotions and thus prevented killings and lynchings (Novick 1968, p. 78; Lottman 1986, p. 93; Kaspi 1995, pp. 199–200). In the first systematic study of the topic, Virgili (2000, pp. 22–23) does not, however, find the stipulated negative correlation between these two forms of extralegal violence. The assertion that quick-and-dirty justice by summary trials and martial courts could preempt lynchings seems better grounded (Lottman 1986, pp. 110, 179, 201).

I shall try to assess trials and sanctions in transitional justice in the light of *theories of retribution*. Classical arguments for criminal punishment include special (individualized) deterrence, general deterrence, incapacitation, rehabilitation, and desert. Except for the first, they have all been used to justify punishment after the transition to democracy. I focus on general deterrence and desert, with brief comments on the two other arguments. I am not claiming that the punishments that are actually imposed can be fully explained in light of the conceptions of retribution held by the various actors. For one thing, if in a given case different actors have different philosophies of punishment there is no metatheory telling us how to balance them against one another.[2] For another, the adoption of specific retributive measures is affected by a host of other considerations, including party politics and economic necessities (see my Introduction to the present volume).

II. THE RETRIBUTIVE EMOTIONS

Before discussing these arguments for punishment I consider some emotional motivations that are sometimes hard to distinguish from more impartial ones.[3] In situations of transitional justice, feelings often run very high. In fact, *five distinct retributive emotions* come into play: anger, two varieties of indignation,

[2] See, for instance, von Hirsch (1993), pp. 12–13 and 47–56, for two distinct ways in which desert-based models and deterrence-based models might be combined.

[3] In the discussion later I refer only to what happened in German-occupied countries after World War II, because these present the greatest range of punishments.

contempt, and hatred; in addition pity for the victims might also shape the emotional responses to wrongdoings. As I shall use these terms (there are no commonly accepted definitions), A is angry when he has suffered unjustly from B's action toward him. According to the Cartesian idea of indignation, A is indignant when he observes B's unjust behavior toward C (*Passions of the Soul*, Art. 195). According to Aristotle, A feels indignation when he observes B's undeserved good fortune (Rhetoric 1386^{b} 10). Although the two ideas overlap, they are distinct. B may behave unjustly toward C without deriving any tangible benefits from it; the Holocaust is an example. Conversely, B's undeserved fortune need not be due to any unjust behavior on his part. One may feel indignation toward the beneficiaries of wrongdoing – the beneficiaries of apartheid in South Africa or Swiss banks that traded in gold that the Nazis had taken from the Jews – even if they have not themselves harmed anyone.

Descartes notes that if A loves C, he will feel anger rather than indignation toward B. In other cases, indignation is typically weaker than anger.[4] This is a key theme in *Stay the Hand of Vengeance* by Gary Jonathan Bass: "Even liberal states are more likely to seek justice for war crimes committed against their own citizens, not against innocent foreigners" (Bass 2000, p. 8). After 1945, the target of American reactions to Nazi crimes is summarized as "The war first, the Holocaust second," with particular "concern over war crimes committed against American soldiers" (Bass, pp. 173, 177). The attitude of the cabinet member (Henry Morgenthau) who was most outraged at Nazi atrocities of the Jews was explained by another member (Henry Stimson) as "Semitism gone wild for vengeance" (Bass, pp. 152, 167). Morgenthau was Jewish. Whereas other members of Roosevelt's administration felt anger for what the Germans had done to Americans and at most indignation at what they had done to the Jews, Morgenthau felt anger at the Holocaust because he identified himself with the victims.

Whereas anger and indignation are triggered by A's belief that B has done a bad *action*, hatred and contempt are triggered by the belief that B has a bad *character*.[5] The antecedent of hatred is the belief that A's character is evil; that of contempt, that it is inferior or base. Followers of Hitler thought Jews evil but Slavs inferior.[6] The distinction between action and character may seem problematic, at least if one believes that a claim that someone has a bad character

[4] Fehr and Fischbacher (2003) show that in experiments in which individuals are allowed to punish those who behave unjustly, at some cost to the punishers, "third-party punishments" by external observers are typically weaker than "second-party punishments" by the victims of the injustice. Yet even third-party punishments are surprisingly strong.

[5] I disagree, therefore, with Carlos Nino (1996, p. 140) and George Fletcher (1978, p. 800) when they claim that retribution is always based on an assessment of the character of the wrongdoer. Elsewhere, however, Fletcher (1978, pp. 117–18) observes that actor-oriented rather than act-oriented criminal law was a feature of Nazi jurisprudence; see also Müller (1991), Ch. 9. Fletcher's own argument (§ 6.2.2) against more severe punishment for recidivists also seems to rest on an act-based rather than actor-based theory. My own view, for what it is worth, is that some but not all acts of wrongdoing justify an inference to the actor's character.

[6] Goldhagen (1996), p. 469. See also Bach-Zelewski's testimony at Nuremberg, cited in Taylor (1992), p. 260.

can be supported only by pointing to his bad actions.[7] Yet in some cases, such as sadistic torture, we tend to think that a single action provides sufficient evidence of an evil character. The same problem arises for contempt and the correlative feeling of shame. The paradox of shame is that it "involves taking a single unworthy action or characteristic to be the whole of a person's identity" (Lindsay-Hartz, de Rivera, and Mascolo 1995, p. 297).

To summarize, we react to the chronically bad with hatred, to the chronically weak with contempt, and to the occasionally and intelligibly weak with anger or indignation. We feel hatred for torturers and denunciators. We feel contempt for those who would enter the Nazi or Communist Party to get a job they could not otherwise obtain. We feel anger or indignation toward the South African lawyers who failed to speak out against apartheid (the vast majority) or toward the Norwegian chiefs of police who joined the National Socialist Party (again a vast majority) because they would lose their job if they behaved differently. But, as Aristotle said (see later discussion), our reaction to the latter may also be mixed with pity or compassion.

The emotions also have different action tendencies. Aristotle says that "much may happen to make the angry man pity those who offend him, but the hater under no circumstances wishes to pity a man whom he once hated; for the one would have the offenders suffer for what they have done; the other would have them cease to exist" (*Rhetoric* 1382^{a} 2–16). This observation, while accurate, is incomplete. If A is angry at B, he wants B to suffer through *his*, A's, agency. Moreover, he wants B to *know* that he is the cause of B's suffering. If B is injured in a car accident, this will not slake A's desire for vengeance. In hatred, by contrast, agency is not essential. What matters for the anti-Semite is that Jews cease to exist, whether it be through his or someone else's agency. Indignation is similar both to hatred and to anger. The indignant person wants the target of the emotion to suffer, but the agency is immaterial. Contempt – the action tendency of which is ostracism – is more similar to anger. The contemptuous man refuses to have any personal dealings with the target of his contempt. Unlike what occurs in hatred, the fate of the target is not his concern.

In transitional justice, these emotions map into distinct legal and administrative reactions.

Anger induces a demand for long prison sentences, and Cartesian indignation a demand for somewhat shorter sentencing.

Aristotelian indignation can induce a demand that the target give up his undeserved fortune. Those convicted for economic collaboration with the German occupying power had their profits confiscated. In August 1998

[7] Anti-Semitism, when it rests on the premise that the evil of Jews is intrinsic, "in their blood," does not need evidence of bad action. It also follows that Jews cannot be redeemed by good actions. Although at Hindenburg's insistence Jews who had served in World War I were initially treated more leniently by the Nazi regime than others, this was a purely tactical concession on Hitler's part.

Swiss banks agreed to pay $1.25 billion in a class action lawsuit filed on behalf of Holocaust survivors in New York City.

Hatred induces a demand for the death penalty. In countries occupied by Germans during World War II, this punishment was mainly used for political leaders who committed acts of treason, on the one hand, and for torturers and informers on the other. Although the use of the death penalty may also have been sustained by other arguments, there is little doubt that the belief that these wrongdoers were evil, rather than merely weak or opportunistic, played an important role.[8] Hatred may also induce a demand for expulsion.[9] Morgenthau, for instance, had plans for the mass deportation of the SS and their families (Taylor 1992, p. 34; Bass 2000, p. 152)

Because of the close connection between ostracism and forced exile, demand for the latter may also spring from contempt.[10] That emotion may equally induce a demand for *inner* exile, as in the imposition of "civil indignity." In the extreme Belgian case, this has been characterized as a form of "civil death" (Huyse and Dhondt 1993, p. 30). If we accept the Kantian view that retribution is a form of recognition of the offender as a moral agent, nonprosecution may also be an expression of contempt.[11] The demand for the dismissal of tainted individuals from public service may reflect anger or contempt, depending, as I said, on whether they are condemned for their actions or their character.

I have suggested the following argument. (i) In transitions to democracy, we observe a range of legal reactions to wrongdoers, including ostracism, shorter or longer prison sentences, and execution. (ii) The wrongdoers differ in ways that tend to elicit systematically different emotional reactions. (iii) The desires and action tendencies of these emotions correspond quite closely to the legal reactions. (iv) Whenever a legal reaction is adopted for a particular category of wrongdoing that also tends to elicit the corresponding spontaneous emotional reaction, we may suspect that the emotion has contributed to the decision, even if the latter is justified publicly (and perhaps privately) by more impartial considerations. Sometimes, we may be able to go beyond mere suspicion. We can often identify emotional behavior by its tendency to decay with time.[12] This feature of emotion provides the most plausible explanation for the fact that in trials in German-occupied countries after World War II, sentencing was almost

[8] In the conclusion to Arendt (1994), pp. 278–79, she states that Eichmann deserved to be hanged because no one would want to share the Earth with someone who would not want to share the Earth with the Jewish people.

[9] Before the adoption of the final solution, it was envisaged to send 4 million German Jews to Madagascar.

[10] Roger Petersen (personal communication) argues that in the 1999 Kosovo war, the Serbian demand was for expulsion of the ethnic Albanians, based on contempt for their "prehuman" character.

[11] Claus Offe (personal communication) made this observation in the context of the low level of prosecution of leaders and agents of the former GDR.

[12] Ekman (1992), p. 185. Some counterexamples are cited in Elster (1999b), pp. 30–31.

invariably more severe in the initial stages than after two or three years.[13] Also, in many instances, the emotional motivation was entirely undisguised. The summary executions in France and Italy in 1944–45 were by all accounts motivated by hate.[14] In all German-occupied countries, the public shaming of women who had been intimate with Germans (Virgili 2000) was a spontaneous expression of contempt and perhaps of Aristotelian indignation.

III. DESERT

Among the impartial justifications for punishment, desert is the only one that is explicitly nonconsequentialist. The idea that wrongdoers deserve to be punished for their acts, irrespective of the consequences of punishing them, is one that probably has a wider appeal in the population at large than among criminal law scholars. In practice, this difference may not show up often, as severe punishment for serious crimes can often be justified both on nonconsequentialist and on (various) consequentialist grounds. Yet sometimes the difference can be dramatic. Discussing transitional justice in Argentina after 1983, Carlos Nino (1996, p. 111–12) writes that

> in addition to the military and the political parties, human rights organizations played a key role in the transition and might be seen as the third collective agent influencing the course of retroactive justice. They emerged from the military dictatorship with enormous, well-earned prestige for their courageous opposition to repression. This gave them considerable influence, which they used through their connections with members of the various parties. . . . The human rights groups' stance toward retroactive justice was intransigently retributive. They sought to punish each and every person responsible for the abuses, regardless of their degree of involvement. They held a Kantian view of punishment; even if society were at the verge of dissolution, it had the duty to punish the last offender.

President Alfonsín and his advisers (including Nino) took a different view. Because they feared that severe punishment of the military leaders might trigger a new coup, they advocated a lower level of retribution than what an unconstrained desert-based argument would require. In other circumstances, political constraints may induce *higher* levels of retribution than what is required by first-best considerations of desert. When the French authorities allowed for martial courts and military tribunals in 1944–45, causing more people to be executed than normally would have been in regular trials, it was because they believed

[13] For Norway, see Andenæs (1980), p. 229; for Denmark, Tamm (1984), Ch. 7; for Holland, Mason (1952), p. 187 n.36; for Italy, Domenico (1991), p. 178; for Belgium, Huyse and Dhondt (1993), p. 231. The last authors consider and reject the objection that the trend could be an artifact of the pattern that the most serious crimes were tried first. The only exception is France, for which Novick (1968), p. 164 n.12, finds no evidence for the hypothesis of progressive leniency of sentencing, without, however, being able to rule it out.

[14] Many examples suggest that the motivation for some killings may be the *guilt* of those who joined the resistance at a late date, as if their post-transition aggression toward the wrongdoers could magically undo their pre-transition passivity.

that the slowness of regular trials would make people take justice into their own hands, leading to an even greater number of killings.

Even assuming that the authorities adopt an unconstrained first-best desert approach to punishment, it remains to be spelled out what it implies in actual cases. To say that a wrongdoer deserves to be punished is not enough: we also have to specify how he should be punished. The desert theory of punishment is that "the punishment should fit the crime," in the sense that the severity of the sentence should match the gravity of the crime.[15] At the very least, there should be an "ordinal" match between crime and punishment: the more serious crimes should be more severely punished. Ideally, there should also be some measure of "cardinal" matching: given that crime A is more serious than crime B, we would want to know not only that A should be punished more severely, but *how much more* severely.[16]

For these ideas even to make sense, let alone be accepted, we need one-dimensional scalings of crimes as well as of punishments. In some cases, this is easy. To embezzle a large sum of money is worse than to steal a small sum. Robbery is worse than burglary, because it involves a threat to physical security as well as to property. The same action is worse if done deliberately than if done recklessly.[17] On the punishment side, the death penalty is worse than a prison sentence, a longer prison sentence is more severe than a shorter one, and a prison sentence worse than a moderate fine. Yet even within ordinary criminal law, there are hard cases. Is cold-blooded attempted murder less serious than hot-blooded successful murder? Is drunk driving worse than perjury? Should white-collar criminals be fined rather than jailed because, for them, mere exposure is already punishment enough? How many days of community work is the equivalent of two months in prison? I suspect that even in ordinary criminal cases ambiguities loom so large that the best one can achieve is a partial ranking of crimes relative to one another and of punishments relative to one another.[18]

[15] There is another and entirely different sense of "letting the punishment fit the crime" that can be observed in cases of transitional justice. In France after 1945, for instance, collaborationist writers were "forbidden to publish their writings for terms ranging from one to two years" (Novick 1968, p. 126). In Holland, artists who had performed before the Germans were banned from appearing in public (Mason 1952, p. 114). These punishments "fit" the crimes in that they are defined in terms of the punishable activity itself.

[16] The idea that the punishment should fit the crime may also be taken in the absolute sense that for a given crime there is a unique punishment that is appropriate (e.g., "an eye for an eye"). To the extent that the task of justice is to "restore the moral order of the universe" (Fletcher 1998, p. 80), there must be an equivalence in absolute terms between crime and punishment. If one can establish an absolute equivalence, ordinal and cardinal matching follow automatically. However, any given ordinal or cardinal matching is compatible with many different absolute scales.

[17] Needless to say, similar distinctions arise in transitional justice, too. Thus in Denmark after 1945, the following acts of collaboration were ranked in decreasing degree of severity: killing, shooting to kill, serving as an armed guard, serving as an unarmed guard (Tamm 1984, pp. 285–90).

[18] This suspicion is confirmed when we see von Hirsch (1993) appeal to Sen's ideas of freedom and capabilities in his attempt to scale crimes as well as punishments. Although Sen's criteria are superior in some respects to welfare-based criteria, they are also notoriously incapable of yielding complete rankings (Roemer 1996, pp. 191–93).

We may be able to say confidently that crime A is more serious than crime B and crime C more serious than crime D, and yet not be able to rank A and C relative to one another, nor B and D – which does *not* mean that they are equally serious. Similar problems arise when we try to rank forms of punishment.

In transitional justice, these indeterminacies are likely to be even more important than in ordinary criminal law. In his discussion of the lack of coherence in sentencing in France after World War II, Peter Novick first discusses the alleged "influence of an insufficiently purged corps of judges; some, it was said, secretly braked judicial action, while others sought to efface the memory of their Vichyite past by becoming 'durs des durs.'"[19] In his opinion, however,

> the principal explanation for "incoherence' was not . . . to be found in procedural flaws or human frailty among those carrying out the trials; this explanation lay in the very nature of the tasks of the courts. Normally, society is able to categorize criminal offenses and assign appropriate penalties – or ranges of penalties – to each. There are different "grades" of burglary, depending on whether it is committed during the day or at night, armed or unarmed, in occupied or unoccupied premises; the penalties are scaled according to the category. Offenses of collaboration resisted such categorization. . . . One of the most persistent problems – and one that was never really solved – was the question of the relative severity to be exercised towards the supervisors and executors of policy. (Novick 1968, p. 168)

The status of crimes committed by officials in the machinery of transmission from the supervisory to the executive levels is no less ambiguous. Two famous cases hinged on the responsibility for organizing the transport of Jews to the gas chambers. In Germany, "Eichmann's position was that of the most important conveyor belt" in the Holocaust (Arendt 1994, p. 153). In France, another instance of "delayed transitional justice" occurred when Maurice Papon was accused of organizing the transport of Jews from Bordeaux to the camp of Drancy near Paris, as a first step to Auschwitz. More generally, David Cohen asks:

> Between those at the pinnacle of power and authority (Hitler, Himmler, Goering, Tojo, and so on) and the ordinary soldier or S.S. underling who commits the ultimate act, who else shall be punished: Executives of the company that produced the gas or manufactured the ovens for the crematori? Officials of the Ministry of Transport who arranged for the victims to be shipped to the death camps? Lawyers who drafted legislation and directives to identify and isolate the victims? Judges who justified the illegal actions of the regime they served? Diplomats and Foreign Ministry officials who negotiated with governments whose cooperation was necessary if the machinery of death was to work? Anthropologists and doctors who contributed to the formulation and application of the racist ideologies that underlay the program? Staff officers who merely transmitted orders to the next level of command? (Cohen 1999, pp. 53–54)

[19] Novick (1968), p. 168. He also writes (pp. 170–71) that "we have become resigned to the fact that perfect proportionality between crime and punishment is an ideal which must be perpetually beyond our reach; we make do with the best approximation available. In the case of the purge trials, even such an approximation was virtually impossible."

The circle of wrongdoers can expand almost indefinitely. In Belgium, the creative interpretation of the phrase "bearing arms against Belgium" allowed the government to prosecute Belgians who worked in the German barracks, on the grounds that if they had refused, their work *would have been done* by Germans, who would thereby have been distracted from the war effort (Huyse and Dhondt 1993, pp. 64–65). To have a causal (and not merely moral) grounding, the argument presupposes that if they had refused, other Belgians *would have refused* too. Although the first counterfactual is true if the second is, the second is almost certainly false.

In challenging charges of wrongdoings, counterfactuals enter in a number of ways.[20] First, there is the common claim that "if I hadn't done it, somebody else would have." In their defense, Eichmann as well as Papon claimed that they were merely fungible "cogs" in the machinery of extermination and as such not personally responsible.[21] In Eichmann's case, the excuse broke down when the prosecution could show that in July 1944 he ignored orders by Admiral Horthy to stop deportation of the Jews and prevented Jewish officials from informing Horthy about his disobedience until it was too late (Arendt 1994, p. 201).

Second, there is the claim "If I had stepped down, somebody else, worse than me, would have taken my place."[22] No doubt these claims are sometimes self-serving, but they may well have a core of truth. Consider for instance the role of the judge who implements and legitimates the inhumane policies of the predemocratic regime. In France during the German occupation, only one judge refused to take the oath to Pétain. Many argued that it should be taken "since the alternative was to see captured *résistants* come before a judiciary even more Pétainized than it already was. . . . Frequently it had been a question of passing an unjust sentence short of death lest the case – or future cases – be taken out of the judge's hand and put in those of a Vichy fanatic" (Novick 1968, pp. 85–86; see also Bancaud 2002, pp. 414–33). In Denmark, too, judges collaborated with the Germans to prevent the occupying power from simply taking the judicial system into their own hands, a course that would have had predictably worse outcomes for the population (Tamm 1984, p. 36). Along similar lines, during the apartheid era a South African human rights lawyer asserted, "If we . . . argue that moral judges should resign, we can no longer

[20] In the following, I mostly do not distinguish between *justifications* and *excuses* (Fletcher 1978, p. 356). For a fuller discussion based on this distinction, see Elster (2004), Ch. 5.

[21] Arendt (1994), p. 289, argues that "if the defendant excuses himself on the ground that he acted not as a man but as a mere functionary whose functions could just as easily have been carried out by anyone else, it is as if a criminal pointed to the statistics on crime – which set forth that so-and-so many crimes per day are committed in such-and-such a place – and declared that he only did what was statistically expected, that it was mere accident that he did it and not somebody else, since after all somebody had to do it." Her reasoning is of course totally confused.

[22] Arendt (1994), p. 145, mentions another counterfactual excuse: "A murderer who could prove that he had not killed as many people as he could have killed would have a marvelous alibi." She imputes this defense to the "moderate wing of the S.S." at the end of World War II.

pray, when we go into court as defense counsel, or even as the accused, that we find a moral judge on the Bench" (Dyzenhaus 1998, p. 57). The claims of civil servants in the Third Reich "that they stayed in their jobs for no other reason than to 'mitigate' matters and to prevent 'real Nazis' from taking over their posts" (Arendt 1994, p. 12) seem more dubious, to put it mildly.

A variant of this excuse that was available in Eastern Europe after 1989 was that "if we hadn't been rigorous in repressing opposition, the Soviets would have intervened, with much worse results." When the Polish parliamentary committee that investigated the possibility of prosecuting the authors of the 1981 martial law decided to drop the case, this argument may have been one of their main reasons (Walicki 1997, pp. 206–15). The man responsible, General Jaruzelski, did not want to rely heavily on this excuse, however. Although he did claim that martial law was the lesser evil, this was so (he said) in comparison not only with foreign invasion but also with the economic anarchy that was ruining the country.

A further counterfactual excuse is that "if I had refused to do it, I would have been killed." This was the defense routinely offered by those who carried out Nazi or Communist atrocities. Objectively, it may have been groundless. Commenting on Nazi exterminations Christopher Browning (1992, p. 170) writes that "in the past forty-five years no defense attorney or defendant in any of the hundreds of postwar trials has been able to document a single case in which refusal to obey an order to kill unarmed civilians resulted in the allegedly inevitable dire punishment." In the 1963–65 trials of the Auschwitz guards, one defendant, Mulka, said that he would have been signing his own death warrant if he had refused to obey. "The court took care to explore the plausibility of Mulka's fear: the evidence suggested that camp officers who refused orders could expect to be transferred to the front and/or to a punishment battalion, but no other penalties were likely" (Sa'adah 1998, p. 169). Yet can we be sure that, subjectively, the guards did not *believe* that they would be shot if they refused to obey?[23] If they believed, non-self-servingly, that to be the case, they might claim that they were "forced" to kill. Whatever the legal response might be to that claim (perhaps they "should have known" even if they did not), a moral response might be that it is better to be killed for refusing to kill an innocent person than to kill that person. But what if that person would be killed by somebody else in any case? There is a double counterfactual: if A had refused to kill B, C would have killed A, and D would have killed B. By killing B, A saved one life – his own.

A different variety of counterfactual excuses relies on the futility rather than the dangers of breaking ranks. In the 1996 trial of seven former members of the East German Politburo, "the indictment held [that] they must have known they

[23] Browning (1992), pp. 170–71, considers this question and answers it in the negative for Battalion 101; that is the main topic of his book. However, "By SS standards, [the commander of this battalion] was a patriotic German but traditional and overly sentimental" (ibid., p. 164), so matters may have been different elsewhere.

had the power in their hands to do more to secure the rights 'to life and freedom' of the GDR's citizens. However, the prosecutors charged, they consciously failed to take advantage of this possibility 'to work to achieve a humanization of the border regime and thereby prevent the killing and wounding of escapee'" (McAdams 2001, p. 48). One of the accused, Günter Schabowski, responded that "under the conditions existing at that time in the GDR he could not realistically have done anything to alter the prevailing policy at the Wall. 'Any effort to move in this direction under the then-existing conditions would have immediately been perceived as an attempt to call into question the general line [of the party] and the personal authority of the general secretary. This would not have had the slightest chance of working in the politburo or in any other body'" (p. 49).

After World War II, many who were accused of economic collaboration with the enemy appealed to counterfactuals in their defense. In Norway, owners of newspapers that had adapted to the occupation defended themselves by saying that a completely German-dominated press would have had a negative impact on public opinion.[24] An enterprise that produced for the Germans might claim that more harm to the country would have been done had the factories been dismantled, machinery shipped to Germany, and workers conscripted into German labor service. Alternatively, if the machines had been idle, they would have deteriorated and not been available for postwar reconstruction; also, there would have been no occasions for sabotage and slowdown actions.[25] Self-serving as such arguments sound, and often were, they cannot be dismissed out of hand.

A second set of excuses turns on the state of mind of the accused (mens rea). The Japanese war trials are exceptional in that they imputed guilt by strict liability (Cohen 1999),[26] making such excuses irrelevant. In other cases of transitional justice, retribution has been guided by the need to establish the subjective conditions for individual guilt. In 1992, the Czech and Slovak Constitutional Court struck down, for instance, the clause in the 1991 lustration law that excluded individuals from certain public functions on the grounds (among others) that they were "listed on the files of the State Security as . . . a *candidate* for secret collaboration" (my italics). As the court noted in its

[24] Hjeltnes (1990), p. 105. The investigative commission reached the opposite conclusion: the German propaganda would have been less harmful if it had been exposed openly as such.

[25] Mason (1952), p. 103; Tamm (1984), p. 486; Andenæs (1980), pp. 134–42; de Rochebrune and Hachera (1995), pp. 320–28.

[26] In Norway after 1945, the attorney general proposed strict liability for economic collaboration (Andenæs 1980, p. 142). All profits deriving from transactions with the Germans were to be confiscated, be they blameworthy or blameless. His argument was that any attempt to draw the line between the blameworthy and the blameless would have an element of arbitrariness and be liable to criticism; better, therefore, simply to confiscate all profits without having to make judgments in individual cases. Although the proposal was not implemented, it is not absurd to impose strict liability if the purpose is linked to the forward-looking task of reconstruction. By contrast, retribution by strict liability is generally seen as a premodern idea. It can be too severe, by penalizing those who bear causal responsibility for an outcome without being morally responsible, and too lenient by ignoring those who try to harm others without succeeding.

decision, such "records were made not only without the knowledge of registered persons, but also with the intention of State security officers to feign their own service activities."[27]

INTENTIONS MATTER. Very roughly speaking, accused agents or leaders of the predemocratic regime can have one (or several) of three motives: *principled* or political, *opportunistic* or gain-oriented, and *personal* or pleasure-oriented. Each can be seen as either aggravating or extenuating. The South African Commission for Truth and Reconciliation, following its mandate, granted amnesty for politically motivated crimes but not for those motivated by economic gain or personal malice (Boraine 2000, p. 277). In the trial against members of the German Democratic Republic (GDR) National Defense Council, the lower-court judge Boss "chose to take mitigating circumstances into account in sentencing Kessler, Streletz, and Albrecht to milder jail terms than those requested by the prosecution. Without excusing the officials' actions, he pointed out . . . that the defendants had themselves been 'prisoners of German postwar history and *prisoners of their own political convictions*'" (McAdams 2001, p. 40; italics added). This amounts to saying that fanaticism is an extenuating circumstance.

After World War II, the Italian Corte di Cazzatione reversed a number of convictions for gruesome crimes on the grounds that there were others that were still worse (Woller 1996, pp. 388–89). Thus "a most unfortunate and grotesque distinction was drawn between 'ordinary' tortures and tortures that were particularly 'atrocious.' Using this formula the courts were able to pardon the following crimes: the multiple rape of a woman partisan; a partisan tied to a roof who was punched and kicked like a punch-bag; electric torture on the genitals applied though a field telephone. On this last case, the Corte di Cazzatione . . . ruled that the tortures 'took place only for intimidatory purposes and not through bestial insensibility'" (Ginsborg 1990, p. 92).[28] In the Danish trials of collaborators after World War II, this priority was reversed. Those who mistreated or killed individuals for personal motives or pique were less likely to get the death penalty than those who did so to serve German interests (Tamm 1984, pp. 321–22, 345). The worst Danish torturer escaped execution because the Supreme Court found that his actions were due to "sadistic perversion of sexual drives" (p. 353) rather than to an instrumental purpose.

Among the agents of the Nazi or Communist regime should the fanatic or the opportunist be punished more severely? In other words, is the personal commitment to an inhumane ideology an aggravating or an extenuating circumstance? In the Fourth *Provinciale*, Pascal heaps scorn on the Jesuits who teach that one

[27] Kritz (1995), vol. 3, p. 362. The decision was accompanied, however, by a reversal of the burden of proof: anyone who was listed as a candidate informer had to ask the Ministry of the Interior to verify whether he was or was not a "conscious collaborator."

[28] Although the SS was widely accused of harboring sadistic individuals, a systematic effort was in fact made to weed out sadists from the Einzatsgruppen (Arendt 1994, p. 105).

cannot sin if one does not know that what one is doing is wrong. Yet the Jesuits were writing for hardened sinners who wanted to enjoy the pleasures of the flesh without paying the price of damnation, not for dedicated ideologues who were willing to risk their life for the perverse cause they believed in. An argument could be made that those who join the same evil causes and perform the same evil acts merely for their career advantage or economic gain are even more debased. This, it seems, was the reasoning of Danish courts when they judged that use of the death penalty for informers was justified if (i) the consequences of the denunciation were serious and (ii) the motive was mere economic gain (Tamm 1984, p. 382).

BELIEFS MATTER.[29] In the High Command case at Nuremberg, the tribunal "insisted on the indispensability of *actual knowledge*" of atrocities (Cohen 1999, p. 67), in contradistinction to the International Military Tribunal for the Far East, which relied on strict liability. In Holland, there were divergent interpretations of the condition that the accused must have "*wittingly* acted against the interest of the Dutch nation. . . . Even the Hoge Autoriteiten [high courts] did not agree. The Hoge Autoriteit at 's-Hertogenbosch decided that 'wittingly' applied only where the accused *knew* that he acted against the interests of the Dutch people; the fact that he *could have known* was not enough. The *Hoge Autoriteit* at the Hague stated that '*should have known*' was sufficient" (Mason 1952, pp. 74–75). The "should have known" standard was also used in Denmark for economic collaboration (Tamm 1984, p. 761).

A main objection to retroactive legislation is that individuals should not be punished for actions that they had no reason to *believe* to be criminal. In the speech "Against Philon" (an Athenian who had remained neutral in the struggle between democrats and oligarchs in 403 B.C.), Lysias anticipates that this objection will be made and tries to rebut it: "He argues, so I am told, that, if it was a crime to absent himself at that crisis, we should have had a law expressly dealing with it, as in the case of all other crimes. He does not expect you to perceive that the gravity of the crime was the reason why no law was proposed to deal with it. For what orator would ever have conceived, or lawgiver have anticipated, that any of the citizens would have been guilty of so grave an offence?" Those who were guilty of collaboration according to laws passed by the Belgian or Norwegian exile governments might also claim to have been unaware of the legislation. In Norway, as Dahl notes in his chapter, members of the Nazi Party were in fact less informed than others – the leadership did not

[29] In fact, beliefs can substitute for intentions. Whereas the prewar Belgian legislation required proof that the accused had acted "with the intention of harming" Belgian interests, the Belgian exile government substituted the weaker requirement that the accused had to be shown to have "acted with the knowledge" that his actions might harm the country or benefit the enemy (Huyse and Dhondt 1993, p. 64).

tell them anything and they could not listen to London or read underground newspapers.[30]

A special case arises when leaders of the predemocratic regime take repressive steps against a danger that appeared plausible at the time but in retrospect proved to be spurious. It seems likely today that the Soviet Union would not have intervened in Poland in 1981 had Jaruzelski failed to impose martial law. Yet after the transition "the majority of legal scholars in Poland took the position that even an erroneous judgment about such a danger could not be punished, provided merely that it did not stem from rashness or neglect" (Walicki 1997, pp. 214–15).[31] The converse also holds: individuals should not be punished for negative outcomes of their behavior if, ex ante, these consequences appeared highly unlikely. Liability is not diminished, however, if the consequences were simply highly *uncertain*. Thus in Denmark, the death penalty for informers depended on whether the denunciation had serious consequences for the target, even if these were unforeseen and unforeseeable (Tamm 1984, p. 368).

A further set of considerations that may be relevant for guilt or sentencing are *time related*:

"I was young then."
"It was so long ago."
"I only collaborated for a short time."
"I only collaborated in the early stages of the repressive regime."
"I am so old now that I should be spared."

The age of the offender at the time of the (most recent) offense is legally relevant for the question of guilt and can be morally relevant for sentencing. The time interval between the deeds and the trial has two separate effects. On the one hand, the intensity of the general demand for retribution may depend on when the worst excesses took place (Nino 1996, pp. 122–23). After 1945, the demand for retribution in German-occupied countries was often very strong because of the German scorched-earth tactics at the end of the war. By contrast, when communism fell in 1989 the worst deeds were decades rather than months in the past. This effect is based on emotion, not on reason. On the other hand, however, one may argue on more principled grounds that a given offense should be treated more leniently if it lies in the distant past. As noted by Nino (1996, p. 182), one justification of statutes of limitation is that the offender may in a real if elusive sense no longer be "the same person" twenty or forty years later. Even when there is no formal statute of limitations, this factor may affect decisions. In Germany after reunification, court decisions led

[30] Unlike other Norwegians, they were allowed to keep their radios and could listen to London even though doing so was forbidden. At a trial, they might say that they did not know – at the cost of reinforcing the image of their loyalty to the party!

[31] One should also keep in mind that even if the Soviets had no intention to intervene, it was in their interest to make the Polish leadership believe that they would.

to 1996 legislation prohibiting the release of files to prospective employers if the individual's contact with the secret police ended before December 31, 1975 (McAdams 2001, p. 83). With regard to dismissal from official service, several German Länder also argued that the *duration* of contact was also relevant (Sa'adah 1998, p. 219), presumably because a short-lived collaboration suggests a momentary weakness rather than a deeper flaw.

In countries occupied by Germany during World War II, early collaboration was usually treated more leniently. Andenæs (1980, pp. 137–38) claims that the confusion reigning in Norway immediately after the German invasion made it more excusable to join at that time than later, when the resistance had been established. In France, too, "there was a tendency to excuse simple Pétainism in the first months of the Vichy Regime, but never after November 1942. In Alsace-Lorraine, on the other hand, account was taken of the increase in German pressure with the passage of time" (Novick 1968, p. 89). In Holland, economic "collaboration in the last years was considered more serious than in the beginning of the occupation" (Mason 1952, p. 103). With regard to Nazi Germany itself, the denazification process imposed the opposite priority. Those who joined the Nazi Party, the Sturm Abteilung (SA), or the Schutzstaffel (SS) before 1933 or 1937 (regulations varied) were subject to mandatory dismissal (Vollnhals 1998). The reasons behind these priorities are opaque. Although joining the Nazi Party at its obscure inception, in its dominant phase, or in its dying agonies would reflect very different motivations, the moral significance of these differences remains to be spelled out.

Old age may affect sentencing, either by itself or in combination with the ailments that accompany age. A ten-years' prison sentence is worse when the condemned person is eighty than when he is forty; hence for equal crimes the former should get shorter time in prison. When a French court sent Maurice Papon to prison for ten years when he was eighty-seven, the term was actuarially close to a sentence for life. The case against Erick Honecker was dismissed because of his illness. "If the trial were allowed to become an 'end in itself' (*Selbstzweck*) . . . the Federal Republic of Germany (FRG) would be as guilty of violating the basic rights of its citizens as was the German Democratic Republic (GDR). 'The individual,' as the judges put it, '[would] become a simple object of state measures,' and a fundamental distinction between the two political orders would be obscured" (McAdams 2001, p. 38).[32] In the case of Auguste Pinochet, too, the main issue has been his mental competence rather than his age.

Among the extenuating circumstances I have discussed, some are transparently self-serving, others are quite compelling, and still others present moral dilemmas that allow for no easy resolution. It is the importance of excuses in this last category that renders transitional justice so different from ordinary criminal proceedings and makes ranking wrongdoings on any kind of scale

[32] This seems a wild overstatement of a valid point. Trying a dying criminal may be to violate his dignity, but on a scale from 0 to 10 it is probably around 1, whereas the GDR routinely committed violations of size 7 or 8.

difficult. And even if we were able to determine and rank the seriousness of various crimes, the idea of punishment according to desert requires that we could establish a correspondent ranking of penalties. Here, too, certain punishments are so unusual that it is hard to tell where they fit on the scale. It is hard to find the equivalent in prison years of lustration, civil indignity, and being named (but not punished) as a wrongdoer. If neither the severity of the crime nor the severity of the legal reaction can be even ordinally ranked, the case for using desert as a criterion for punishment is very weak.

IV. DETERRENCE

An important argument for retribution has been the need to deter future offenders. "The fulcrum of the case for criminal punishment [of generals and dictators] is that it is the most effective insurance against future repression" (Orentlicher 1995, p. 377). Again we may ask whether this standard argument from ordinary criminal law carries over to the special circumstances of transitional justice. Whereas burglary, embezzlement, and homicide occur regularly in any society, dictatorial seizure of power is a much rarer occurrence. By definition, it is not an act that can happen more than once during a given regime. It is not obvious, therefore that the usual incentive arguments are relevant.

In some cases, the deterrence argument clearly applies. When exile governments during World War II announced the reintroduction of the death penalty for certain acts of collaboration, it was to deter people from engaging in such behavior. The French resistance, as well as de Gaulle from his leadership in exile, issued warnings to deter collaboration (Novick 1968, pp. 24–30; Lottman 1986, p. 31). The draconian laws adopted by the Belgian exile government in December 1942 were probably also motivated by a desire to stem the rising wave of collaboration (Huyse and Dhondt 1993, p. 68). In some cases, moreover, we know that the deterrence worked. The foremost historian of the Norwegian war trials, Johs. Andenæs, cites a letter he received from a former collaborator, who recounts how he refused a request from a superior in the Nazi hierarchy to serve in one of the infamous special courts. When told that he might suffer the death penalty for his refusal, he replied that he might also risk the death penalty if he accepted, and that it would be better for his posthumous reputation if he were sentenced by the Nazi Party than by the resistance.[33] Another effect of the severe exile legislation was to raise expectations in the population that collaborators would indeed be severely punished, and hence to make it very difficult for the government to choose a lenient line had it wanted to do so.[34]

[33] Andenæs (1980), pp. 187–88. The superior was shaken by the reply and later also refused to serve on these courts.

[34] Ibid., p. 269. In fact, these expectations may have served to make the announcement more credible. Collaborators who otherwise might have asked themselves whether the government would in fact use the death penalty may have understood that by announcing the intention it left itself no choice.

In these cases, there was an outside actor – an exile government – that could announce credible statements about retribution for the purpose of deterrence. In most other cases of transitional justice, there are no such actors. During the years of oppression in South Africa, Argentina, Chile, GDR, or Poland, there was no actor outside the country that could credibly threaten collaborators or agents with reprisals after a conjectural transition to democracy. This state of affairs is now changing, by the emergence of international courts and the acquisition of international jurisdiction by national courts. Up to the present, these courts have mainly taken action retrospectively. Increasingly, they are also assuming the role of warning incumbent dictators and their underlings about the fate they may expect if they commit serious human rights violations and are later deposed.

The main deterrence argument, however, does not depend on signals from the outside to the inside, but on signals from the present to the future. Severe punishment of dictators and their collaborators is supposed to act as a precedent that will deter future would-be dictators and their collaborators. Gary Jonathan Bass (2000, pp. 70, 72) cites powerful claims to this effect by F. H. Smith, British attorney general at the end of World War II, in his statement to the cabinet supporting Lloyd George's demand for strict punishment of the German elite:

> Prime Minister, in my judgment, if this man escapes, common people will say everywhere that he has escaped because he is an Emperor. In my judgment they will be right. . . . It is necessary for all time to teach the lesson that failure is not the only risk which a man possessing at the moment in any country despotic powers, and taking the awful decision between peace and war, has to fear. If ever again that decision should be suspended in nicely balanced equipoise, at the disposition of an individual, let the ruler who decided upon war know that he is gambling, amongst other hazards, with his own personal safety. . . .
>
> It is surely vital that if ever there is another war, whether in ten or fifteen years, or however distant it may be, those responsible on both sides for the conduct of war should be made to feel that unrestricted submarine warfare has been so branded with the punitive censure of the whole civilised world that it has definitely passed into the category of international crime. "If I do it and fail," the Tirpitz of the next war must say, "I, too, shall pay for it in my own person."[35]

This was also Justice Robert Jackson's position during the Nuremberg trials: they were needed "to make war less attractive to those who have the governments and the destinies of peoples in their power" (cited in Taylor 1992, p. 55). A French member of the International Military Tribunal (and a lifelong student of international criminal law), Donnedieu de Vabres, stressed the function of the Nuremberg judgment as an "incomparable precedent." Otto Kirchheimer (1961, p. 325 n.29), who cites this phrase, goes on to comment that "the incomparable precedent would backfire, however, if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible future of war criminals."

[35] If the German (and American) submarine commanders in World War II who engaged in similar practices considered this warning, it did not suffice to deter them (Taylor 1992, pp. 399–409).

The precedent argument does, in fact, have a number of flaws. What are the mechanisms by which severe punishment in one country could set a precedent for another country – or even within the same country – at a later date? Situations in which transitional justice is called for tend to be so turbulent or fragile that concern with precedent will at most be a marginal consideration for policymakers (Nino 1996, pp. 144–45). If they want to punish severely and there is a precedent for doing so, they may invoke it, but that is not to say that they will follow the precedent if other considerations urge a different policy upon them.

Suppose, nevertheless, that for whatever reason severe punishments in the present will indeed install the appropriate belief in potential coup makers that they will be harshly punished if they take power illegally and then are deposed. I submit that it is extremely unlikely that the deterrence effect of this belief will reduce the chance of an illegal seizure of power to zero. In a given case, a rational would-be dictator might find that the expected benefits from taking power exceed the costs, even when the latter are inflated by the prospect of severe punishment. Some aspiring dictators may not even care about their personal fate. They may view themselves as being on a holy crusade against fascism or communism and genuinely set the interest of their country, as they perceive it, over their personal one.

Given that some illegal seizures of power are likely to occur, Kirchheimer's observation applies forcefully. In this perspective, the net effect of severe penalties in the present on human-rights violations in the future is essentially indeterminate (Elster 1999, Ch. 1). On the one hand, some rational would-be dictators will be deterred from taking power. On the other hand, the dictators who actually do take power will hang on to it longer and apply more violent means to retain it, reasoning that they might as well be hanged for a sheep as for a lamb.[36] Thus Samuel Huntington (1991, p. 103) asserts that "the early actions of the Alfonsín regime in prosecuting the former military rulers stimulated some Uruguayan military to back away from their commitment to relinquish power." During the trials of the South Korean generals who presided over the transition to democracy, *The Economist* wrote in an editorial (August 31, 1996) that

> it is probably true that neither the generals who run Myanmar, nor President Suharto in Indonesia, nor the Communist Party in China, will be encouraged to move towards democracy by the fate of Messrs Chun and Roh. After all, Mr Roh ceded power as gracefully as any military man can. Now he has fallen victim to the process of democratisation that he helped to foster. The moral drawn by Asia's nervous dictators may well be that, when democrats are at the door, lock them up rather than usher them in.

[36] While recognizing this effect, Orentlicher (1995, p. 382) asserts that it "is outweighed by the more harmful effects of failing to establish an effective deterrent to systematic violations of fundamental rights, in part because the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur." In addition to the cases of Uruguay and South Korea discussed in the text, the South African transition provides a counterexample to the last claim. An even more poignant counterexample is provided by the tension between the simultaneous peace negotiations and indictments for war crimes in ex-Yugoslavia (Bass 2000, Ch. 6).

The reference to China suggests an analogy to Eastern Europe after 1989. In this region, communism collapsed as if it were a house of cards. Among the leaders very few have been put on trial and even fewer convicted. Although there is little hard evidence that the low level of prosecution of the leaders was part of a negotiated deal, there seems to have been an expectation or tacit consensus that they would be spared. Suppose, however, that there had been a strong expectation that all the top leaders in these countries would be sent to prison for life (or even executed) after the transition to democracy. In that case, would the transitions have occurred as early and as peacefully as they did? These leaders did, after all, have control of an impressive array of means of violence.

V. REHABILITATION

Rehabilitation is a marginal concern in transitional justice, although, as shown by Luc Huyse's chapter in this volume, not entirely absent. As usually conceived, the aim of rehabilitation is to reduce recidivism (von Hirsch and Maher 1992). For reasons similar to those discussed in the previous section, that is not likely to be an acute concern in transitional justice. The idea of "treating" generals or torturers so that they will not take power again or not engage in sadistic practices is absurd.[37]

Yet even if the aim of rehabilitation is to reduce recidivism, that goal may require measures that facilitate the reinsertion of the offender into society. By a change of emphasis, that means to a goal may itself be turned into a goal. This idea may be defended in a weak or in a strong version. In the weak version, one may simply claim that once the offender has paid his fine or served his sentence in prison, he should face no further state-created obstacles to resuming a normal life. This desideratum is obviously violated by imposition of national indignity, which, to be meaningful, had to last beyond the term of the prison sentence. As noted, the Belgian version of national indignity was especially crippling.

In the strong version, which is closer to rehabilitation in the traditional sense, prison should include a component of civic reeducation to prevent offenders from creating "subcultures and networks that would almost certainly become hostile toward democracy" (Huyse, this volume). It might also include a component of occupational reeducation. After prison, the offenders should be integrated in support networks, which could help them find work, housing, and so on. As Huyse shows, the Belgian version of his program failed entirely. The Dutch version, by contrast, seems to have been more of a success. I have no knowledge about similar measures being undertaken in other countries.

I can report, though, the following fact from Norway. Some years ago, the publication of a Norwegian "War Dictionary" dealing with World War II in Norway prompted the Ministry of Culture to request a juridical report on whether information on individuals punished for *landssvik* (betrayal of the country) should be treated as confidential. The report stated that the

[37] For similar reasons, the principle of special deterrence does not apply to these cases.

information should be treated as confidential as long as the offender or close relatives survived, adding that "the need for confidentiality must be assumed to be stronger, rather than weaker, after the passage of a long period of time, for instance fifty years as in the case at hand." The idea must be that immediately after the Liberation facts about collaboration were common knowledge, but that with the passage of time and erosion of that knowledge, those convicted for *landssvik* (and their close relatives) had a right to be protected against its redissemination. Nobody has argued, to my knowledge, that the *victims* of the collaborators (and the descendants of victims) have a right to know.

VI. INCAPACITATION

To prevent individuals from committing wrongful acts, one can act on their incentive structure (deterrence), on their motives (rehabilitation), or on their physical opportunity set (incapacitation). The last is usually offered as a rationale for imprisonment, although it could also be used to justify the death penalty. Typically, it is a question of *selective* incapacitation, that is, of identifying certain offenders as especially dangerous and then keeping them in jail so that during that time at least they can commit no further crimes. An operational criterion for "dangerosity" widely used in the United States is that of recidivism ("Three strikes and you're out").

There are several instances of incapacitation in transitional justice. In some of the countries occupied by the Germans during World War II, liberation did not occur on a single day (as it did in Denmark and Norway), but over an extended period. In the regions that were liberated early, many collaborators or suspected collaborators were then incarcerated as a preventive measure, to make them physically incapable of assisting the Germans in the regions that had not yet been liberated. In Belgium, for instance, tens of thousands of persons were interned under chaotic and inhumane conditions, partly to prevent them from helping the Germans and partly to protect them against the spontaneous anger of the population.[38] These were not selective, but on the contrary extremely inclusive acts of incapacitation. Some mayors were pressured by members of the resistance into giving them blank internment orders.

In addition to incarceration, this strategy may take the form of removing corrupt or incompetent individuals from public positions in which they can do damage to the new democracy. In Norway, one reason why wealthy collaborators were fined more heavily was to ensure that "no member of the N.S. [the Nazi Party] can be a powerful economic factor" (Novick 1968, p. 212 n.16, citing Andenæs 1947). It is not easy to determine when administrative purges are motivated by a desire to remove officials from public service and when they reflect desert-based arguments. In the post-1945 purges, the fact that many dismissed officials later regained their job supports the second interpretation. Also,

[38] Huyse and Dhondt (1993), pp. 97–106. For similar information about Holland, see Mason (1952), p. 42.

I assume that officials deemed so corrupt as to be unemployable would have to have acted so badly that they would be liable for prosecution. Moreover, strictly speaking, dismissal for *incompetence* cannot be a political sanction. As noted by Claus Offe (1996, p. 94), it may nevertheless serve as camouflage for such sanctions. When the East German university professor who only knows Marxism-Leninism loses his job, both he and the public at large may well perceive it as a punishment:

> The Unity Treaty provides an ingenious mix of "political" and "technical" justifications for disqualifications. While the Czech Lustration Act declares a clear preference for openly political criteria for disqualification . . . , the German counterpart primarily relies on technical incompetence . . . and assigns a supplementary role to the unacceptability of a public sector worker because of his or her previous political acts. At the same time the net effect of technical disqualification in the German case may well be as great as or even greater than that of the predominant use of political criteria in other countries, given that the skills of whole categories of occupations and professions (law, public administration, humanities) are largely rendered obsolete. . . . As German authorities can therefore rely to a large extent on the technical section (4) of the above law . . . the use of the more controversial "political" disqualification rules of section (5) . . . is often dispensable. (Offe 1995, p. 213)

Lustration may indeed also be seen in this perspective. Commenting on the lustration law passed in Czechoslovakia in December 1991, Kieran Williams (1999) writes that "to avoid charges of retroactivity, the bill was not presented as a means to deal with the past, or see that justice was served. Its advocates' arguments were entirely prospective, focused on preserving the new democracy from the danger allegedly posed by citizens clinging to totalitarian values." Aviezer Tucker (this volume, Chapter 9) similarly argues that lustration partly was a rough-and-ready way of preventing the nomenklatura from occupying positions that allowed them access to movable or liquid assets – not only to prevent them from getting rich (this would be a form of punishment), but to prevent them from doing more damage to the country. As he notes, lustration has also been justified on the grounds that former agents whose identity is unknown are susceptible to blackmail and thus should be kept out of responsible positions.[39]

VII. CONCLUSION

From a behavioral perspective, the crucial question is the causal efficacy of these various justifications for retribution in actual cases of transitional justice. I suspect but cannot prove that deterrence for the purpose of preventing future dictatorships has been relatively unimportant. When invoked, it is most likely to be an additional argument for conclusions already reached on other grounds.

[39] The latter problem, however, unlike the former, could be solved by making the information public, just as homosexuals who in the past were thought to be at risk because of their susceptibility to blackmail now have defused that danger by coming out in the open.

Among those other grounds, three stand out. First, the idea of deterrence to dissuade collaborators of the *current* dictatorship can help explain the policies of exile authorities that are in a position to make credible announcements about retribution. Second, the argument from incapacitation clearly has force in some instances. Third, in transitional justice the pure backward-looking argument from desert often has an overwhelming appeal. It can tap into the very strong retributive emotions that are triggered by human rights violations on a scale and of an atrocity far beyond what are found under normal circumstances. It can also tap into the needs of those who did nothing, for whom retribution can be a means to redeeming themselves in their own eyes and, no doubt, in those of others.

At the same time, the principle of retribution according to desert is often hard to apply, except in core cases. In times of transition, there may be wide agreement that wrongdoers should get the punishment they deserve, and large disagreement about what should count as wrongdoings. In the presence of many competing narratives, accusations, and excuses, the real struggles that took place before the transition are now replaced by the struggle over the past.

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PART II

GERMANY AND GERMAN-OCCUPIED COUNTRIES AFTER 1945

The fall of the German Reich in 1944–45 triggered the most extensive processes of reparation and retribution in the history of transitional justice up to the present. In a first wave, the proceedings focused on war crimes (in Germany) and collaboration (in German-occupied countries). In a second wave, which started in the 1960s and 1970s, the Holocaust began to be seen as the crucial event, leading to new prosecutions and new compensations. It is instructive in this regard to compare the petty compensations offered Jewish slave laborers in the 1950s (Ferencz 2002) with the much larger amounts that were part of the package deal struck with German firms and the German government in 1999 (Eizenstat 2003). With regard to retribution, the trial in Jersualem of Adolf Eichmann (Arendt 1994) was a seminal second-wave event. In France, the prosecution of Maurice Papon for the part he played in the deportation of French Jews was both the effect and the cause of new legal approaches to collaboration.

In Germany, the first wave was itself a succession of separate stages. The first trials of major Nazi figures were conducted by the four-power International War Crimes Tribunal in Nuremberg, whose importance lay not so much in the sentences it handed down as in the new jurisprudence it established. Later, the four occupying powers established separate war crime tribunals and initiated processes of denazification. Finally, these tasks devolved upon the Germans themselves. David Cohen's chapter provides a full survey of these processes and their implications. Similarly, processes of reparation were initiated by the Allies and continued by German legislatures, courts, and agencies. For details, the reader is referred to the harrowing account in Pross (1998).

The pattern of trials and purges in the seven German-occupied countries discussed in this part were roughly similar, although with substantial national variations. One simple statistic is the proportion of the population who suffered some kind of legal punishment, including the loss of civil rights:

Austria	Belgium	Denmark	France	Holland	Hungary	Norway
0.2%	1.2%	0.3%	0.25%	1%	0.3%	2%

The higher numbers for Belgium, Holland, and Norway are due in part to the fact that in these countries members of Nazi organizations were automatically considered guilty. Another statistic, virtually uncorrelated with the first, is the number (per million of population) of executed death sentences.

Austria	Belgium	Denmark	France	Holland	Hungary	Norway
4	30	11	39	4	16	10

In all these countries there were also dismissals in the public sector. Exact numbers are hard to come by. In France, about 2 percent of the 1 to 1.5 million public functionaries were sanctioned, about half by dismissal (see Rousso's chapter). Overall, Denmark seems to have been the most lenient and Belgium the most severe country in this respect. There is no systematic or comparative literature on the extent and adequacy of reparations in German-occupied countries. In France, the compensations for confiscated Jewish property that were made immediately after the war turned out to have been surprisingly adequate. Of the confiscated properties 75 percent were restituted, representing 90–95 percent of the value of the total (Prost, Skoutelsky, and Etienne 2000, p. 173). In Austria, large Jewish concerns were returned, but no compensation paid for the many liquidated small businesses, mostly shops (Eizenstat 2003, p. 302). Some of these countries also paid limited compensation for war damages.

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4

Transitional Justice in Divided Germany after 1945

David Cohen

The confrontation with the past in divided Germany after 1945 presents one of the most complex cases of transitional justice in the postwar period. There is first the fact that at least until 1951 the reckoning with past injustice was for the most part imposed, guided, or supervised by outside conquering powers rather than by internal forces that had overthrown the previous regime. Second, the occupying powers exercised their authority in four separate occupation zones, each with its own administration and political goals, as well as its own approach to coming to terms with the Nazi era. To complicate matters further, the judicial dimension of holding Nazi Germany to account was also pursued, more or less simultaneously, on a number of different tracks:

1. Through cooperative prosecution by the four occupying powers in the International Military Tribunal at Nuremberg
2. Through national military war crimes tribunals of all four occupying powers under Control Council Law No. 10 and national war crimes legislation
3. Through a variety of domestic German criminal courts operating under Allied supervision, and, later, independently

Apart from prosecuting war criminals, the occupying powers sought to purge Germany of its Nazi legacy and prepare the ground for new forms of government through a series of executive, administrative, quasi-judicial, and criminal measures involving automatic arrest, internment, loss of employment, denazification, and punishment for membership in a criminal organization.[1] Some of these measures were carried out with the participation of German personnel or institutions; others were not. In addition, the form of all of these measures shifted repeatedly over the course of the occupation period. Indeed, the advent

[1] Other measures aimed at "reeducation" and administrative, educational, and governmental reforms. These aspects, important though they are for a full appreciation for the foundation of the Bundesrepublik, are beyond the scope of this chapter.

of the Cold War produced fundamental changes in the goals of the occupying powers, changes that had a profound impact upon the quest for justice and the creation of a new political order.

Any of these topics might be (and indeed has been) examined in a book-length study. My more modest purpose here is to survey all of these aspects of coming to terms with the past in an attempt to identify key features of relevance to problems of transitional justice in our contemporary world. As complicated and unique as the German case may be, it nonetheless displays characteristics that have much in common with dilemmas that more recent transitional regimes have also faced. I will organize the analysis around four aspects of the German experience: (1) Allied attempts to punish German war criminals in national and international military tribunals; (2) denazification programs and other measures designed to isolate or neutralize dangerous elements in the four zones, and the German reaction to them; (3) German attempts to achieve justice for Nazi criminality; (4) other aspects of the political context of transitional justice in Germany, which are considered in the Conclusions section. This includes the ostensible failure of denazification and the paradox of the success of the Bundesrepublik's (BRD's) Rechtstaat in the face of the apparent "renazification" of BRD institutions. The discussion will for the most part focus on the period 1945–50. A full history of the attempts to confront past injustice in postwar Germany would not only lead long past anything that might be meaningfully regarded as a transitional period, but also in a sense be nothing less than a full history of the modern Bundesrepublik to the present day.

I. ALLIED TRIALS

The best known of all the Allied measures to deal with Nazi criminality was the trial of top ranking German leaders before the International Military Tribunal at Nuremberg (IMT). The trial is well known, but a few salient features deserve to be highlighted. The first of these is that there was a trial of Nazi leaders at all. There were intense debates within British and American policy circles about the desirability of trials, as opposed to other forms of executive measures. The British wound up opposing a trial of leading Nazis and argued instead for their summary execution. In America, for a time, the Morgenthau Plan, based upon a theory of collective guilt, aimed to punish the entire German people and reduce them to a rudimentary agricultural existence. In the end, the American advisers favoring a trial prevailed and the United States persuaded the British to go along.[2] Whatever Stalin may have earlier said about summary executions, the Soviet Union also weighed in in favor of a trial. This decision meant, of course, that in place of executive action, which would have been seen as pure revenge, a judicial framework would be used to deal with the criminality of

[2] The story of the British–American deliberations has most recently been recounted by Bass (2000: Chapter 5), who also cites much of the earlier scholarship.

the Nazi regime.[3] The participants were well aware that beyond the guilt or innocence of these individuals, the Allies were making history in choosing this course. This was what Justice Jackson was referring to in his opening address as the American chief prosecutor before the IMT when he said that because of the decision to "stay the hand of vengeance," the trial represented "one of the most significant tributes that Power has ever paid to reason."[4] Despite subsequent jurisprudential objections about the legitimacy of the trial, none of the goals that it did achieve could have been realized by summary executions, the only viable alternative course of action.

The goals of those who established the IMT were multiple. In the first instance, the trial aimed at punishment and retribution. As Jackson argued in his *Report to the President*, because of the impossibility of apprehending and punishing the actual perpetrators of all the Nazi atrocities, only by proceeding against the "top officials . . . can there be just retribution for many of the most brutal acts."[5] This idea of achieving *symbolic* justice for *all* victims by prosecuting and punishing a relatively small number of members of the leadership echelon is one that today is often used to defend the very limited scope of tribunals like those for Bosnia (ICTY) and Cambodia. Although the IMT aimed at establishing the guilt of the defendants and punishing them as war criminals, this was only its narrowest, albeit vitally legitimating, purpose.[6] In fact, the trial was to represent the indictment not just of a group of individuals but of the entire German state and the principal institutions that supported it. Defendants were carefully picked so as to represent central governmental and administrative institutions, the branches of the armed forces and the general staff, the administration of the occupied territories of the Reich, the Nazi Party, the propaganda apparatus, the SS, the administration of the war economy, private industry, and others.[7] It was for this reason that relatively minor figures such as Hans Fritzsche were included. Goebbels was dead and the propaganda apparatus required a representative.[8] The centrality of the notion of indicting a system of government and the regime that personified it is brought out

[3] In his *Report of Robert H. Jackson to the President* (August 7, 1945), Jackson recapitulated the case against summary execution and argued that a trial was the only legitimate course for the United States to pursue (Section III.1).

[4] The sentiment was echoed by the Soviet chief prosecutor at the end of the trial, when in his closing address he stated, "For the first time in the history of mankind, criminals against humanity are being held responsible for their crimes before an International Tribunal" (July 29, 1946).

[5] Section I.3.

[6] The London Agreement of August 8, 1945, establishing Charter of the IMT bore the title "Agreement . . . for the prosecution and punishment of the major war criminals of the European Axis."

[7] The representative of Germany industry was to be Alfried Krupp. The American prosecution staff mistakenly indicted the elderly, bedridden Gustav Krupp, who was declared unfit to stand trial.

[8] In terms of the Nazi hierarchy Fritzsche and Julius Streicher (editor of *Der Stuermer*, a rabidly anti-Semitic publication) were far beneath the other defendants.

perhaps most forcefully in the decision to prosecute as criminal organizations six institutions, three of which were convicted.[9]

In contrast to retribution, the other goals of the IMT were forward-looking political goals. To some extent they existed in tension with the legalist principles that the trial was designed to vindicate and exemplify. This tension is implicitly acknowledged by the tribunal itself when in the IMT judgment they state that the charter was an exercise of the "sovereign legislative power" of the victorious Allies but was also expressive of existing international law.[10] The "sovereign legislative power" of the Allies rested, of course, not upon any legitimate institutional authority, but upon the brute fact of their victory and their ability to impose an unconditional surrender upon Germany and Japan.[11] Apart from deterring future aggressors, it was thought important to indict the Nazi state as a whole so as to discredit fully its institutions (as opposed to a handful of its leaders) and thus pave the way for a new, democratic Germany.[12]

Beyond removing the leadership echelon and the organizations upon which it depended, the IMT aimed to educate the German people as to the crimes that had been committed in their name, through institutions in which many, if not most, of them had participated. It also intended to provide a kind of education in the meaning of the rule of law. While German lawyers and legal scholars attacked the ex post facto quality of the indictment for crimes against peace, very few questioned the fundamental fairness of the proceedings or the fact that the war crimes charged had been committed. Paradoxically, in attacking the retroactive nature of some of the charges in the name of such principles as *nulla poena sine lege*, it put the German legal community in the paradoxical position of defending the rule of law and the very principles of legality that had been shattered in the Nazi period. In this way, too, Nuremberg may have contributed to the foundation of the Rechtstaat.[13]

The organizers of the IMT also aimed to educate the world community, as well as to provide a lasting record for posterity not only of Nazi criminality, but also of justice done at Nuremberg. For this reason, Justice Jackson insisted upon a strategy of proving the Nazi regime's crimes not from the mouths of

[9] The other reasons for this will be dealt with later. The organizations included the leadership echelon of the Nazi Party, the SS and SD, the Gestapo, the SA, the cabinet, and the general staff and high command.

[10] This tension was made even more painfully obvious in the IMTFE in Tokyo, when the Allies decided not to prosecute Emperor Hirohito because they believed he would be more useful as their puppet. The internal memoranda and high-level diplomatic correspondence of the British and American governments are brutally frank about this, making it obvious that they saw the trial as, in part, a political tool. Australia and other countries violently and repeatedly objected to the decision, and, contrary to widespread belief, the discussions about whether or not to indict Hirohito continued through 1946, subsided somewhat, and briefly flared again in 1948.

[11] It is worth noting that the Articles of Surrender expressly provided that Germany and Japan would submit to the jurisdiction of Allied war crimes tribunals.

[12] In his *Report to the President*, Jackson makes the case for deterrence as a major goal of the IMT (III.5).

[13] See Shklar (1964: 168–70).

witnesses (whom some might consider unreliable) but from their own documents.[14] As the French chief prosecutor, Champetier de Ribes, succinctly put it, "[T]he chief concern of this trial is above all that of historical truth."[15] For the Nuremberg prosecutors truth and justice were inseparable. Only through the judicial process could the "historical truth" be known, for that historical truth embodied not just the horrific facts of the atrocities but also the responsibility of the individuals and institutions who planned, ordered, and perpetrated them – a responsibility expressed through the unequivocal voice of judicial sentence against which there was no right of appeal. It is significant that the documents collected for the prosecution of the Nazi leaders provided the foundation for the next half-century of historical research on the Nazi regime and its crimes. In this very real sense the IMT was an indispensable vehicle for "historical truth" and fulfilled its "educational" purpose beyond the expectations of the participants. Without Nuremberg the millions of pages of German documents collected by the Allied prosecutors and their investigative teams would likely have been lost. In light of the Nuremberg experience, in response to contemporary debates about truth and reconciliation as opposed to justice, one might well ask what kind of "truth" it is that is possible without the judicial process of trial and judgment?

Beyond Nuremberg, the occupying powers pursued their own national war crimes programs against German defendants either under the framework they had set up in Control Council Law No. 10 or in conjunction with their own national enabling legislation. These trials began in 1945 and, in the case of the French, went on well into the 1950s. American military tribunals convicted 1,814 German war criminals (450 received death sentences), British tribunals 1,085 (240 death sentences), French 2,107 (104 death sentences). About half of the death sentences were commuted (on which, see later discussion). On some accounts, the Soviet Union tried and convicted as many as 45,000 Germans for war crimes,[16] though some other figures are lower and caution is required until the trial documents themselves have been thoroughly studied (see later discussion).

These trials also pursued a variety of goals, both within and between the national war crimes programs. As at the IMT, the United States had the most resources and the most ambitious program. Its centerpiece was the "Trials before the American Military Tribunals at Nuremberg." These twelve "follow-on" trials, or "subsequent proceedings," as they are often known, prosecuted 177 German military and civilian officials, many of whom were drawn from the echelon just below the defendants at the IMT.[17] Again the goal was not to

[14] According to many participants and observers this made for an exceedingly dull and monotonous trial, as thousands of documents were introduced into evidence, but Jackson's eyes were set on a wider audience.

[15] De Ribes, *Closing Address*, July 29, 1946.

[16] Teschke (1999: 242).

[17] Of these, 142 were convicted.

punish all of the offenders from the upper bureaucratic echelons (a list of five thousand potential defendants had been drawn up), but rather representatives of the Nazi state and its most iniquitous organizations. Thus, a group of high-level diplomats and officials from the Foreign Ministry, the Interior Ministry, and so on, were put on trial together in the "Ministries Case." Two groups of the highest-ranking generals were likewise tried in the High Command, Hostage, and Milch Cases. The Nazi system of the administration of justice was prosecuted in the Justice Case under the prosecution theory, accepted by the tribunal, that the justice system in Germany had itself become a criminal organization, whose purpose was to destroy the rule of law and justify a regime of arbitrary terror. Key bureaucratic elements of the machinery of destruction and slave labor of the concentration camp system were prosecuted in the RSHA, WVHA, RuSHA, and Medical Cases.[18] As representatives of German industry, a group of leading German industrialists were tried for their use of slave labor and other crimes in the Flick, Krupp, and I.G. Farben Cases. These cases were prosecuted as "mini-IMT's," with American civilian judges, massive investigative and prosecutorial efforts, and a mountain of evidence provided by captured German documents. As such they represent a continuation of most of the goals discussed for the IMT.

Below this very high-level judicial effort, the United States conducted a series of 489 trials against lower-level German war criminals. Within this program the goals varied considerably. Most of the American trials were held at Dachau (an obvious symbolic statement in itself), where of the 1,672 defendants tried, 1,416 were convicted.[19] A major portion of American prosecutorial resources were devoted to hunting down and punishing those responsible for war crimes against American military personnel. The most famous of these cases was the controversial group trial of seventy-four of those German soldiers responsible for the Malmedy Massacre during the Battle of the Bulge.[20] These types of prosecution were largely aimed primarily (or solely) at retribution. Beyond this, however, the United States also conducted a series of major trials against large groups of defendants who had been involved in running concentration camps: Dachau, Nordhausen, Mauthausen, and Buchenwald.[21] These cases used a theory of collective responsibility of participation in a system of organized criminality to connect every member of the camp staff from the lowliest guard

[18] The SS Main Office for Reich Security (RSHA) included the Gestapo, SD, and other security and police formations and was directly involved in the activities of the *Einsatzgruppen*, and in the administration of the deportation and extermination process. Its chief, Ernst Kaltenbrunner, had been hanged by the IMT. The SS Main Office for Economy and Administration (WVHA) was the purely administrative (finance, supply, construction, maintenance, audits, etc.) division of the SS and its far-flung activities. These included the concentration camps. The Medical Case charged the public health officials and concentration camp doctors who had planned and conducted the program of medical experiments at the camps. The SS Race and Settlement Main Office (RuSHA) was involved in Aryan racial programs.

[19] Final Report or Buscher (1989: 31).

[20] On the controversy, which resulted in a congressional investigation on account of allegations of torture and other irregularities in producing confessions, see Weingartner (1979).

[21] For an overview of these cases, see Siegel, *Im Interesse der Gerechtigkeit* (1992: 40–112).

and functionary to the camp commander to *all* of the crimes committed in the camp. These cases, of course, did not focus upon American victims and, as did the American prosecutions of those involved in the euthanasia program, aimed at exposing the crimes of the German regime.[22] The Americans hoped through such trials to erase any doubt in the mind of ordinary Germans about the criminality of Hitler's government.

To a significant degree the British war crimes program (370 cases) also followed the dual goals of retribution for those responsible for the death or mistreatment of British prisoners of war (POWs) and exposure to the German public and the international community of the iniquity of Nazi Germany, its leaders, and its institutions. In the latter category, for example, the British prosecuted concentration camp staff (Belsen, Neuengamme, Ravensbruck), high-ranking generals, and officials of the I. G. Farben corporation who had been involved in producing and selling Zyklon B gas for Auschwitz. On the other hand, the British devoted the bulk of their more limited investigative and prosecutorial resources to punishing as many cases as possible of war crimes against individual British personnel.

This decision about priorities vividly illustrates one of the fundamental problems in any war crimes program, whether after World War II or in Rwanda, about where to direct limited prosecutorial and judicial assets. In the case of the British and Americans this became even more acute as enthusiasm waned for the trials as higher governmental levels and resources (funding and personnel) were cut back. On the one hand, there was clearly a desire to confront the larger-scale crimes representing the criminal policies and institutions of the Nazi regime. These trials, as I have indicated, pursued a variety of political goals beyond simple retribution. On the other hand, the very strong emotions aroused by Nazi mistreatment of downed flyers, for example, ensured that prosecution of such individuals would absorb most of the resources.

Given unlimited time, money, and political will the British and American war crimes programs could have accomplished both goals. War crimes programs, as the new tribunals for Rwanda, Sierra Leone, and the like, vividly illustrate, never enjoy this luxury. They must act decisively while the public interest and political will that created them still are strong and must set priorities that will help to maintain that support. In the case of the British and American programs, because of the way in which priorities were set, very large numbers of high-level German war criminals, who were connected to mass murder but who had not been involved in atrocities against Allied British or American personnel, escaped prosecution while the lowliest perpetrators who participated in beating, mistreating, or executing even a single POW were relentlessly pursued.[23] This course may have satisfied public opinion at the time, but the public soon

[22] For example, in the Hadamar Case. On these cases see Siegel (1992) and Cohen (1999).

[23] A further irony is that on the whole the level of treatment of British and American POWs was very high (mortality rate of approximately 3.5 percent) compared with either the fate of Allied POWs in Japanese camps (approximately 30 percent mortality) or that of Russians in German hands (approximately 65 percent mortality).

lost interest in most of the trials anyway. In retrospect, their decision, especially because for political reasons the trials ended sooner than prosecutors had anticipated, seems parochial and shortsighted. This conclusion depends, of course, on one's sense of how justice is best served and the political realities that prosecutors must always face. That such dilemmas are still with us is vividly illustrated by the way in which the first defendant tried by the ICTY was a low-level thug who had never occupied a position of political or military responsibility. Prosecutors feared that without bringing someone to trial they might jeopardize their funding and political support, and the Tadic Case was the first they could prepare for trial. They were willing to spend millions of dollars, thousands of hours, and years of judicial activity to obtain this single conviction of an insignificant perpetrator. The cost of symbolic justice has become very steep in the era of new international tribunals.

The French and Soviet approaches to postwar trials were largely shaped by the bitter experience of occupation. Although France tried a far larger number of collaborators than war criminals, the more than two thousand Germans convicted by French military tribunals far exceed the results of any other Western country. In the prosecution of the industrialist Roechling, and of members of the concentration camp staffs of Natweiler and Ravensbruck, the French also aimed at exposing the criminal policies of the German regime and the institutions that supported it, though principally as exemplified in the suffering of French citizens in such institutions. Most of the prosecutions, however, aimed at punishment of those guilty of individual offenses against French citizens. The French will to prosecute outlived that of either the Americans or British. Whereas the latter wound up their war crimes programs in 1948–49, French trials lasted until well into the 1950s. It was not until 1953, for example, that perpetrators of the massacre at Oradour-Sur-Glane were convicted.

What are the explanations for this French persistence? One factor is certainly that the desire for retribution was stronger because it was fueled by the humiliation of defeat and the terror of the German occupation. Another is certainly the political uses to which such prosecutions could be put. Apart from other more specific political issues,[24] they provided a continuing way to support the postwar myth of the unity of the French nation in its victimization by and resistance against the Nazi oppressor. After the immediate wave of spontaneous violence and prosecutions against collaborators, it was not until the 1990s that the French government was willing through new prosecutions to face the complicity of high Vichy officials in the Nazis' worst crimes. Whereas, as will be discussed later, the Cold War led the British and American governments to turn their efforts from prosecution of Germans to clemency and early release, the French had political reasons to persist far longer. One need only consider how powerful a symbol Oradour-Sur-Glane has become to recognize the role that such prosecutions must have played in shaping public consciousness about the

[24] See, e.g., Teschke (1999: 228).

war experience.[25] The political dimensions of such trials are amply illustrated by the irony of the discovery by the French public at the time of the trial that many of the perpetrators at Oradour were Alsatian. Not only did these defendants receive lighter sentences, but, as a result of public sentiment in their favor, officials soon pardoned them, though not their German coperpetrators.

The Russian trials of German war criminals were even more dominated by retribution for the brutality of the war and occupation on the Eastern Front. The Russians had, however, earlier than the other Allies realized the political uses to which war crimes trials could be put. The first Allied war crimes trial was conducted by the Soviet Union in Kharkov on December 15, 1943.[26] Widely publicized in Russia, the transcript was also published in English. This trial, as did the Stalinist show trials on which it was modeled, appears to have been political in the fullest sense, for the defendants were forced to admit their crimes and thereby serve in the Russian denunciation of the brutality and criminality of the German occupation. Further such trials followed in Krasnodar, Minsk, Riga, and elsewhere. In many POW camps more than thirteen thousand German soldiers were also put on trial and convicted without attendant publicity.[27] These trials continued through 1949.[28] After the end of the war, the Soviet Union also conducted war crimes trials in the Soviet Occupation Zone in Germany (SBZ). According to one important early study of the occupation, 14,820 Germans were tried as war criminals in the SBZ. Of these, 13,198 were convicted, 138 sentenced to death.[29] These numbers, of course, dwarf the figures of all of the war crimes programs of the other occupying powers and point to the intensity of the Soviet desire to enact retribution and to lay the political foundation for what was to become the DDR. The NKVD and the Communist Party Central Committee were centrally involved in the preparation of these trials. While the focus of the Russians was on the suffering of the Soviet people and retribution for the iniquity of the Nazi regime, the trials served a number of larger purposes consistent with the ideology of the victory of the Stalinist regime in the Great Patriotic War. In the SBZ they aimed, among other things, at political consolidation of a new elite (to be considered further later).

[25] The massacre at Oradour-Sur-Glane involved a relatively small number of victims (in comparison with extermination and slave labor camps, or with the activities of Einsatzgruppen and other death squads in the East), but came to symbolize Nazi iniquity for the French in much the same way that the Fosse Adreatine or Marzabotto did for Italy.

[26] The Russians also widely publicized the Khabarovsk Trial of Japanese involved in the Unit 731 bacteriological and chemical warfare experiments that murdered thousands of victims. Part of their motivation was to embarrass the Americans, who had prevented these perpetrators from being prosecuted before the Tokyo Tribunal (IMTFE).

[27] Rueckerl (1982: 100).

[28] In comparison with the figure of more than 45,000 that is often cited, e.g., by Teschke (1992: 242), who also claims that more than 10,000 were executed, a recent search of Russian archives commissioned by the International Documentation Center for War Crimes Trials found the following statistics for war crimes trials in the USSR (not counting those in the SBZ): 16,572 Germans tried for war crimes, 12,807 convicted, 118 sentenced to death. Future research will have to clarify the discrepancy between these figures.

[29] Friedman (1947: 332).

II. DENAZIFICATION

Denazification shared a number of goals with the Allied war crimes programs. Not least of these was the most immediate objective of removing the Nazi leadership not only from power but also from the public arena, where they might influence the course of the occupation. Also as did the trials, denazification had punitive aims, though only as one element in a complex set of policies and practices. The complexity of denazification is heightened by the fact that it operated with significantly different means and objectives in the four occupation zones. One cannot emphasize enough that there was no single experience of denazification, and that it not only varied among the zones but also changed radically during the course of the first four years of occupation.[30]

Denazification, as the term implies, aimed at a purging of Germany of nazism. But what was nazism for this purpose, and how wide a swath of the German population should the program include? There was little unanimity among the Allies in this regard beyond their conviction that the governmental and party leadership echelons should be removed and rendered harmless, and that the economic, cultural, and educational spheres should be freed from the constraints of Nazi ideology. But what about the more than 6.5 million members of the NSDAP or the countless Germans who, although not party functionaries or even members, had denounced neighbors, participated in or profited from persecution or exploitation in one way or another, or simply lent their enthusiastic support to the regime?[31] In response to such questions, in the Western occupation zones British, French, and American authorities devised a series of measures and policies targeting different groups and different areas of social, economic, and political life. In what follows I will leave aside the important and complex dimension of reeducation, involving educating the German populace in democratic values, reforming the school system, and the like, and concentrate on the political and judicial features of denazification in its central sense of identifying and removing "harmful" or "dangerous" Nazi elements from German institutions.

Before examining differences in the goals and methods of the different denazification programs it may be useful to focus first on the measures that they had in common. In the initial phase of the occupation denazification was intimately linked to concerns about security and the establishment of full Allied control. Security concerns focused above all on the anticipated armed resistance of underground organizations and on neutralization of the ability of Nazi leaders

[30] Recent studies of individual cities or areas have shown ways it could also vary considerably within zones. Important as this point is, my general assessment will necessarily have to forgo analysis at this level of detail. For examples of studies of individual cities or variation in zones, see, e.g., Ettle (1985), Henke (1981), Welsh (1989), Woller (1986).

[31] The Allies had captured the NSDAP membership list. In addition to the 6,542,261 members on May 1, 1945, there were members of other related organizations as well as those who had applied but whose membership had not yet been officially approved. General Lucius Clay later estimated that some 12 million or more Germans were identified with Nazi activities (1950: 67).

to organize popular support against the occupiers.[32] On the American side, for example, Eisenhower's staff initially prepared the *Handbook for the Military Government in Germany*. This document's categories encompassed the automatic arrest of individuals who, because of the level of their status in Nazi Party organizations, were felt to be certain security risks.[33] Mandatory automatic arrest also applied to all members of certain security and police formations, for example, the Gestapo, SD, SA, and SS.[34] In all, something like 250,000 individuals fell into these categories. Automatic arrest and ensuing internment without trial were practiced by all the Allies. In addition, of course, the Allies were actively seeking individual war crimes suspects, who were also arrested upon identification as potential defendants for the trials discussed in section I.[35] Their arrest, of course, was predicated upon suspicion of individual responsibility for particular war crimes rather than, as was the case with automatic arrest and internment, their status and affiliation within certain specified organizations. The difference between these two programs is succinctly captured in the statement of objectives in Control Council Law No. 38, promulgated in October 1946, to provide a uniform policy in Germany concerning[36]

a. The punishment of war criminals.
b. The complete and lasting destruction of Nazism and Militarism by imprisoning and restricting the activities of important participants or adherents to these creeds.
c. The internment of Germans, who, *though not guilty of specific crimes* are considered to be dangerous to Allied purposes (my emphasis).

Internment was thus conceptualized as a preventative security measure rather than as punishment, but the conditions in many of the camps, particularly through the winter of 1945/46, made it seem punitive both to those interned and to many in the German public.[37]

The numbers of those interned as of January 1, 1947, were as follows:[38]

	American Zone	British Zone	Soviet Zone	French Zone
Interned	51,006	34,500	59,965	10,923
Released	44,244	34,000	7,214	8,040
Total	95,250	68,500	67,179	18,963

[32] See Wember (1992: 23), who cites the following British definition of internment: "Die Neutralisierung der Aktivitaeten von potentiell gefaehrlichen Personen."

[33] American intelligence teams arrested individuals on the basis of the categories developed in the SHAEF *Arrest Categories Handbook* (April 1945).

[34] Kormann (1952: 24).

[35] Such individuals were sought on the basis of lists like the Central Registry of War Criminals and Security Suspects (CROWCASS) list circulated by the United Nations War Crimes Commission.

[36] The text of Control Council Law No. 38, and of many of the other documents referred to here, is conveniently available in Rhum von Oppen, *Documents on Germany under Occupation* (1955).

[37] Conditions in general in Germany were very bad at this time. Despite the undoubted suffering of many internees, the mortality rate was very low, less that 1 percent.

[38] Badstuebner (1999: 234). See also Friedmann (1947: 332).

As can be easily seen, the Allies were quite serious about the potential security risk and acted decisively in carrying out their goal of removing and neutralizing those who were most likely to oppose their policies.[39] One can also see an important difference in the internment politics of the Western powers as opposed to the Soviet Union. The former, in response to a wide variety of circumstances, relatively quickly began releasing large numbers of internees. By the end of 1948, for example, in the American Zone only a few hundred remained interned. The British Zone also moved relatively quickly toward emptying its camps. In the SBZ, however, fewer of those who entered the internment process were relatively soon filtered back out again and a significant number were deported for slave labor to the Soviet Union. Those detained also seem to have included a larger percentage of individuals whose internment appears to have been unrelated to Nazi stigma (*Belastung*).[40] This again points to the different goals that the occupying powers sought to achieve through their denazification programs.[41] The mortality rates in the Soviet internment camps were also extremely high. According to Soviet figures more than a third of those interned died (43,000 of 122,671), compared with less than 1 percent in the British camps.[42] For the Soviet Union internment and retribution seem to have gone hand in hand.

In the Western zones the automatic arrest and internment policies created a number of new problems. First, the political goals of removal and neutralization increasingly clashed with the economic necessities of maintaining and rebuilding even a rudimentary system of public services.[43] Thus, many exemptions had to be made for officials, technicians, businessmen, and workers whose services were deemed essential. Policies varied widely here between zones in the initial period, with the British placing a higher priority on reconstruction than the Americans. The French and Soviets, as will be seen, followed an altogether different line. Second, there was a growing recognition that the "big fish" had not been caught in this net: many of those who were arrested or who had lost their jobs were of relatively low status, and the upper echelons had gotten away by going into hiding, changing identity, or leaving the country.[44] By the end

[39] Not all of those interned had been subject to the summary arrest procedures, but most were. See, e.g., Wember (1992: 7). Suspected war criminals were also interned, usually separately.

[40] Niethammer (1999: 274–75).

[41] Vollnhals (1991: 54–55) points out that the Soviets also interned many persons not because they had been members of the Gestapo, SD, NSDAP leadership, and so on, but because they were potential opponents of Soviet occupation policies. In the West those interned could in principle include anyone who was regarded as a security risk or as a danger. Exactly how different these policies were in practice would require more careful study of their implementation.

[42] Vollnhals (1991: 54–55) notes that these Soviet numbers are much lower than West German estimates, but that the latter (estimating 160,000–260,000 interned) may well be inflated.

[43] Military Government Law No. 8 provided sweeping exclusions from employment other than ordinary labor for Nazi Party members.

[44] Peterson (1978: 146). According to some estimates approximately 100,000 went into hiding (Wember 1992: 27). Even though they were not interned, their being forced into hiding also effectively prevented their participation in public and political life.

of 1945 it was becoming clear in American and British policy circles that a different approach was needed as German approval of denazification measures was steadily falling as their arbitrary and unfair aspects became increasingly apparent.

Apart from automatic arrest and internment, a second prong of the policy of removal and neutralization involved trials for membership in criminal organizations. Here the punitive aspects of the removal and neutralization policy became fully explicit. As mentioned in section I, six German organizations had been prosecuted at the IMT as criminal. Three of them were "convicted." The idea behind this extended beyond mere symbolism. A fundamental concern of the British and American war crimes program planners had been coping with the vast number of potential war criminals, estimated to number in the hundreds of thousands. There was a very strong conviction that the "symbolic justice" of the IMT was not enough; nor was that provided by the national military tribunals, which, inevitably, would not be able to try all those who had participated in the crimes associated with the SS, Gestapo, SD, and so on. Control Council Law No. 10 (December 20, 1945) provided that "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal" was a crime punishable by death, imprisonment, fine, forfeiture of property, or loss of civil rights.[45] The original idea had been to make possible summary trials in which only the identity of the person and his or her membership in the particular organization would need to be established. The IMT rejected this strategy of collective responsibility by holding "that criminal guilt is personal and that mass punishments should be avoided." They did not completely reject the notion of "group criminality," however, but rather excluded those who were members of criminal organizations but "had no knowledge of the criminal purposes or acts of the organization or those who were drafted by the State for membership, unless they were personally implicated."

Although American officials, such as General Lucius Clay, had initially been very keen on such trials, they eventually collapsed this category of organizational criminality into the general denazification proceedings under Control Directive No. 38. Only the British Zone pursued a systematic policy of criminal proceedings for membership in a criminal organization. They did this by creating German tribunals (*Spruchgerichte*) that operated in the internment camps. By October 1949 these tribunals had tried 24,154 members of the leadership corps (*Fuehrerkorps*) of the Nazi Party (NSDAP), the Gestapo and SD, and the SS (*Allgemeine* and *Waffen SS*). Of these, 15,724 were convicted, 5,614 received a penalty of imprisonment, and the rest were fined. These trials generated great public interest in Germany, but the consequences were rather anticlimactic. The vast majority of those sentenced to a prison term were eligible for immediate release because their internment time counted against their relatively shorter sentences. Only nine hundred had to spend any additional time in custody and

[45] Article II, 1(d) and 3(a–f).

most of these were released after a few months. In July 1950 only forty-three remained in custody in the British camp at Esterwegen.[46] This outcome, as will be seen later, was largely related to the shift in the political climate in Europe and the consequent changes in Allied occupation policy. It must also have been clear to British officials that whatever need there had been to remove and neutralize potential opponents of Allied policy had by this time been satisfied to the extent that it would ever be.

In the other zones membership in a criminal organization was treated under the purview of Control Council Directive No. 38, as part of the general process of denazification. This meant that it had in actuality lost any practical significance as an independent category of criminality and was simply subsumed within the general purge of denazification that would have, in any event, taken the significance of such membership into account. According to official statistics, the Americans in particular tried and convicted large numbers of individuals as members of Nazi organizations under Control Council Directive No. 38:[47]

	U.S. Zone	French Zone	Soviet Zone
Tried	169,282	17,353	18,328
Convicted	144,139	17,033	18,061

As these numbers make abundantly clear, there was widespread divergence among the Allies in their conceptions of the goals and appropriate methods of denazification. The great discrepancy between the American figures and the others seems to indicate how much more seriously the Americans took the task of purging those who had belonged to key Nazi organizations from German public life. The Allies did all agree on the principle of removing and neutralizing the Nazi elite (however difficult it might be to identify them in practice). What they could not agree on was how to proceed with the actual practice of denazification, or what larger goals it should serve. It is therefore necessary to examine each of the four occupation zones individually before drawing any conclusions about denazification and what it did or did not accomplish. It is appropriate to begin with the American program, which, as indicated, was by far the most ambitious in its scope. I will examine the American efforts in some detail and in subsequent sections briefly highlight the different goals and methods adopted in the other three zones.

The American Zone

The scope and moral fervor of the American ambition are perhaps best indicated by Dwight Eisenhower's explanantion that "reduced to its fundamentals, the United States entered this war as a foe of Nazism; victory is not complete until we have eliminated from positions of responsibility and, in appropriate cases

[46] This account is drawn from the excellent study by Wember, *Umerziehung im Lager*. The statistics are found on 318–43.

[47] These official figures are given by Friedmann (1947: 332).

properly punished, *every* active adherent of the Nazi party" (my emphasis).[48] More concretely, in 1952 an official American report on denazification identified the three major goals that had informed the program at its inception. The first involved the transfer of power to non-Nazis so that a stable, democratic, and peaceful Germany could emerge. This was conceived of as a "revolution by decree." The second goal was to punish the guilty in such a way that the German public would recognize that they had "violated basic standards of a just society." This recognition would, it was hoped, bring about a change in German values. Finally, and in important ways limiting the previous two goals, denazification was to be accomplished in such a way that it did not produce "social instability."[49]

The translation of these not necessarily compatible goals into practice was not an easy process. Driven to a significant degree by public opinion in the United States, the American authorities initially pursued broad denazification with great energy. In connection with the Military Government Law No. 8, which restricted employment for those with certain kinds of Nazi affiliations, a questionnaire system was introduced to determine whether an individual fell into particular categories. By June 1, 1946, the American public safety officers had received 1,613,000 such questionnaires as the net was cast increasingly more widely.[50] At the same time, an attempt was made to coordinate such measures throughout Germany with the passage of Control Council Law No. 24 (January 12, 1946), which provided for the removal of Nazis from positions of responsibility under ninety-nine categories. By the end of June 1946, 107,440 Germans in the American Zone had lost their job or been banned from employment under this measure. The results of all this were increasing German dissatisfaction with perceived and real inequities in the system (especially its reliance upon mechanical criteria) and a growing American realization that they lacked both the resources to do the job quickly and the necessary knowledge of German society and Nazi institutions to do it well.[51] The result was a decisive shift in policy, resulting in a dramatic change in the direction and effects of denazification.

What the American authorities decided to do was to turn over the denazification process to the Germans. The vehicle by which this was accomplished was the Law for the Liberation from National Socialism and Militarism (known in Germany as the *Befreiungsgesetz*), enacted in March 1946. One of the fundamental difficulties confronting the Americans in charge of denazification before mid-1946 had been the problem of identifying those outside the higher echelons of the party and government who should be brought within its scope. This

[48] OMGUS, *Weekly Information Bulletin*, 9 (Septemeber 22, 1945).

[49] Kormann (1952: 44–46).

[50] Fuerstenau (1969: 38). Clay gives the number as 1.65 million (1950: 69).

[51] As tacitly acknowledged even by Clay (1950: 70–71). In 1946 57 percent of Germans polled expressed satisfaction with denazification, in 1948 32 percent, in 1949 17 percent (Peterson 1978: 153).

difficulty arose in part from the sheer number of individuals who had participated in Nazi organizations of various kinds or who had not participated but had nonetheless actively supported the regime. Beyond mere numbers, it also had to do with the lack of American understanding of the German society in general and of the complex of organizations that the NSDAP had established in particular. Having adopted the strategy of screening through questionnaires (*Fragebogen*), the American administration found itself faced with the task of how to evaluate the more than 12 million documents expected. In the first half of 1946 the administrative apparatus saw itself devoting more resources to this task than to any other and, consequently, neglecting matters that were increasingly seen as of greater moment.[52] According to a contemporary observer of American denazification efforts, "The more systematic the procedure, the more irresistible became the conclusion that the original idea of removing anyone who had in some way been associated with the Nazi party or another Nazi organization was incapable of execution."[53]

The result of this recognition that the effort was bogging down and doomed to failure by virtue of its unrealistic ambitions was a new policy based upon three insights. First, in order to be effective, denazification procedures would have to distinguish the "real" Nazis, the active supporters of the regime, from those whose participation had been only "nominal." Second, this process could only be accomplished by transferring it to the Germans. Finally, some officials who had been active supporters would have to remain in their position to further the work of reconstruction that was becoming an increasingly central American goal.[54]

The decision to hand over denazification to the Germans was as controversial as it was inevitable once its scope had become so vast. In the end, the Law for the Liberation from National Socialism might be regarded as in fact a "law for liberation from denazification." A vast apparatus of 545 German tribunals with a staff of twenty-two thousand was set up.[55] They were to decide which cases should be a heard and to classify individuals according to five categories: major offenders (who could be punished by up to ten years' imprisonment, property confiscation, loss of some civic rights), offenders (imprisonment or fine), lesser offenders (fine only), followers, and nonoffenders or exonerated by trial. By February 1947 the German tribunals (*Spruchkammern*) had processed only slightly more than half of the 11,674,152 completed questionnaires. Of these 6,000,000 individuals, only 168,696 had been brought before a tribunal (less than 3 percent). Of them only 339 had been classified as major offenders, 3,612 as offenders, 13,708 as lesser offenders. A total of 2,018 had been sentenced to a period of internment. There was considerable scandal over the meager results of

[52] Zink (1957: 159). Zink notes that many thousands of officials would have had to be trained to carry out this program adequately.
[53] Friedmann (1947: 114).
[54] Ibid.
[55] Zink (1957: 162).

this massive screening effort and the exoneration of various individuals whose past activities were highly questionable.[56]

After vainly threatening the Germans about the obvious whitewashing, American officials aimed to end what had become an embarrassment as quickly as possible. As a result of successive amnesties of various categories of individuals, the group subject to review was made ever smaller.[57] By the time the entire operation was wound up, altogether 13,410,000 persons had been examined. Of these, 3,660,000 had belonged to the NSDAP or some other Nazi organization. Of this group subject to the classification schema of the liberation law, only 1,549 major offenders had been identified and a total of 9,600 persons sentenced to some term of imprisonment. 475,000 were branded as "followers" (*Mitlaeufer*).[58] Already in 1949 only three hundred of those sentenced to imprisonment were still incarcerated.[59] The former chief historian for the U.S. high commissioner in Germany summarized these results of this massive effort: "When one contemplates the enormous amount of energy expended by American military government, the serious interference occasioned in other major programs, the loss of prestige and respect which the United States suffered among Germans in its and other zones, and various other factors, the achievement seems small indeed."[60]

What of course doomed the German administration of denazification was the inverse of what produced the American failure. The Americans (initially at least) had the political will to make denazification effective but lacked the knowledge to do so. The German tribunals were far more capable of discerning which defendants were in fact truly *belastet* by their Nazi past but lacked the political will to apply the scheme with its intended rigor. Even more serious was the fact that a decision had been made to proceed with the easier cases first and save the more serious for the end. Since, for reasons relating to wider political

[56] "The press was filled with reports of denazification 'atrocities.' A day did not pass when an incident involving a too lenient sentence, or a denazified SS assaulting a former concentration camp inmate, was not recorded. The American newspapers were eager dispatchers of these tidings" (Kormann 1952: 126).

[57] On the various amnesties (the first, announced on July 8, 1946, excluded those born before January 1, 1919), see, e.g., Kormann (1952: Chapter 7).

[58] Clay (1950: 260). Hilberg (1985: 1085) gives slightly different numbers.

[59] Hilberg (1985: 1085) summarizes the American Zone results as of mid-1949 statistically:

Registrants (Fragebogen)	13,199,800
Charged	3,445,100
Amnestied without trial	2,480,700
Fines	569,600
Employment restrictions	124,400
Ineligibility for public office	23,100
Property confiscation	25,900
Special labor without imprisonment	30,500
Assignments to labor camps	9,600
Assignees still serving sentence	300

As he dryly notes, "In a sense, the most significant figure in this tabulation is the last one."

[60] Zink (1957: 164).

developments in Europe, the American and, consequently, German will to pursue denazification steadily ebbed, many of the most serious offenders escaped punishment, while most of those who were punished were only small fry.[61] Although the American effort failed to achieve its goals, in other, unintended ways it may have been a considerable success.

The most influential scholar of the American denazification effort has argued that from the standpoint of practical consequences the tribunals really represented a procedure for social and political rehabilitation of those with a Nazi past.[62] Lutz Niethammer argued that the tribunals undermined the *political* purge (*Saeuberung*) of denazification by a strategy of "juridification." By insisting that only the strict standards of proof of the criminal law could justly establish individual responsibility for those accused of being offenders, it was possible to downgrade all but the most egregious cases to the category of "follower" or *Mitlaeufer.* The tribunals, on his view, thus functioned as a *Mitlaueferfabrik*, literally, "a factory to produce 'followers'." The judgment of the tribunal that one had merely been a follower relieved one of the stigma of Nazi activity and allowed social and economic reintegration. Such judgments thus functioned as a "Persilschein" (after a German brand of laundry detergent) whereby one's past was wiped clean.

As one might expect, in a society that had been characterized by mass support for the Nazi regime, the status of merely having been a follower was unlikely to be seen as a just basis for exclusion or punishment. This was even more so the case as time began to pass and other preoccupations took the foreground. Indeed, some of the Nazis' most vehement critics, such as Eugen Kogon, had argued eloquently for the injustice of punishing such individuals, who had only made an innocent "political mistake" in following Hitler and participating in Nazi institutions.[63] The American effort to remove and stigmatize those with a Nazi past thus produced a procedure that enabled all but a handful of them rather to reintegrate themselves into the mainstream of German society.[64] The gradual turn toward economic prosperity, along with other factors, ensured that this mainstream moved united (on the whole) in its collective sense of guilt and united in its repression of the past toward a democratic culture that the United States had hoped to promote through very different means.

The British Zone

Commentators often note that the British denazification program oriented itself to a significant degree on the policies and goals articulated by the Americans.[65]

[61] See, e.g., Badstuebner (1999: 246).
[62] L. Niethammer, *Die Mitlaeuferfabrik* (Berlin, 1982).
[63] Kogon (1947).
[64] See also Vollnhals (1991: 23): "In dem langwierigen Entnazifizierungsprozess hatte sich das Personal der NS-Diktatur mehr oder weiniger in nichts aufgeloest."
[65] See, e.g., Vollnhals (1991: 24).

Although there is significant truth to this claim, there were also important differences that reveal a distinct underlying attitude toward denazification. While the British military government in Germany clearly saw denazification as an important goal, they pursued it more selectively and with greater moderation. In the first place the British did not follow the American lead in early on shifting primary responsibility for denazification to the Germans. They did engage German tribunals in the process but only at a much later stage (after mid-1947). Second, and not unrelated, they resisted the temptation to extend the denazification purge to the entire adult population of their zone. In general, they also adopted a more pragmatic attitude toward balancing the goals of denazification with those of reconstruction.[66] Improving economic efficiency was given a high priority so as to reduce the reconstruction costs that the British government would have to bear. Large categories of professional activity were excluded from denazification for this purpose. It was also easier for the British to pursue a pragmatic policy because they did not have to contend with the kind of overheated public opinion that existed in America. As the former chief historian for the U.S. high commissioner for Germany noted, "Though their people had suffered far more grievously than Americans . . . there was never in Britain the wildfire of revenge which was kindled in the United States."[67] In our own recent history we have seen how public concern over massive human rights violations in one country can drive an international response when in another country equally serious atrocities are met with international indifference. Likewise, the political will to respond may immediately wane when public attention is distracted. Such external political factors in the United States, France, Britain, and the Soviet Union were no less important in shaping the role of denazification in post-1945 transitional justice in Germany.

After the initial phase of automatic arrest and internment (described previously), the British also proceeded, under the framework of Control Council Directive No. 38, with a system of classifying individuals who fell into one of ninety-nine categories of Nazi affiliation. Although the British employed the same five-part classification (major offenders, followers, etc.), there were a number of important practical differences in their approach. First, because the system of registration was not universal, they screened a far smaller number of questionnaires (by November 1947 only 2.1 million from a population of 22 million).[68] Second, because (as noted) the British more carefully distinguished between denazification screening and criminal proceedings (prosecution for

[66] In the economic sphere, they also first applied a policy of compulsory removal to employees in the public and private sector who fell into certain categories of status or affiliation in Nazi organizations. As in the American Zone this led to significant economic and administrative problems. In the second phase, under the framework of Control Council Directive No. 24, they concentrated their efforts primarily on civil servants and only selectively on employees in the private sector.

[67] Zink (1957: 167).

[68] Vollnhals (1991: 28).

membership in a criminal organization or for war crimes), the first two groups, major offenders and offenders, had been dealt with already. Those accused of war crimes were tried before British military tribunals, those accused of membership before the special criminal tribunals (Spruchgerichte) set up for that purpose in the internment camps. This meant that the German panels who advised the denazification officials of the British military government dealt only with individuals who fell into one of the lesser three categories (lesser offenders, followers, and nonoffenders).[69] If it turned out that some of these individuals appeared to have committed war crimes or crimes against humanity, they were turned over to appropriate tribunals.[70]

The British thus maintained a more consistent distinction between the *political* process of denazification in the form of an administrative purge and the *judicial* process of criminal prosecution as a form of punishment and retribution.[71] Paradoxically the advantages of this consistency seem to have been largely lost on the German public, who widely perceived the British practice as arbitrary and unfair. By the middle of 1947, partly as a result of the British public's sympathy with German complaints about the denazification program, partly because of a general loss of interest in retribution for the losses of the war, the British military government largely turned over the process to the Germans.[72] Whereas the American program had aimed at punishing both the Nazi elite and the mass of those who had worked for or supported the regime, the British effort followed a somewhat different course. The real punitive teeth of the program were reserved for those thought to be the most serious offenders, who were segregated into a group and subjected to purely criminal proceedings. A more modest selective procedure was aimed at a smaller spectrum of mass supporters. In the end it appears that the British scheme was at least as effective as the American in identifying serious offenders, without the enormous costs generated by the huge apparatus required by American ambitions. It remains an open question, however, as to whether identifying a few hundred thousand "followers" advanced the British closer to the accomplishment of their goals except perhaps in the unintended way suggested by Niethammer in his study of the American *Mitlaeuferfabrik*. It may be that an administrative system of classification of those who actively politically supported a totalitarian government is always doomed to fail in circumstances in which the general public sees little difference between the actions of those supporters and their own acquiescence or participation in the same regime.

[69] Fuerstenau (1969: 104–6).

[70] Ibid., 106.

[71] Thus, those convicted of membership in a criminal organization were, upon release from internment, subject to the regular denazification review and classification as a lesser offender, follower, or nonoffender.

[72] Under the German program some 2,041,000 individuals were reviewed, of whom 27,177 were classified as lesser offenders, 222,028 as followers (Vollnhals 1991: 32–33).

The French Zone

As discussed, the French government pursued the largest and longest war crimes trial program of the Western Allies. Interestingly, denazification was clearly accorded a far lower priority, largely, it would seem, because it was seen as having little political utility. Most commentators seem to agree that the French military administration was less prepared and less interested in pursuing denazification systematically than that in any of the other zones. Their main goals were to secure as many German resources as possible for French reconstruction and to enhance their own power while weakening Germany, so as to ensure that it could never again become a dangerous neighbor.[73] The most careful study of the French denazification program concludes that any approach to denazification that conflicted with these goals had no chance of being adopted.[74]

With no systematic policy in place, the initial phase of denazification appears to have been largely improvised. Perhaps because they were so ill prepared the French placed significant responsibilities in German hands early on and proceeded in a decentralized manner. There were numerous shifts of policy and a good deal of bitterness on the German side at the seemingly arbitrary manner of proceeding. Most scholars accept that bribery of French officers enabled many who were subject to economic disqualification to maintain their positions.[75] In the first six months of 1946 the French military government reviewed 77,924 persons who, according to the criteria of Control Council Directive No. 24, should have been automatically fired or subjected to particularly careful scrutiny. Of these individuals, primarily civil servants, 45,015, or 58 percent, remained in their positions; only about one-third were removed. The results of the purge of the economic sector were even more meager. Of 11,304 persons who met the same criteria, two-thirds (7,343) were retained.[76]

The important exception to the chaotic state of denazification in the French Zone was Wuerttemberg-Hohenzollern. Here the provisional German SPD regime in place since October 1945 persuaded the French to adopt their denazification model. This resulted in the promulgation in May 1946 of the Rechtsanordnung zur politischen Saeuberung. Most German scholars of denazification agree that this was the most effective program devised in any of the occupation zones. Its distinguishing characteristics were that, in the first place, it eschewed the formal, mechanical criteria used by the American and British programs. Instead, it focused on a substantive assessment of the individual's past activities and current position in the civil service. Second, it employed a purely political administrative procedure, with no judicial trappings and no right of appeal. That is, the decision was seen as a purely political measure, not

[73] See Vollnhals (1991: 35–37), Fuerstenau (1969: 134–35), Henke (1981: 8–19).
[74] Henke (1981: 18).
[75] See, e.g., Vollnhals (1991: 35–36).
[76] Vollnhals (1991: 38).

as a judicial sanction based upon a finding of individual responsibility. Finally, its effectiveness was driven by the *Staatskommissar fuer die politische Saueberung* (state commissioner for political cleansing), Otto Kunzel (SPD), who enjoyed the authority to decide all cases, subject to confirmation by the French authorities. In the thirteen months of its operation this program reviewed 7 percent of the population. Of those in the civil administration 42 percent received sanctions ranging from dismissal without pay to loss of voting rights, bar from holding public office for a specified time, and cuts in pay. From the perspective of German scholars the absolutely crucial factors for its success were that it resulted from a German initiative, was carried out by a German administration, and conceptualized denazification as a purely political, as opposed to a legal, problem.[77]

The success of the Wuerttemberg-Hohnezollern experiment was, however, short-lived. The French regime, largely out of a desire to avoid the image of being soft on denazification in the eyes of the other Allies, made an abrupt change of course and adopted throughout the zone the *Spruchkammerverfahren* favored by the Americans under the "Liberation Law." The results were predictable. When the tribunals began hearing cases, they first reviewed earlier condemnations that could now be adjudicated under the new procedure. The results were overwhelmingly rehabilitation of the individual and vacating of the previous decision. The *Mitlaeuferfabrik* phenomenon produced by the *Spruchkammern* in the American Zone appeared here as well. Apart from the effects of various amnesties, the French Zone *Spruchkammern* heard a total of 669,068 cases. Only 13 individuals were found to be major offenders, 938 offenders; 16,826 (2.5 percent) were classified as lesser offenders; and 298,789 (about only 15 percent of whom received some fine or other minor penalty) as followers; 52.2 percent of the proceedings were simply terminated.[78]

The Soviet Zone

In comparison with that of the other zones the Soviet denazification effort was perhaps the most consistent in defining itself in political terms. German scholars often portray the Soviet program as unique in its attempts to use the purge as an instrument to restructure society.[79] This desire to restructure society according to a particular ideological orientation in itself hardly seems to distinguish the Soviet aims from those of the other Allies. The Americans, as noted, tirelessly reiterated their desire to reeducate the Germans, instill in them democratic values, erase German militaristic values, and so on. What does seem to distinguish the Soviet Zone (SBZ), however, was that these attempts were

[77] The account in this paragraph is based on Henke (1981) and Vollnhals (1991: 34–42). See also Fuerstenau (1969: 134–47).

[78] Vollnhals (1991: 42).

[79] So Vollnhals, who says that the program was "ein Instrument zur stukturellen Umwaelzung der Gesellschaft" (1991: 43).

also guided by a program to substitute a selected new elite for those who were removed. Further, as noted already, the Soviet program was carried out in a far more consistent manner with other goals – retribution, reconstruction, and the like – clearly subordinated to the main political aim.

From very early on the Soviet Military Administration (SMAD) worked closely together with the Ulbricht Group of the Communist Party (KPD) functionaries. This, of course, distinguished it from the other zones, where Germans only began to play a systematic role much later. By July 1945 SMAD had already set up new state and provincial administrations and placed reliable individuals in office concerned with police, education, and personnel.[80] At this time political parties had also already been permitted to form, far earlier than in the other zones. As did their Western counterparts the SBZ began a purge of the civil service, schools, and so on. These purges proceeded with differing degrees of rigor in different regions of the SBZ but were in general of greater intensity than in the West. The Soviets, however, also had to make concessions to economic and administrative necessity as they, as the Americans did, realized that the goal of removing all Nazis whose participation was more than nominal was unrealizable.[81] Still, by the end of 1946 large numbers of individuals had been purged from their jobs, although not significantly more than in the American Zone.[82] Already in 1946, however, they had begun to move to rehabilitate the "nominal" Nazis and to rehabilitate them politically. The political strategy was to promise them work and restoration of political status if they demonstrated that they had "innerly broken with Nazism."[83] In mid-1947 SMAD began to wind down its denazification program. The political goal of a thorough purge of "unreliable" elements in the civil administration and other important institutions had been largely achieved, and further efforts would have merely reduced the pace of economic reconstruction and reparations to the Soviet Union.[84] This reintegration of the "small fry" posed a challenge, in the escalating Cold War climate, to the Americans and British in particular, who responded with attempts to move more quickly to wrap up their programs in response. In the end, "the difference to denazification in the western zones lay not in the number of those removed from their positions, but rather in the rehabilitation policies."[85] As denazification relaxed, in the West the functionaries who had been removed as NSDAP members returned to their positions. In the SBZ they remained largely excluded (with important exceptions) from public service and were replaced with a new elite from significantly different social groups.

From this perspective the Soviet denazification policy was quite successful in achieving its political goals, though not necessarily in removing former

[80] Vollnhals (1991: 43).
[81] Bagstuebner (1999: 251).
[82] Vollnhals (1991: 48): 390,478 in the SBZ, 337,000 in the AZ.
[83] Badstuebner (1999: 252).
[84] See Badstuebner (1999: 253) for statistics on the low percentage of former NSDAP members in higher civil service and public offices.
[85] Vollnhals (1991: 53), my translation.

Nazi supporters. A new leadership and higher functionary echelon were put in place to anchor the new political order, and the mass of NSDAP members and supporters were effectively politically reintegrated.[86] In the West, on the other hand, the old administrative civil service elite eventually returned to their positions (now shorn of its higher political leaders) as the *Spruchkammern* distributed their *Persilscheine* and amnesties were established. In the Western zones too much time had been lost in setting up the cumbersome apparatus of questionnaires and then shifting to the *Spruchkammern* of the Liberation Law.

The American authorities in particular did not appreciate that in such transitional situations time is of the essence. After the initial six months of occupation had passed, German support for denazification steadily waned; the process bogged down under its own excessive weight and American inability to identify the "real" Nazis in the German population at large. At the same time, external political parameters shifted, and the American will to pursue their original goals gradually faded. Contemporary British and American commentators argued that a quick, decisive program focusing on denazifying the political elites would have had far greater prospects for success.[87] On the other hand, the British and American programs were, as pointed out, successful in spite of themselves. Apart from inhibiting the kind of spontaneous violence seen in other countries (and to some extent in the SBZ), they succeeded in keeping large numbers of individuals out of circulation for two to four years, through internment, criminal conviction, or denazification. By the time they emerged from camps, came out of hiding, received clemency from Allied authorities, or were whitewashed by *Spruchkammern*, they proved adaptable enough to integrate themselves into the process that would culminate in the new order of the Adenauer era and the *Wirtschaftswunder*. Just how "new" that order was will be taken up briefly in section IV.

III. GERMAN TRIALS

Though one often hears that German trials of Nazi war crimes and crimes against humanity began in the early 1960s with the Auschwitz trials (or with the Ulm Einsatzgruppen trial in 1958), the full story is more complicated. German trials actually began in 1946 and have continued, more or less continuously, albeit in a variety of forms, until today. Control Council Law No. 10 (December 10, 1945), which provided the legal framework for the trial of Nazi war criminals in occupied Germany, also delegated to each of the occupying powers the right to establish German tribunals. The British, French, and Soviets made more use of this than the Americans. The jurisdiction of such tribunals was limited to crimes committed by Germans against other Germans. All other cases were within the jurisdiction of the tribunals described in section I. By 1950, German courts in the Western zones operating under this rubric had convicted

[86] See Badstuebner (1999: 257).
[87] Friedmann (1947: 125), Zink (1957: 164).

5,228 persons.[88] Although most of the sentences were very light and relatively few trials prosecuted the most serious crimes, it is worth remembering that this is about as many convictions as the British, French, and American military tribunals combined produced. Since most of the German war criminals convicted by Allied tribunals never served most of their sentence anyway, the difference in severity is in effect diminished. It is also striking, however, that the total number sentenced by German courts up to 1992 was only 6,487.[89] In other words, in the first five years after the war German courts convicted four times more defendants than they did in the next four decades. Some of the reasons for this will be sketched in the following.

Of the 5,228 successful prosecutions, however, only 228 involved capital offenses. For a variety of reasons the post-1950 cases typically involved far more serious crimes. Here German prosecutors for the first time tried systematically to come to terms with the machinery of death of the extermination centers, the Einsatzgruppen, and so on.[90] The reason usually given for the failure to deal more fully with the Nazi system of mass murder is the limitation on jurisdiction noted earlier. Recent research has shown, however, that although Control Council Law No. 10 formally barred prosecution for crimes committed against non-Germans, the Allies did not in fact enforce this rule. Thus, of a total of 260 Nazi murder trials before German courts in the period 1945–50, 61 involved the murder of non-German nationals.[91] That there were not more is perhaps not surprising since there was of course little incentive to focus on such cases while the massive Allied war crimes programs were going on. By 1950, however, it was clear that these trials had only scratched the surface in terms of the perhaps 100,000 perpetrators who manned what Raul Hilberg calls "the machine of destruction." Why, then, were only 1,259 convictions obtained in the next forty years?

The number of prosecutions slowed dramatically after 1950 for several reasons. The first is that in 1950 the statute of limitations passed on the lesser crimes punishable by imprisonment for no more than five years. This was the first of a series of such events that hampered prosecution as the years went by. Further, the political climate in Germany, and in Europe in general, had changed. The British, French, and American authorities had now begun systematic reductions in sentences and early release for even the most serious convicted war criminals. This was hardly an encouragement to German judicial institutions to begin the inevitably painful process of identifying the murderers in their midst. In 1951 a German law permitting the reinstatement of most of those who had been removed from office under denazification proceedings further aided this trend.[92] This is especially true for the judiciary, which, as is well known, remains

[88] Rueckerl (1980: 39).
[89] De Mildt (1996: 20).
[90] On the few prosecutions that did occur, see Rueckerl (1982: 121–23).
[91] De Mildt (1996: 22), Rueter and De Mildt (1997: x–xi).
[92] Rueckerl (1980: 44–45).

largely unchanged and in any event unwilling to convict its own.[93] As Adalbert Rueckerl summarizes the situation, all of these measures, as well as the reestablishment of German armed forces, "created the impression in the public that the goal of 'coming to terms with the past' had now been reached. The opinion prevailed in wide sections of the population that those responsible for Nazi war crimes who had survived the war and not succeeded in disappearing abroad had now been tracked down and called to account."[94] As one of those interviewed by Marcel Ophuls in *The Memory of Justice* succinctly put it, for most Germans intent on looking to the future it was much more pleasant to think that the few major Nazi criminals still at large were cowering in fear in some South American jungle rather than to recognize that they were living next door, quietly collecting their pension.

The period 1950–55 thus saw a dramatic slowing of German prosecutions of Nazi crimes, but not the total cessation that is sometimes described. In this five-year period there were still 638 convictions, though most of them occurred in the first half of that period.[95] What, among other things, dramatically changed the situation were the arrest in 1956 and subsequent prosecution of Bernhard Fischer-Schweder. Fischer-Schweder had been involved in a labor dispute, the reporting of which led to his recognition as a person who had been involved in mass murder in Lithuania, where he had been a police director. Thanks to the initiative of the prosecutor, Erwin Schuele, the investigation was expanded, and the ensuing trial in Ulm in 1958 included Hans Joachim Boehme and members of his Einsatzkommando, who had operated in Lithuania. The trial galvanized public opinion and led to the creation, under the directorship of Schuele, of the Zentrale Stelle der Landesjustizverwaltung zur Aufklaerung nationalsozialistischer Verbrechen.

The creation of this centralized authority for the investigation and prosecution of war crimes in one sense utterly transformed the situation. As Helge Grabitz puts it, "Wie ein Paukenschlag wirkte es daher, als man bei der Durchfuehrung des sogenannten Ulmer Einsatzgruppen-Prozesses erkennen musste, dass man im Gegenteil ganz am Anfang einer strafrechtlichen Aufarbeitung war."[96] It led, for example, to the series of major extermination center trials (Auschwitzprozesse, Majdanekprozess, etc.) in the 1960s and beyond. These trials, as the Ulm trial had a few years before, again sensationally prodded the German public yet again to "rediscover" their past (the American TV show *Holocaust* and the film *Schindler's List* were yet to occur). On the other hand, as important as the creation of the Zentrale Stelle was, *95 percent* of the investigations it opened in the next thirty years never went to trial.[97] In fact, the

[93] See Friederich (1983), Stolleis (1998: Chapters 11 and 12), Mueller (1991).
[94] Mueller (1991), 45–46.
[95] Ibid., 46.
[96] Grabitz (1998: 153). A rough translation of the passage would be "The criminal law is simply incapable of dealing with this question."
[97] See Grabitz (1998: 157–60) for a brief overview of the difficulties.

611 convictions after 1955 were fewer than the number in the first five years of that decade. The notoriously light sentences, interrupted proceedings, and mysterious acquittals that characterized many of the cases that were tried are well known and, in any event, take us too far beyond the postwar transitional context into the long history of postwar *Vergangenheitsbewaeltigung*.

What the West German trials do show, however, is the immense difficulty of judicial pursuit even of the most serious war criminals after the process of political reintegration has begun. If the Western Allies were unwilling to prosecute the thousands of German war criminals whose cases had already been investigated, and, moreover, were prepared quickly to release many of those who had been convicted of mass murder from prison, how reasonable was it to expect the German judiciary (largely staffed by the same officials who held office under Hitler) to carry on the task the Allies had abandoned? If it was true for the Allies that a reckoning with Nazi criminality had to occur quickly if it was to occur at all, this is no less true for the Germans themselves. This is in no way to excuse the deplorable way in which so many of those (particularly the *Schreibtischtaeter*) responsible for mass murder, deportations, slave labor, and devastation of occupied countries escaped justice.[98] On the other hand, if, as the Allied attempts to deal with war criminals and denazification show, only sufficient political will can bring attempts to do justice to fruition, there were even fewer causes to generate that political will in a revived and ever more prosperous West Germany than there had been for the Allies. The economic and political success of the postwar Bundesrepublik was thus in part a cause of the process of rehabilitation and reintegration and in part an effect. On the other side of the balance, over against the many failures of the postwar German judiciary, Dick De Mildt has rightly pointed out that perhaps the greatest success of the German prosecutions was their contribution to the understanding of Nazi criminality.

Those who believe that truth is more important than justice will perhaps be able to find sufficient solace in this insight.[99] Those who do not may ponder the explanation offered by Grabitz of the inadequacy of *any* attempts at retribution in such cases. In response to the astonishing fact that the average penalty imposed by German postwar tribunals for participation in mass murder was "3 minutes imprisonment per murder," she asks what penalty would have been appropriate for those who participated in the killing of tens or hundreds of thousands of victim. Her answer is "Die Strafjustiz ist mit dieser Frage schlicht ueberfordert."[100] Before dismissing this obviously unsatisfying conclusion as mere German apologetics, one should first look carefully at some of the

[98] On the difficulties of prosecuting the Schreibtischtaeter under German criminal law see the excellent analysis of De Mildt (1996: 33–35).

[99] De Mildt (1996: 39–40). The quotation he cites from Martin Broszat may serve as an example of the sentiment that the historical truth uncovered by the investigations "'was perhaps of greater importance than the individual punishments the courts did not impose'" (40).

[100] Grabitz (1998: 160).

shockingly light sentences being handed down today by the ICTY. Her claim demands to be taken seriously, but only as a challenge, by those convinced that "justice," in the retributive sense, is being done in The Hague.

The trials of Nazis in the DDR began soon after the end of the war. Although much more research is required before a comprehensive assessment is possible, it seems clear that the prosecutions were conceptualized as part of a political program. Nearly all of the 12,861 who were convicted by East German courts had been tried by 1950. It is often pointed out that these trials aimed principally at punishing those who were seen as Fascists or who had committed crimes against the Soviet Union during the German occupation, rather than those who had participated in the Final Solution. On the other hand, it must be remembered that West German courts did not aim at such offenders either during this initial period (1945–50).[101] The question is thus rather why East Germany never renewed its pursuit of Nazi mass murderers as happened (though with the ambiguous results noted) in the West. The answer seems to be related to the political nature of the whole process. This may be seen, for example, in what was really the final showpiece of the East German trial program: the Waldheim trials. When the Soviet Union closed its internment camps at Buchenwald, Sachsenhausen, and Bautzen, 3,385 of the 18,000 internees were prosecuted. Denied even the most basic due process rights, 3,308 of them were convicted in trials that lasted fifteen to thirty minutes. The pace of further prosecutions dramatically slowed after this, and by the midfifties the official position was that no further prosecutions were necessary because the purge of Nazis in the DDR was complete. The Waldheim trials were a means of underscoring that point. This claim, though largely unfounded, could serve as the basis of continuing criticism of West Germany for its laxity in regard to Nazi war criminals.

IV. CONCLUSION

In March 1950 High Commissioner John McCloy appointed the Advisory Board on Clemency for War Criminals to study the petitions concerning the high-ranking Nazi war criminals imprisoned by the Americans in Landsberg. McCloy himself announced his decisions in regard to the board's recommendations at the end of January 1951. Of eighty-nine prisoners still in Landsberg who had been convicted in the twelve American trials at Nuremberg (see section I), seventy-eight received a significant reduction in sentence. For thirty-one of them it amounted to time served, and they were immediately set free.[102] They included Alfried Krupp, high-ranking SS officers, generals, ministers, and judges. Writing in *The Nation*, Telford Taylor, U.S. chief prosecutor at these trials, slammed McCloy's clemency decision as "the embodiment of political expediency, distorted by a thoroughly unsound approach to the law and the facts. . . . Mr. McCloy paints his action as an effort to iron out discrepancies in

[101] In the period 1951–89, 734 persons were convicted (Grabitz 1998: 164).
[102] Taylor, *The Nation*, February 24, 1951.

severity and to consider individual circumstances justifying clemency. Analysis shows, however, that what was done approximates a blanket commutation of sentences."[103]

Although the American and British war crimes programs had ended in 1948 and clemency and parole proceedings had been under way for some time, McCloy's decision marked a watershed. In 1950 a total of 663 German war criminals were imprisoned in Landsberg. By mid-1955 there were only fifty.[104] Before the end of the decade almost all of the thousands of convicted German war criminals had been released. There is little doubt that, on the whole, Taylor's assessment of the motivations underlying the clemency movement was correct. Some scholars have indeed shown that before 1951 the clemency review process was in part motivated by concerns about the fairness of sentences or convictions.[105] All agree, however, that political developments such as the Cold War were the driving force behind the emptying of the prisons in 1951–55. As American interest in strengthening and rearming Germany as a Cold War ally increased, the Adenauer government was increasingly successful in making the release of war criminals a condition of German cooperation.[106] This was to a significant degree motivated by the desire to project the image of a new Germany, which had put its past behind it, and for which those imprisoned were an uncomfortable reminder and an embarrassment. Adenauer's aims were supported by a widespread German campaign, including by the Evangelical Church, to obtain mass release for those imprisoned. The hypocrisy and futility of having invested vast resources in prosecuting and trying Nazi war criminals only to grant them clemency and release a few years later were not lost on many contemporary observers.

This convergence of political forces produced a parallel development in German institutions. As noted, the numbers of prosecutions of Nazi criminality by German tribunals also fell drastically in the years 1951–55. At the same time, the "Kalte Amnestie"[107] brought about the return to public service of many of those functionaries, judges, bureaucrats, and the like, who had been removed through denazification. As a result of changes in German law, from July 1951 to March 1953, thirty-nine thousand excluded individuals were able to return to positions in the higher civil service.[108] This was in addition to those who had previously been reinstated after having been "washed clean" as mere "followers," after receiving their *Persilschein* from the *Mitlaeuferfabrik* (described in section II). Critically minded Germans were not slow to point out that "renazification" was at work as the ministries and other state institutions were taken over by "the men of yesterday."

[103] Ibid.
[104] Buscher (1989: 174).
[105] E.g., Buscher (1989: Chapters 2–3). For the more critical view of Allied motives see, e.g., Bower (1995).
[106] Buscher (1989: 70–72).
[107] Friederich (1985).
[108] Vollnhals (1991: 62).

Does all this mean that transitional justice failed in Germany? The answer depends on what kind of justice one has in mind. As preceding sections have shown, Allied attempts to purge Germany were from the very beginning characterized by a tension between political goals and a desire for retributive justice, between political and administrative and juridical solutions. That is, political goals were from the very beginning at the core of the Allied program to eliminate the legacy of nazism and create a new political order in Germany. Trials and legal punishment were merely among the elements of that program. It should come as no surprise that the German institutional response after the reestablishment of sovereignty was also to trade the possibility of retributive justice for political goals as well. As political priorities shifted in light of wider German, European, and global developments, as they inevitably would, given the long span of time that the Allies took to implement their goals, so the commitment to particular programs and measures shifted too.

From this perspective (however unsatisfying for those committed to retribution as an indispensable element of transitional justice), the Allied decision to release Germans convicted for their contribution to mass murder does not mean that the trials and denazification did not serve important purposes. They did, from stigmatization of the NS regime and its highest servants, education of the German public as to what had been done in their name, criminal condemnation of thousands of perpetrators, and removal and neutralization of a large group of individuals during a critical period, to serving the discovery of historical truth and providing rehabilitative, integrative, and unifying mechanisms by which Germans could come to terms (however imperfectly and in whatever different ways) with their past and get on with the work of reconstruction. The irony of the failure of denazification and of the "renazification" of the early 1950s was that they seem to have served the creation, for the first time in German history, of a stable democratic *Rechtstaat*, built, above all, upon Germany's successful reemergence as a major world economic power. From this standpoint the Allied program for Germany was an undoubted success (even if in part due to unintended consequences). But at what cost, and whether the ends of justice were sufficiently served in the process, are questions. Anyone contemplating the "symbolic" justice of the ICTR and ICTY in comparison with the difficulties of reconstruction, reintegration, and judicial reckoning in Rwanda and Bosnia (to say nothing of Cambodia) will realize how much this dilemma and this challenge were not unique to Germany after 1945.

5

The Purge in France

An Incomplete Story

Henry Rousso

On November 8, 1989, the Berlin Wall was precipitously torn down, leading to a wave of joy that washed over all the countries in the Soviet bloc. The fossil Communist regimes fell one after the other. The question of a "purge" was raised quickly and emphatically in Romania, Bulgaria, Czechoslovakia, and the former East Germany – no longer after the manner of the Stalinist purges. It resembled more a stage and an important factor in the establishment of new democracies founded on respect for a government of laws.

By comparing the present with the past, and since the present sometimes induces us to reread history, this significant event is a good occasion to revisit the case of the purge in France, which followed the end of the German Occupation and accompanied the restoration of the Republic. The literature on this topic is certainly abundant and it would be wrong to claim that this event is not well known.[1] Nevertheless, it would be useful to reconsider the case of the purge and the role it played in the immediate postwar period. One of the most intensely studied aspects, the statistical totals, is worth revaluing today, since historians have perhaps relied too heavily on Peter Novick's pioneer work,[2] which appeared in 1968.

The present chapter, which originated from a comparative history of the purges in Europe at the end of World War II,[3] has a triple purpose: to offer

[1] Concerning the purge in France, in addition to the works cited in the notes, see the bibliographies in the most recent works on the topic: Henry Rousso, *Vichy, l'événement, la mémoire, l'histoire*, Paris, Gallimard/Folio-Histoire, 2001, pp. 711–14; Marc Olivier Baruch (ed.), *Une poignée de misérables: L'épuration de la société française après la Seconde Guerre mondiale*, Paris, Fayard, 2003, pp. 583–88.

[2] Peter Novick, *The Resistance versus Vichy: The Purge of Collaborators in Liberated France* (London, Chatto and Windus, 1968). French translation: *L'Épuration française, 1944–1949* (Paris, 1985), preface by Jean-Pierre Rioux (nlle éd.: Seuil, coll. "Points," 1991).

[3] The project was created by the Institut für Zeitgeschichte in Munich and gave rise to a work just published in Germany: Klaus-Dietmar Heuke, Hans Woller (eds.), *Politische Säuberung in Europa. Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*,

an internal critique of the statistical, especially legal sources for the purge; to restart research on the issue by pointing out certain important gaps;[4] and finally, to encourage more extensive reflection on the social, cultural, and political phenomena that constitute a purge when it occurs during a democratic transition.

VICHY, FASCISM, AND COLLABORATION: PURGE WHAT?

The purge was difficult to carry out because the acts it was supposed to judge and repress were of a twofold nature. Some acts involved capitulation to the German enemy, which was treason. Others concerned ideological choices contrary to republican principles and democratic values. Many had aspects of both.

The first considered was the regime that grew out of defeat. From the summer of 1940 on, the Vichy government was engaged in a policy of state collaboration, the result of its near total dependence on the Nazi conqueror. France was deluded that it could retain its political and territorial sovereignty at the price of enormous concessions and held the conviction that Germany had or would soon achieve military victory in Europe. The Vichy government's policy was not a simple surrender to the conqueror nor a blind adherence to nazism, but the affirmation of a concept of its national interest and a strategic choice, whose result was a progressively closer engagement on the Nazi side. From the beginning, Vichy policy also assured the success of the national revolution, which intended to break brutally with the republican system. Without being exactly Fascist, this attempted cultural revolution nevertheless had several points in common with fascism and nazism, which added to the regime's problems when the Resistance fighters and a large segment of public opinion required it to account for its acts.

The Vichy regime otherwise legitimized three other forms of collaboration, which were different in nature, extent, and results. Tens of thousands of the French – not very many in comparison with those in other countries – were actively engaged in ideological collaboration. The fact that a significant number of intellectuals took a public, conspicuous stance in favor of

Munich, DTV, 1991. The work covers eight countries: Germany (including the Soviet zone), Austria, France, Italy, Norway, the Netherlands, Yugoslavia (Croatia), and Hungary. I would like to thank the authors and the editor for allowing me to publish here a revised and updated version of the chapter I devoted to France. It was originally conceived as a comparative piece and was meant for a foreign audience. This explains the "mixed" nature of this article, which is both a partial summary of the subject and a critical analysis based on a new reading of the sources.

I particularly want to thank Jean Astruc, director of the library at IHTP, whose assistance has been decisive, as well as Jean-Pierre Azéma, Denis Peschanski, and Jean-Pierre Rioux for their valued advice.

4 The reconsideration of the purges is one of the themes in a research project launched by the IHTP, "Justice, Repression and Persecution in France from the End of the 1930s to the Middle of the 1950s," which followed the seminar by Robert Badinter and Michelle Perrot, Prison under the Republic (Paris VII and EHESS). This new project is under the direction of Denis Peschanski and the author of this article, with the aid of Danièle Lochak (Paris – X) and Mireille Gueissaz (CNRS/Ministry of Justice). Cf. *Bulletin de l'IHTP*, no. 45, September 1991, pp. 5–14.

this "collaborationism" played an important role in French perceptions of the time. From this derived the importance accorded, after the war, to the trials of intellectuals, whose prime example was Robert Brasillach. Even though his particular collaboration was marginal, it contributed to hardening the debates on the purges; commitments by intellectuals have traditionally carried a heavy symbolic meaning in France.

Economic collaboration, on the other hand, involved a large portion of society. Difficult to evaluate and even define, it included those firms required to work in the framework of the German war economy on pain of dissolution, those firms in search of immediate high profit, and still others engaged in medium-term negotiations, persuaded as they were that postwar European markets would be dominated by German companies. Those most at risk were the senior executives of large firms. If not all executives did collaborate – far from it – nearly all were directly confronted with the dilemma. However, they were not alone, because the vague idea of economic collaboration would concern the large-scale black-market traffickers, but also the tens of thousands of workers – men and women – who left voluntarily for Germany before the Relève (relief) and the Compulsory Labor Service (STO) to seek higher salaries and jobs that were not to be had in France. Motivated by material interest that was almost always void of ideological consideration, the various forms of exchange and economic cooperation with the enemy, which did not all constitute collaboration in the infamous sense of the term, caused serious problems for those carrying out the purges. This was especially true for purging the professions, since a distinction always had to be made between economic necessity and a cynical search for profit.

Finally, the third category was individual collaboration. There were certainly many denunciations, but were these acts of individual resistance, or protection of the persecuted? Were the collaborators really more numerous than the denunciations that abounded in times of peace, even if the consequences were tragic under the Nazis? The answer is difficult even today. Millions of the French, but not all, lived from day to day in familiarity with the Occupation forces. This exceptional situation, for which no one was prepared, established effective social and cultural ties, although it was not like that of the French in the north and east who underwent that fate in 1870 and 1914. As for other occupied peoples, French men and women of all ages and conditions could not escape the need to live with the enemy for four years. They could not all reach London nor remain silent before the Germans. This led to inevitable compromises, acts of cowardice, and ambiguities, which formed the essential character of individual forms of collaboration. These attitudes, often in small towns and villages, were more conspicuous and concrete than radical – if not widespread – political commitments, and they left intense bitterness. Their repression, sometimes brutal and unjust, only aggravated resentment and the chances of deep dislocation in societal ties during the Liberation's first weeks.

In conclusion, let us note that these distinctions among the various types of collaboration were not as clear at the time as they are now. Much to the

contrary, one of the purge's great difficulties was precisely that of considering these different types of crimes and misdeeds and distinguishing among them, in a context fraught with tension, which scarcely facilitated calm analysis.

THE OVERALL CONTEXT OF THE LIBERATION

The Liberation was a transition phase between a most difficult occupation and a progressive deliverance, between a regime of conquered power and that of a power now associated with the final victory, and between an authoritarian regime and the restored republic. It was an exceptional time of both violence and joy among the people, and anxiety over an uncertain future.

This exceptional situation followed a general climate of violence during the Occupation, especially in the winter of 1943–44, when the French were living in fear and expectation of a long and deadly deliverance. The most difficult phase of the purges, in the autumn of 1944, occurred when the war was still in progress and when various foreign armies faced each other on French soil. Set under the banner of a national insurrection at times more symbolic than real, the Liberation took on the air of popular uprisings against not the Germans, but the collaborationist militia and other collaborators in certain areas such as the south and the center of France. On the political level, the Liberation involved a race between the provisional government – le Gouvernement provisoire de la République Française (GPRF) – of General de Gaulle; the Communist Party and its armed organizations; and certain Resistance movements, notably the Movement of National Liberation. The Americans, observers if not actors in the drama, should not be omitted. In this context, the purge was a major struggle for legitimacy between Communists and non-Communists, between Resistance fighters of the interior and General de Gaulle, and between local initiatives and the institutions put in place by the central government – the regional commissioners of the republic and the departmental liberation committees (CDLs), many of which were controlled by the Communist Party.[5] This climate of violence derived from this situation but was also part of an ancient historical tradition, that of a revolutionary-type situation whose outcome was awaited by some with fervor and others with dread.

[5] On these issues, which have been extensively studied, see, among others: Comité d'histoire de la Deuxième Guerre mondiale (Committee on the History of World War II), *La Libération de la France*, Paris, Éditions du CNRS, 1976; Charles-Louis Foulon, *Le Pouvoir en province à la Libération*, Paris, Presses de la Fondation nationale des sciences politiques, 1975; Jean-Pierre Rioux, "L'épuration en France (1944–1945)," *L'Histoire*, October 5, 1978, and his book *La France de la Quatrième République*, tome 1, *L'Ardeur et la nécessité 1944–1952*, Paris, Seuil, 1980; Philippe Butou and Jean-Marie Guillon (dir.), *Les Pouvoirs en France à la Libération*, Paris, Belin, 1994 (acts du colloque de l'IHTP tenu en décembre 1989); and finally: Philippe Buton, *Le Parti communiste français à la Libération. Stratégie et implantation*, doctoral dissertation, University of Paris – I, 1988, 2 vols. (published under the title *Les lendemains qui déchantent: Le Parti communiste français à la Libération*, Paris, Presses de la FNSP, 1993).

The people's fear of the future and their daily anxiety equally marked this period. They derived first and foremost from the persistence of economic shortages and food restrictions, which were spontaneously associated in French public opinion with the presence of the occupying power. In 1944–45 the economic situation was disastrous and the large cities underwent difficulties of supply that were worse than during the Occupation. The rancor connected with these material difficulties took the form of a search for those responsible, at times aggravating the popular resentment against collaborators – real or not.

Finally, before rendering judgment, we need to keep in mind the differences among the purges in time and place. These differences were inextricably linked to the rapid pace of events and were not of the same kind when they unfolded in the phase of liberation fighting in the spring and fall of 1944 or afterward, on the occasion of the definitive restoration of state authority and central power. Furthermore, the purges became more intense after the deportees' return in April 1945, which led to an often described shock that affected the atmosphere of the trials of Pétain and Laval in August and October 1945. This intensity began to diminish in 1946. The purges were also different geographically because of the great diversity of circumstances in different areas. Their extent and intensity, and the part played by legal and extralegal purges, varied with the presence or absence of the maquis, the French Resistance movement; with the areas through which the Allied armies passed; with the importance of the persecutions and massacres during the Occupation; with the charisma of this or that local Resistance leader; and with the strength or weakness of this or that commissioner of the republic. It is known, for example, that illegal executions were more numerous in the areas controlled by the maquis. This is no surprise. However, it is also known that legal executions were less important there, as if illegal executions had served as an outlet for the people but also had purged some of the most serious cases.

"UNCONTROLLED" OR "EXTRALEGAL" PURGES

The uncontrolled or extralegal purges are an aspect of the purges that has been the source of heated controversy since 1944. Many authors, especially those of the extreme Right, have claimed that "uncontrolled" or "summary" purges had caused more than "100,000 deaths" in a few weeks, a veritable bloodbath for which the Communists were mainly responsible.[6] It was comparable to and even worse than the actions by the Nazis and collaborators, and this idea was brought forward for the first time in November 1944 by Adrien Tixier, the provisional government's interior minister and an anti-Communist Socialist. An American journalist claimed on his own that there were fifty thousand

[6] See, for example, the first issues of *Rivaroli* or *Écrits de Paris* from 1947 on, then: *L'Épuration*, a special issue of *Défense de l'Occident 39–40*, January–February 1957, or also *Le Livre noir de l'épuration*, published by *Lectures françaises* by Henry Coston, September 1964.

summary executions in the Mediterranean zone alone,[7] relying on self-styled unofficial French military sources. None of these authors, including Minister Tixier, had reliable, verified statistics available. In 1948, then in 1952, the government published two inquiries based on sources from the prefectures. Both publications gave statistics in the range of ten thousand "extralegal" executions, more than half of which had taken place before the Liberation. It was the latter statistic that General de Gaulle often used, notably in his *Memoirs*. In 1959 Robert Aron cut the matter in two and presented the figure of thirty thousand to forty thousand summary executions, on the basis of unreliable official documents, which counted among the purged the victims of the Nazis.[8]

In the 1950s the Comité d'histoire de la deuxième guerre mondiale (CHGM), (Committee on the History of World War II), undertook a vast investigation into the numerical total of the purge, both legal and extralegal, department by department, based on multiple sources – police reports, civil registries, witness statements, and others. The investigation presented overall results for eighty-seven of the ninety departments in metropolitan France and statistics on extralegal repression for eighty-four. This investigation concerns the entire purge process. It was performed by the departmental offices of the committee before it was integrated into the Institut d'Histoire du Temps Présent (IHTP) (Institute for Contemporary History) and was coordinated by Marcel Baudot. It was carried out in two stages: a first series of results for fifty departments was published in the *Bulletin du CHGM* (*CHGM Bulletin*) from 1969 to 1980. A second series took up twenty-six other departments and brought out two that had been previously studied (Seine and Var). It was published by Marcel Baudot as "*L'épuration: bilan chiffré*" (The Purge: Statistical Results), *Bulletin de l'IHTP*, no. 25, September 1986, pp. 37–53, and it gives a partial synthesis of the inquiry. Further, eleven departments were the subject of a study whose results have not been published but are available at the IHTP library. It was possible to establish statistics on extralegal executions for only eight of these. Three departments – l'Hérault, Landes, and Loiret – had only weak explanations. From this arises the total of eighty-four departments considered here (50 + 26 + 8). The three departments that were not the subject of a study in the context of this inquiry were Loire-Atlantique, Lot-et-Garonne, and Oise.[9] According to

[7] Donald B. Robinson, "Blood Bath in France," *American Mercury*, April 1946, cited by Peter Novick, *op. cit.*, pp. 318–19.

[8] Robert Aron, *Histoire de Libération de la France, juin 1944–mai 1945*, Paris, Fayard, 1959.

[9] For further information see: CHGM, "Statistique de la répression à la Libération," *Bulletin spécial*, July 1967, p. 13; Marcel Baudot, "La Résistance française face aux problèmes de répression et d'épuration," *Revue d'histoire de la Deuxième Guerre mondiale*, no. 8, January 1971, pp. 23–47, as well as "La répression de la collaboration et l'épuration politique, administrative et économique," in *La Libération de la France, cit.*, pp. 759–83, and his article cited in the *Bulletin de l'IHTP*, which unfortunately has some mistakes and inaccuracies. Finally we should mention that Henri Amouroux presents a comparative study of the various sources concerning the extralegal purges, among them the CHGM inquiry, in the last volume of *La Grande Histoire des Français sous l'Occupation* (tome 9, Paris, Laffont, 1991).

this inquiry, the number of people killed outside any legal proceedings in these eighty-four departments amounts to approximately 8,100 persons.[10]

Further, these executions can be broken down in terms of time. The following data are available for the seventy-six departments studied by Marcel Baudot.[11] Let us specify once and for all that these exact numbers have no absolute value, the margin of error never being negligible. They are given so that the reader can easily compare the statistics given here with those published by other authors:

Before June 6, 1944	2,004
From June 6 to the liberation of the department (August–November 1944)	4,025
After the liberation of the department	1,259
Unknown date	18
Total	7,306

We will add the unpublished figures for three departments that were not considered in the preceding partial total, which were among the eleven whose results were unpublished where the extralegal repression was especially severe, which confirm this chronological disparity:[12]

	Pas de Calais	Savoie	Haute Vienne
Before June 6	46		30
From June 6 to the Liberation	93	185	191
After the Liberation	34	67	20
Unknown date	—	—	9
Totals	173	252	250

Even though one should be prudent as to the absolute reliability of the CHGM inquiry, the fact remains that this on-the-spot extended effort supports the orders of magnitude given in the official investigations of 1948 and 1952. It also shows that 20 percent to 30 percent of the extralegal executions took place before June 6, 1944; 50 percent to 60 percent between June 6 and the date the relevant department was liberated; and 15 percent to 25 percent thereafter.

It is crucial to stress that more than 80 percent of the "summary" executions were perpetrated by one of the opposing sides in the midst of the Occupation for reasons essential at the time for the Liberation struggle. In other words, the idea of an extended "uncontrolled purge" that occurred at the same time as a legal purge that could not or did not want to prevent it does not conform to reality, except for one thousand or two thousand executions.

Second remark: According to this inquiry, a good number of victims were gendarmes, policemen, or Nazi auxiliaries, against whom the Resistance fighters had unleashed an assassination campaign since 1943. The assassination of

[10] This conclusion concerns all of France with the exception of the following departments: Hérault, Landes, Loiret, Loire-Atlantique, Lot-et-Garonne, and Oise. It takes up Marcel Baudot's total of "7,306" executions (*Bulletin de l'IHTP*, *cit*., p. 52), which covers seventy-six departments. The unpublished statistics of eight departments have been added to this total.

[11] Marcel Baudot, "L'épuration: bilan chiffré," *art*. *cit*, p. 52.

[12] IHTP Archives. These three departments were among the eleven whose results have not been published.

Philippe Henriot on June 28, 1944, for example, may be qualified as a "summary execution," since it was clearly an act of war – or guerrilla war. The executions by the "courts-martial" composed of personnel from the Forces françaises de l'interieur (FFI) (French Forces of the Interior), the free French Resistance, or the Francs tireurs et Partisans (FTP) (Irregulars and Partisans), the Communist Resistance, after a "sentence" (*jugement*), without legal justification in the strict sense of the term, are also included among these "summary executions." The most celebrated case was that of the Grand-Bornand, near Lake Annecy, where ninety-seven militiamen accused of "bearing arms against France" were tried by an improvised court-martial based on Article 75 of the Criminal Code concerning "secret dealings with the enemy." Seventy-six of these were executed on August 23, 1944, a few days after the liberation of Haute-Savoie. These were without doubt summary executions, since these "courts-martial" were exceptional courts (*jurisdictions d'exception*). However, these assassinations corresponded to those committed on March 26, 1944, at the Glières plateau, where the Milice (Vichy's military arm) had participated with the Wehrmacht in the elimination of a 450-person Resistance group, a third of which was killed in combat and another third deported after ignoble tortures. However, it is probable that if they had been judged by formal legal bodies, a good number of the militiamen executed at Grand-Bornand would have been executed at any rate, given the accusations weighing against them. The provisional government and General de Gaulle had been very clear on the fate that awaited the militiamen and all those captured with weapons in hand fighting against the Resistance fighters.

According to the results of the CHGM investigation, of the eight thousand to nine thousand extralegal executions, about one thousand were carried out after sentences of this type, either by courts-martial or by summary military courts (*tribunaux militaires d'urgence*), which were more or less tolerated by the authorities of the provisional government and by the commissioners of the republic, who represented it.

A recrudescence of summary executions – in this case the term is justified – may be noted when the legal authorities were too slow to get under way or too lenient or when those condemned to death received clemency. Where legal repression operated rapidly extralegal repression was limited. Where the former was slow, extralegal repression was more significant. In this sense, the uncontrolled purges can only be understood as the extension and aggravation of internal confrontations. It is the dramatic but logical continuation of the "war of the French against the French," which tore the country apart from June 1940 and broke out in earnest in 1943–44. Daniel Mayer recalled in 1952 during the amnesty debates that the executions had begun "during the period when the national insurrection against the common enemy was the duty of each citizen."[13] For the Resistance fighters, this enemy was both German and French.

[13] *Journal officiel*, Parliamentary Debates, National Assembly, session of October 21, 1952, p. 4253.

Finally, these executions developed from the widespread disorder that preceded and followed the progressive liberation of the country. There were certainly some innocent victims among those executed, as well as minor collaborators and individual victims who had nothing to do with the Resistance. Further, some Resistance fighters were executed by their leaders because of pillage, rape, or war crimes. The FFI and the FTP were, just as an army was, placed under the orders of the government, provisional though it was. Their leaders tried to limit or control all types of abuses. The most important goal was the reestablishment of order and the credibility of the Resistance fighters among the population, rather than efforts at vengeance. Some, perhaps a thousand, genuine or false, were judged between 1944 and 1953 for having perpetrated crimes under cover of the Resistance. Some of those were even executed.[14]

The Case of the "Shorn Women"

One of the most dramatic episodes of this extralegal purge was that of women whose hair was cut off, the "shorn women." According to recent research, the phenomenon concerned about twenty thousand women. This practice arose from a very old tradition. It was used by the partisans of General Franco, during the Spanish Civil War, as well as by the Nazis. In France, it was taken up on a large scale between summer 1944 and summer 1945, with some isolated cases until 1946. It affected prostitutes and women who simply had amorous relationships with German soldiers, as well as women who collaborated with the Nazis or denounced Resistance fighters, just as the men did. This ill treatment was meted out throughout France. Cases have been noted in the Meuse, Bouches-du-Rhone, Paris, the North, Gironde, Savoie, Brittany, and elsewhere.[15] It was mostly a case of spontaneous, popular vengeance, which often got out of control. But sometimes the "shearing" was organized with the assistance of legal authorities. Jacques Bounin, former commissioner of the republic at Montpellier, for example, described in his memoirs how, after a meeting organized by him with the FFI to insist on his perogatives as representative of the state, he took the initiative himself, without the least discomfort and as a simple police measure: "It was proposed that the women who slept with the Germans would be conducted into prostitution, shorn, and registered, after having been examined for venereal diseases."[16] It seems that the shorn women, whatever may have been their actual "crimes," were often taken for prostitutes, from which derived the traditional custom of cutting their hair for alleged prophylactic reasons.[17] This particular ill treatment, which affected the woman's body

[14] See M. Baudot, "La répression de la collaboration," *cit.*, p. 762, and Henry Rousso, *Le Syndrome de Vichy de 1944 à nos jours*, Paris, Seuil (coll. "Points"), 1990, p. 47.

[15] Fabrice Virgili, *Shorn Women: Gender and Punishment in Liberation France*, Oxford/New York, Berg Publishers, 2002 (1st edition Paris, 2000).

[16] Jacques Bounin, *Beaucoup d'imprudences* (Many Thoughtless Actions), Paris, Stock, 1974, pp. 155–56.

[17] Sophie Bernard, *op. cit.*, p. 32.

and explicitly displayed sexual difference, dates back to an ancestral tradition according to which adulterous women were exposed and promenaded through the streets of town, often on a horse or donkey.[18]

The shameful episode of the shorn women points up the purges as an emotional outlet. One frequently cited fact: during the first weeks, the scenes of the shorn women often resulted in a fall in local tension and a reduction of the purge's bloody nature. All the same, executions of women after the public humiliation of their hair's being cut off were rare.[19] However, contrary to certain legends, many women were executed. Such cases were brought out in the inquiry of the CHGM in Morbihan and in the Ardennes. It should also be noted that this repression of a sexual nature broke out at a time when the status of women in French society was entering a phase of change, notably through granting them the right to vote in October 1944.

Unlike male collaborators or the men who had amorous relations with German women or German men, the women were symbolically accused of "deceiving" the nation and "soiling" it with their bodies, as if their bodies collectively belonged to France. This was what Arletty expressed in her own way to her purgers, who were reproaching her affair with a German officer: "My heart belongs to France, but my vagina is mine." This specific and discriminatory mistreatment served as collective expiation. It seemed to say that only women, and that in a sexual context, had no right to see a distinction in public acts – the prostitutes' venal and economic collaboration, the ideological collaboration of women denouncing others, or the militant women – from private acts, such as an amorous relationship.[20] That was a way of exorcising the fact that most French people of both sexes, in public as in private life, had also been obliged in their daily contact with the enemy to "deceive" and "betray" the nation by the most trifling of deeds.

THE JUDICIAL PURGES

The Political and Legal Bases

The debates concerning the purge, its legal basis, its political and social justification, and its legitimacy began back in 1941 and became specific in 1943 in Algiers, where the French Committee of National Liberation had been located since June 3, 1943. Pierre Pucheu, former junior minister for the interior in the Vichy government, was executed there on March 20, 1944, after a trial. He is traditionally regarded as the first Frenchman to be purged on legal grounds.

[18] Cf. Jean-Marie Guillon, "La Libération du Var: Résistance et nouveaux pouvoirs," *Cahiers de l'IHTP*, 15, June 1990, p. 13.

[19] Fabrice Virgili has contested these statements in his thesis *La France "virile," cit.*

[20] Lucia Reggiani, *Les Tondues. Cortèges de barbarie à la Libération (1944)*, 1988 (twelve typewritten pages), bibliothèque de l'IHT: RF 517.

The principles guiding these purges responded at first to the need to punish those responsible for the arrest, death, and deportation of numerous Frenchmen, whether Resistance fighters or not. By the same logic, the purges were to provide guarantees for the future by eliminating from positions of responsibility those who had served the Vichy regime, whether they had collaborated with the occupiers or not. This need was all the more acute since the Resistance fighters knew that public opinion insisted on severe punishments, at least at the beginning. The Resistance fighters were soon aware that the purge was going to constitute a decisive political test, which gave rise to differences on its basis and form. The Communists and their fellow travelers were in favor of a radical purge with revolutionary accents of social justice. The Gaullists, Christian Democrats, and some Socialists defended the idea that the purge must absolutely take place within the framework of the restoration of the Republic and of a nation based on the rule of law. One of the most thorny problems was avoiding (in this sense) the promulgation of retroactive laws and the establishment of exceptional jurisdictions, since legal purges should, on the contrary, prevent or at least limit the summary settling of accounts. Finally, this purge should be guided by principles of justice and not a feeling of political revenge, the crime seen by public opinion as being against the very republican values the people were trying to reestablish. These principles, which were difficult to conciliate, would encounter technical obstacles. The criminal code in force before 1940 had not actually provided for the situations of a foreign occupation or those of a civil war. The judges who had been required to swear allegiance to the head of the French state were not safe in all circumstances, and the time factor weighed heavily, since it was out of the question to await the end of hostilities and the return to normal.

The collaborators were at first judged before the fact as traitors to their country, as partisans of fascism or nazism. This was not without problems, because the Occupation had a very different ideological dimension from the traditionally accepted idea of a patriotic war. Even if certain crimes committed by the collaborators did not incite to a state of mind, the fact that at least two concepts of legitimacy and "national interest" confronted each other for four years gave the purge the character of political repression. On several occasions, the new power specified the extended meaning given to the idea of "treason." The collaborators had not only betrayed France as a sovereign state by collaborating with the enemy, but had betrayed it "in its soul," according to the statement of Pierre-Henri Teitgen, then minister of justice:

> France is first and foremost a tradition, a culture, and a vocation that constitutes the soul of this country. This soul is made up of the long inheritance of Christian humanism, this belief that we have a natural law that rules over men, families, governments, nations, and states and which distinguishes for everyone . . . good and evil, and honor. . . . It consists of that fundamental belief in the primacy of man . . . over social institutions, in the primacy of man over the state itself, since, in our French concept, it is the state that is at the service of man and not man at the service of the state. This French tradition, this French vocation consists of this faith, which animates us all. It comprises fundamental

qualities of men of all colors, all races, all nations, and all beliefs, of all the territories and all the horizons. This vocation consists of the sense of the universal. . . . Now see that the acceptance of the collaboration policy led us to forget all these values. . . . It was the betrayal of France in the essential of its strength. What the collaborators have done is not a political error, it is not a political mistake; it is the denial of the very reasons for our country's existence, and that is the crime contemplated by Article 75 of the Criminal Code.[21]

Therefore, the purge was unambiguously proclaimed to be an answer to barbarism and the Nazi totalitarian system. It was an occasion to reaffirm the values on which the Republic was founded and to renew them with a concept of the nation anchored in the tradition of 1789.

Two major changes and one innovation were made to the laws in force before the war.[22] Criminal repression was based on Articles 75 through 86 of the Criminal Code, some of which had been strengthened in 1939 in extremis just before the war. These articles repressed acts that were "harmful to national defense," "having intelligence with the enemy," and "an offense against the State's external security." However, the first modification, the Ordinance of June 26, 1944, included among these crimes that of being an informant, which had caused numerous victims among the Resistance fighters (Article 3, paragraph 3), and acts committed against the allies of "France at war," that is, the Americans, the British, and the Soviets (Article 2). This, for example, enabled the prosecution of those who had voluntarily joined the Legion of French Volunteers against Bolshevism (LVF) or the Waffen SS and had left to fight in the East. This modification arose from an essential decision: the nonrecognition of the armistice and the designation by the GPRF, the French Republic's provisional government, of the different governments in power in France between June 16, 1940, and August 25, 1944, hence not only those of the "Vichy regime" as "de facto authorities" and not legal governments. In principle, the officials and ministers who had been guilty neither of pro-Nazi zeal, nor of personal initiatives, nor a fortiori of crimes embraced by Article 75, could not be prosecuted under the plan. However, and this was the second change, there could be no guarantees of immunity for officials who carried out orders (Article 3, paragraph 2).

The principal legal innovation in this provision was the installation by an ordinance of August 26, 1944, of the penalty of "national degradation," or loss of civic rights, for those who were guilty of "national indignity." This did not amount to a crime in the legal sense of the word, but a status in which the citizen, by participating in the activities of the regime and its organizations, belonging to the collaborationist parties, or writing in the German-controlled

[21] Pierre-Henri Teitgen, *Les cours de Justice: Conférence du 5 avril 1946*, Paris, Le Mail, 1946, p. 16.

[22] On the purge's legal basis, see Peter Novick, *op. cit.*, pp. 229ff. However, the extremely detailed analysis in Émile Garçon (dir.) *Code pénale annoté*, New edition, Rousselet, Patin and Ancel, Paris, Sirey, 1952, tome 1, *Articles 1 to 294*, pp. 244–414, is preferable. This source was noted by Peter Novick and others, who did not always take full advantage of it.

press, would be excluded from the nation. This penalty called for the denial of civic rights – prohibition from voting and abolition of the right to be elected. It affected everyone convicted of criminal offenses, the members of Parliament who had voted full powers to Pétain, and all those who had served him as ministers or secretaries-general.

The Judicial Organizations

Nevertheless, it was difficult to avoid the establishment of special courts. Four types of courts were thus in charge of the judicial purge.

1. The Courts of Justice (*cours de justice*), new institutions established by the ordinance of June 26, 1944, were created by the desire of General de Gaulle to prevent the cases of collaboration from being entrusted to the military tribunals alone. They were based more or less on the model of the assize courts (*cours d'assises*), consisting of a judge and four jurors chosen by the departmental liberation committees from among the citizens who had given "proof of their national sentiments." This one aspect was most criticized because the jurors of the Resistance, when they had actually belonged to Resistance organizations, could appear as both judges and parties to the cause. Even though they were exceptional, the courts of justice, judging in principle as the assize courts "in the name of the French people," were regarded as having greater legitimacy than the military courts. The procedural rules differed from standard legal practice (*droit commun*) on many points. The government commissioner's (public minister's) assistants could be chosen from outside the corps of career judges, notably from among solicitors and attorneys. The examining magistrates were not required to follow all the obligatory procedures in the law of December 8, 1897, for examinations. This law mentioned "a serious violation of the principles which safeguard the rights of the defense," according to the commentators on the 1952 Criminal Code.[23] Still more important, the decisions could be subject to an appeal to the Supreme Court, but not to an ordinary appeal. Also, the dismissal of the charges was not the purview of a judge or an examining magistrate, whose decisions had a jurisdictional character, but of the government commissioner. Some of the latter's decisions, such as a dismissal, could lack a definitive character and therefore would be affected by the authority conferred by the matter judged. One significant innovation was the presence of women among the jurors. Finally, the courts of justice issued all sentences from the assize courts – the death penalty, hard labor, criminal imprisonment, civil imprisonment (*réclusion criminelle, prison*), as well as sentences of "national degradation," either systematically in the death penalty and imprisonment cases, or to the exclusion of all other sentences. In this case the courts of justice replaced the civic chambers in fact. These courts were abolished

[23] On the unusual procedural rules, see the *code pénal annoté cit.*, pp. 271ff. especially paragraphs 195–200.

by a law of July 29, 1949, but they sat until January 31, 1951. After that date, their cases were transferred to permanent military courts.

2. The "civic chambers," established by an order of August 28, 1944, and incorporated into the previous courts, had the function of judging "national indignity" and had the choice of only two conclusions: acquittal or "national degradation" for life or for a term. However, this sentence could be lifted immediately for "Resistance activities." The civic chambers were abolished on December 31, 1949.

3. The military tribunals had an equally important portion of the collaboration cases, especially at the start, before they were handed over to the courts of justice. A number of cases fell under military justice to the extent that France had officially never ceased to be at war and that many collaborators were captured after fighting against the FFI. Moreover, the military tribunals reconstituted after the Liberation were tasked with settling the last cases of collaboration after the dissolution of the courts of justice. Finally, they were charged with the repression of war crimes committed by the occupying forces. They judged thousands of German and some Italian, Austrian, Polish, and Hungarian citizens enrolled in the German armies.

The legal courts-martial must be added to the military tribunals. They presided over certain purge cases in combat zones or areas with a strong concentration of Resistance fighters. In fact, it is often difficult to distinguish the "improvised" "courts-martial" or the "emergency military tribunals" from the legal military courts of law when it is noted that both performed activities of an "extralegal" character. In the situation in the fall of 1944, the definitions of military authority as well as political authority appeared extremely vague, a point to which we will return.[24]

4. Finally, an ordinance of November 18, 1944, established the High Court of Justice, composed of three magistrates and twenty-four jurors chosen by the members of the Algiers Consultative Assembly from two lists, one consisting of fifty members of Parliament who were sitting on September 1, 1939 – naturally excluding those who had later voted full powers to Pétain – and the other composed of people prominent in the Resistance or those close to them.

All in all, this measure partially achieved its goal of preventing the legal purge from appearing to be political vengeance, in form if not in fact. Without prejudging the effective outcome, and leaving aside for the moment the savage controversies among the French, a foreign observer's judgment may be cited. Charged by the Allied High Command with conducting an inquiry into the purge in France in order to determine whether it could be used as a guide

[24] Novick explains that the courts-martial were subordinated to the commissioners of the Republic, and the military tribunals were under the army (*op. cit.*, p. 138, note 27). This distinction, however, seems too formal when one considers first the situation during the Liberation's first weeks, when the powers were tangled up with each other; second, the terms then used for designating certain appealed cases did not have the precision they had in peacetime. This is one of the points that call for more accurate research.

for purging Italian Fascists, the American major E. J. Palmieri, after a mission carried out between December 26, 1944, and January 22, 1945, at the very beginning of the purges, concluded on a positive note: "For someone coming from Italy, the French purge system gives the impression of having been more thorough and quicker, but less orderly than the Italian system."[25]

Concerning the courts of justice, he wrote:

> One cannot help but think that those who had the idea of establishing the courts of justice demonstrated praiseworthy foresight and to an exceptional degree had a precise understanding of developments as they unfolded after the liberation of France.[26]

Admiring the rapidity of the procedures, Major Palmieri praised the judges' competence, praise that is at least surprising when one considers the mistrust in which the magistrates were held. With the exception of the civic chambers, which he criticized on principle, he urgently recommended applying in Italy a system equivalent to the one in France. He was astonished by the fact that the French he had questioned showed themselves much more critical of their purges.[27]

THE STATISTICS ON THE LEGAL PURGE

The High Court of Justice

One hundred eight ministers, secretaries of state, secretaries-general, delegates general, commissioners general, and governors general of the Empire who belonged to the governments in power between June 16, 1940, and August 25, 1944, as well as the head of state and the head of government, were tried by the High Court.[28] (See Table 5.1.)

Courts of Justice and Civic Chambers: Contradictory Figures

The data for the courts of justice should by definition have posed fewer statistical problems than for the extralegal purge, because the former numbers resulted from official decisions that had been duly reviewed in principle. In fact, it was thought after the appearance of Novick's book, which discussed and analyzed the official sources from the time, that the figures for the legal purge were a given by then.

[25] "Report on French system of epuration [*sic*] and the prosecution of crimes of Collaboration," by Major E. J. Palmieri, Allied Control Commission, Italy, Civil affairs section, February 10, 1945, 39 pp. US National Archives, Box 19, 10000/105/896. I wish to thank Hans Woller for informing me of this document, a copy of which may be found in the files of the Institut für Zeitgeschichte, Munich. The quotation is on page 1.

[26] *Ibid*., p. 4.

[27] *Ibid*., p. 26.

[28] See the complete list of names in Novick, *op. cit*., pp. 334ff.

TABLE 5.1. *Results from the High Court of Justice*

Died before sentencing		8
Cases dismissed		42
Acquittals		3
National degradation (loss of civic rights)		15
Effective	8	
Suspended for "Resistance activity"	7	
Imprisonment		14
For life	1	
For a term	10	
For a term in absentia	3	
Hard labor		8
For life	1	
For life in absentia	1	
For a term	5	
For a term in absentia	1	
Death sentences		18
Executed (Laval, Darnand, de Brinon)	3	
Commuted (including Pétain)	5	
In absentia	10	
TOTAL		108

As I see it, nothing is less certain. First, the CHGM investigation provided new elements whose importance has not been sufficiently stressed, including those persons who bore direct responsibility. Second, an attentive rereading of Novick's conclusions brings out the contradictions, errors, and omissions in the data, received in good faith but not critiqued by several historians.[29]

To simplify, there are three groups of immediately accessible sources that give a relatively complete account of the results of the judicial purge.

The first is an overall table for the activities of the courts of justice and the civic chambers as of December 31, 1948, published in a short article in the *Cahiers français d'information*, a governmental publication that did not specify the source of these statistics.[30] It provided details on twenty-seven judicial districts that had courts of justice. The table gives only the total numbers, and the presentation adopted seeks to bring out an essential distinction – mostly

[29] I was among them up to then. In the last summary in terms of dates (*L'Epuration 1943–53*, Paris, Fayard, 1986), the American author Herbert Lottman was neither more nor less negligent than others, and the total he gives on pages 460 and 461 of his book is neither more nor less confused and incomplete than that of others. But that has not prevented him from giving some resounding lessons and from presenting himself as a "discoverer" compared with "French historians who have given signs of a certain timidity with respect to those black years" (*Le Nouvel Observateur*, October 10, 1986). François Bédarida's reply evokes with respect the pioneers (R. O. Paxton, S. Hoffmann, E. Jäckel, P. Novick, etc.) in "American historians of the third or fourth zone" (*Le Nouvel Observateur,* November 7, 1986).

[30] *Cahiers français d'information*, 128, March 15, 1949, pp. 3–6. This table is reproduced by Novick, *op. cit.*, pp. 330–31.

TABLE 5.2. *Results from the Courts of Justice and the Civic Chambers as of December 31, 1948*

1. *Number of cases*			
Cases decided by the courts of justice		50,095	
Cases decided by the civic chambers		67,965	
Total cases decided		118,060	
Cases dismissed (courts of justice and civic chambers)	45,017		
Overall total of cases	163,077		
2. *Breakdown of individual cases in the courts of justice (of 50,095 cases decided)*			
Acquittals			8,603
Death sentences			7,037
In absentia	4,397		
With defendant present, but commuted	1,849		
With defendant present and executed	791		
Life at hard labor, in absentia, unspecified			2,777
Hard labor for a term, in absentia, unspecified			10,434
Imprisonment at hard labor, in absentia, unspecified			2,173
Imprisonment			23,816
Loss of civic rights (national degradation) (as the main sentence)			692
Total individuals tried			55,532
3. *Breakdown of individual sentences pronounced by the civic chambers, in the context of the 67,965 cases tried*			
Sentenced to loss of civic rights			48,486
Sentences commuted for "service to the Resistance"			8,929
Acquittals			19,881
Total of individuals tried			77,296
OVERALL TOTAL OF INDIVIDUALS TRIED			132,828

ignored by the historians – between "cases" and "individuals." A "case" may imply several "individuals."

Therefore, following this table, of the 163,077 cases examined, 118,060 gave rise to a sentence concerning a total of 132,828 individuals, whose fates were as follows:

Acquitted, released, or their sentences lifted	37,413
Condemned to death, of whom 791 were executed	7,037
Condemned to forced labor or imprisonment	39,200
Condemned to loss of civic rights	49,178
	132,828

This first source, which ends at December 31, 1948, is of great interest because it is one of the most accurate ever published. The problem is that it sometimes contradicts the data subsequently published.

The second source derives from cross-checking several statements made by the minister of justice during parliamentary discussions between 1951 and 1954, especially the debates on the amnesty laws.[31] These statements are generally laconic, and, moreover, they do not say a word on the origin of the data or the methods of calculation. We find the same numbers, with some transcription mistakes clearly arising from the same source, in the 1952 edition of the annotated Criminal Code.[32] This second source is taken up here in detail – and for the first time – on the model of the tables set out previously. It establishes the definitive totals from the courts of justice and the civic chambers as of January 31, 1951, hence at the last date of their operation. For the sake of clarity, the different elements are summed up in a table comparable to the previous one.

Thus, according to this second source, at least 311,263 cases were opened before the courts of justice and the civic chambers; 183,512 were dismissed without further action, while 127,751 gave rise to continuations. The latter numbers concern 124,613 individuals, whose fates were as follows:

Acquitted, released, or their sentences lifted	29,361
Condemned to death, of whom 791 were executed	6,763
Condemned to forced labor, or imprisonment	38,266
Condemned to loss of civil rights	50,223[33]
	124,613

Finally, the third source is the summary of the CHGM's departmental investigation. Its interest derives from the fact that it is a collection of basic information and not of statistics taken from the central administration, contrary to the previous sources. Its disadvantage is that it is often inaccurate, unequal, and unusable in certain cases. Furthermore, only the results concerning seventy-seven departments can actually be used. As it is, however, it provides an excellent indication of death sentences followed by executions, that is, at least 1,483 judiciary executions, 714 of which were sentences from the courts of justice and 769 from military justice.[34]

[31] The main ones are: written question by Paul Estèbe and the minister's reply on executions and sentences to forced labor, *Journal official, Débats parlementaires, Assemblée nationale*, session of December 12, 1951, p. 9100; written question by Deputy Jacques Isorni and reply by the minister on the total sentences in the purge, *ibid.*, session of July 11, 1952, p. 3939; intervention of J. Isorni in the debate on amnesty, *ibid.*, session of October 21, 1952, p. 4248; Mr. Léotard's written question and the minister's reply, *ibid.*, session of March 23, 1954, p. 1213.

[32] *Code pénal annoté, cit.*, p. 266.

[33] Taking account of the errors noted in Table 5.3, the total of the sentences issued by *Le Code pénal annoté* is 49,723.

[34] These figures were obtained by adding to Mr. Baudot's provisional total of 1,393 executions from courts of justice sentences and 694 from military justice sentences (L'Epuration: bilan chiffré, *cit.*, p. 52) – the results from Haute-Vienne. Of the 11 departments covered by the investigation whose results have not been published – see previous discussion – only the statistics concerning this department (where the purge was especially severe) allow disclosure of the results between death sentences from the courts of justice and those from military justice. According to a reliable source, the Haute-Vienne court of justice condemned 71 persons to death, 15 of whom were

These, then, are the three major statistical sources presently available. A comparison of these three sources poses many questions.

First, it appears that the historians have never considered the figure of 311,263 cases, cited in the second source, more precisely, the Criminal Code of 1952. This is the total of cases transferred just to the courts of justice and civic chambers by the purge committees, the police, the army, and the gendarmerie. This number is doubly interesting. It gives an idea of the overall number of persons, perhaps 350,000 individuals, who were threatened at one time or another with a court sentence. It certainly does not indicate in any way the number of real or potential "collaborators," but it does give a notion of the purge's relative extent at its initial stages. If we refer to the legends that decry the climate of systematic accusations of the time, we may definitively characterize this number as moderately high. However, it is important enough to show that the purge was a genuine social phenomenon that touched not just some well-defined groups. Nevertheless, and this is also essential, it can be shown that of this total, nearly 45 percent of the cases were decided before any information was presented, and 15 percent after a rapid preliminary inquiry. In other words, 60 percent of the cases were empty or considered as such by the judges, who declined to pursue them further. Despite the purges' sometimes disorderly nature and their difficulties, there was a security bar that acted as a brake and limited the mistakes, for good or evil. Because this is a statistical reality it does not mean that injustices were not committed.

Second remark: these sources include all the mistakes and inaccuracies of addition and transcription – we have noted a few of them. They include unexplained internal contradictions. For example, how is it that in the second source, which gives the final official balance, the number of individuals judged (124,613) is lower than the number of cases that gave rise to judicial prosecutions (127,751)? It was seen in the first partial table of 1948 that the number of individuals judged was, on the contrary and most logically, much greater than the number of cases. Is this a technical problem, such as transfers of cases that were not recorded, or is it an indication of possibly significant errors?

Finally, these sources show serious contradictions among themselves. The first (1948) and the second (1951–54) sources do not agree, even though they both originate with the government. The 1948 source mentions 791 executions carried out, the second, which gives a later total, cites the figure of 767. Why have the historians repeated especially the latter number? The fact that it is later is really no guarantee. If an error on so symbolic a number was possible in 1948, why would it not be possible later, unless the figures had been deduced

executed, while the "military court of justice" at Limoges – and this is a further designation that indicates a military tribunal sitting between August 24 and September 28, 1944 – condemned 76 persons to death, 75 of whom (or perhaps 74) were executed. A last important clarification: the extralegal executions (250 victims, see previous discussion) were very clearly differentiated from these legally executed. (Cf. "Letter from the director of the departmental archives of Haute-Vienne," October 16, 1968, Archives of the IHTP.)

TABLE 5.3. *Definitive Official Total from the Courts of Justice and the Civic Chambers as of January 31, 1951*

1. Number of cases		
Cases judged by courts of justice		57,954
Cases judged by civic chambers		69,797
Total cases judged		127,751
Cases dismissed before an inquiry*		140,011
Cases dismissed after an inquiry		43,501
Total cases dismissed		183,512
Overall total of cases		311,263**
2. Breakdown of individual sentences from the courts of justice (among the 57,954 cases judged)		
Acquittals		6,724
Death sentences		6,763
In absentia	3,910	
In presence of the accused but commuted	2,086	
In presence of the accused and carried out	767	
Life at hard labor		2,702
In absentia	454	
In presence of the accused	2,248	
Hard labor for a term		10,637
In absentia	1,773	
In presence of the accused	8,864	
Criminal imprisonment		2,044
In absentia	88	
In presence of the accused	1,956	
Prison sentences		22,883
National degradation as the main sentence		3,578
In absentia	19	
In presence of the accused	3,559	
Total individuals judged		55,331
3. Breakdown of individual sentences by the civic chambers, among the 69,797 cases judged		
Condemned to national degradation for life		14,701
In absentia	4,755	
In presence of the accused	9,946	
Condemned to loss of civic rights for a term		31,944
In absentia	1,327	
In presence of the accused	30,617	
Total condemned to loss of civic rights		46,645***
Sentenced but released for "service in the Resistance"		3,184
Acquitted		19,453
Total individuals judged		69,282
OVERALL TOTAL OF PERSONS JUDGED		124,613

* The *Code pénal annoté, op. cit.* This is the only source that indicates this category of cases.

** The *Code pénal annoté,* with the same elements, gives a total of 311,516 cases. This is only one of many addition and transcription errors to be found in most of the cited sources.

*** The *Code pénal annoté* gives the figure of 46,145. I preferred to take the detail of the sentences to national degradation (loss of civic rights) provided by Deputy J. Isorni of the National Assembly, session of October 21, 1952, *op. cit.*, whose addition gives 46,645, since the authors of the *Code pénal annoté* have clearly made another error of addition or transcription.

from executions that had not been branded as extralegal? However, that is not very likely, when one takes into account the fact that it concerned decisions issued by the courts of justice, hence without the slightest doubt as to their nature. In addition to that, the CHGM investigation cites 714 executions for only seventy-seven departments.

Generally speaking, no historian, especially Peter Novick, who uses both sources, has tried to explain the discrepancy between the 1948 figures and those of 1951–54, in particular – and this is the last bizarre development – the fact that the total persons judged is presented as greater in 1948 (132,828) than in 1951–54 (124,613), when the purge continued well after December 1948.

These contradictions are curious, but they do not call for a complete revision of the matter, even if it now appears essential to find the original justice ministry figures. However, these official sources contain a large gap that the CHGM investigation indirectly reveals.[35]

The Black Hole of the Military Tribunals

The data given in the official statistics concern only the courts of justice and the civic chambers. None of these documents mentions the military tribunals' activities. The latter courts were the first to operate, before the courts of justice were established. They were also the last, since after the suppression in 1951 of the courts of justice, the military tribunals heard the remainder of cases then under way. Further, there is no question of totals for the "courts-martial" in the official statistics, which operated in the Liberation's very first hours. From that time on, it appears that there was a sort of black hole, both because these courts were under the Ministry of National Defense and not Justice and because their operations were not accounted for with the same rigor as with the courts of justice. At a National Assembly session in 1954, the justice minister, the minister most happy to be asked about the matter of the purge, replied to Deputy Léotard: "Questions about the organization and operation of the military tribunals are outside the jurisdiction of the Minister of Justice, who can only leave the Honorable Deputy with the task of taking it up with the Ministry of National Defense and the Armed Forces."[36]

It also does not appear that the deputies actually did ask the defense minister that question. Stranger still, in 1952, Deputy Jacques Isorni, a fierce enemy of the purge, brought up this issue in a simple allusion: "If you do not count the 766 executions following the decisions issued by the courts martial, that is how the final total of the courts of justice was arrived at." Isorni then accurately announced the official figures then available – identified here as the second source. He concluded:

[35] *Journal officiel*, session of March 23, 1954, *cit.*, p. 1213.
[36] *Ibid.*, session of October 21, 1952, p. 4248.

The decisions issued by the military tribunals are not included in this total, since it is often very difficult to find out when these courts spoke, whether they received the cases at first, that is, directly, or whether, when they were called upon to purge the condemnations pronounced in absentia by the courts of Justice, hence, after 1951.[37]

No historian mentioned Isorni's allusion to "766 executions by courts martial." Isorni himself had not used this information against the government, while he and the nostalgic extreme Right spoke of the "100,000" deaths by summary execution.

As a general rule the academics who have carefully studied the issue posed by the military tribunals are rare. The activity of these tribunals was anything but negligible, and a large number of their sentences were quashed later by the criminal section of the Court of Cassation, a circumstance that does not simplify the evaluation of the actual decisions.[38] Furthermore, the military tribunals were concerned with punishing war crimes committed by the German occupier, of which there were 20,127 cases if we are to believe a figure presented in 1947.[39]

Only the CHGM investigation, despite its imperfections, permits a preliminary evaluation of these tribunals' activity: that 769 collaborators were reportedly executed after a regular sentence by the military tribunals, but from only seventy-seven departments. However, it is not possible to evaluate even summarily either the total number of cases tried or the number and breakdown of the other decisions, whether acquittals, imprisonment, or other. It is interesting that this figure is nearly the same as Isorni's (766), from an unspecified source.

Therefore the qualitative and quantitative analysis on this point is yet to be done. The first task is to specify the difference between regular military tribunals and those characterized as urgent, even between the courts that were, in fact, illegal and those whose total has been included with that of the extralegal purge. Therefore, the total for the regular military tribunals, if it can ever be determined accurately, requires the reevaluation of the rise in the overall total from the legal purge. For the executions only carried out after a regularly pronounced death sentence, there are more than twice the generally given data, since, to the 767 (or 791) executed on sentences by the courts of justice – the official figures – there would have to be added at least 769 executions that followed decisions of the military tribunals. This gives a partial total of at least 1,536 persons executed after a legal sentence. As to the total number of cases

[37] *Journal officies*, session of October 21, 1952, p. 4248.

[38] Robert Aron is one of the few who treated this subject, without, however, providing any figures. *Histoire de l'épuration*, tome 2, Paris, Fayard, 1969, pp. 52ff.

[39] Touffet, "Crimes de guerre et recherche des criminels de guerre," *Receuil de Droit pénal*, June 1947, cited in *Code pénal annoté, cit.*, p. 276. A rapid consultation of a list, which unfortunately is incomplete, of all the German, Italian, Polish, and other nationals who were tried in approximately half the French military tribunals leads one to believe that this figure is certainly exaggerated (IHTP Archives). Note that this issue appears not to have been studied in the historiography. The matter is the subject of a thesis under way by Claudia Moisel at the University of Bochum.

examined by these courts, the number of sentences of imprisonment, acquittals, and dismissals they delivered, all this is unknown.

Do we therefore need to review completely the purge's physical numerical total?

Regarding the number of deaths, the orders of magnitude presented up to now are not likely to be overturned. The purges, legal and extralegal, caused about ten thousand deaths, of which eight thousand to nine thousand were extralegal executions and fifteen hundred to sixteen hundred were sentences carried out. However, for the rest, it must be noted that a great deal is still unknown. The partial results of the CHGM investigation – when they give data for a department on other decisions by the military tribunals (prison, acquittals, etc.) – leave an impression that the courts of justice had about two or three times as many cases as the military courts. This leaves a significant margin of unknowns.

Nevertheless, interpretations here must be prudent, and we will refrain from hasty conclusions. At the moment only one point is certain: the number of those "legally" purged was significantly greater than has been noted with regard to those sentenced to death, with no information on the other sentences. There were many more than 311,000 cases brought before civil and military justice. Therefore, were there many more than 350,000 individuals who were weighed down by the threat of an investigation, however light and temporary? How can the decisions in the military justice cases that gave rise to an investigation be broken down? How many transfers and confusion of cases were there, and what was the dividing line between civil and military justice in space and time? Are the orders of magnitude likely to be overturned, and among all categories, as soon as studies are no longer based on court of justice statistics alone, which are reliable in terms of order of magnitude? At this time the answers are difficult to find. However, two additional indications are worth pointing out at this time. It is known through case studies that death sentences from military tribunals were more systematically followed by an actual execution, especially when the tribunals were sitting before the establishment of the courts of justice. However, these same tribunals were relatively less harsh than the courts of justice in treating the remainder of their cases at the end of the purges. However, reliable criminal statistics do show us that the number of persons detained for collaboration was 29,179 in 1946,[40] a date by which all these matters were before the courts of justice. This number includes those detained who had not yet been judged by that date, those already sentenced by civil justice – at least fourteen thousand if the more or less reliable Ministry of Justice, is to be believed. That ministry reported about ten thousand prison sentences and about four thousand death sentences. Nearly all these sentences pronounced in the courts of justice on March 15, 1946,[41] as well as the sentences from military justice were

[40] A figure cited by Marie-Danièle Barré, "130 Années de statistique pénitentiaire en France" (130 years of criminal statistics in France), *Déviance et société*, 10 (2), 1986, p. 116.

[41] Pierre-Henri Teitgen, *Les cours de justice*, *cit.*, p. 33.

commuted. However, preventive detentions comprised the greater part of this total (which is not impossible) and the courts of justice considerably speed up their work between March 1946 and the end of that year (which is less probable). This leads to the hypothesis that the portion of military justice in this first phase of its activity could reach 10 to 20 percent of the twenty-nine thousand detained in 1946.[42]

To sum up:

- The total for the legal purge needs to be revalued upward.
- The number of death sentences reported carried out has doubled, however, with relatively weak absolute figures. For the other sentences, some unknowns remain that could lead to a partial revaluation, which would not substantially change the way the whole purge process is regarded.
- Nevertheless, it is the first phase of the legal purge between 1944 and 1946 that is worth analyzing differently, since the total number of individuals threatened with punishment and the number of those imprisoned are certainly greater than was formerly believed.

THE ADMINISTRATIVE PURGE

Parallel to the judicial purge, another purge of a professional nature was soon established. It was for the purpose both of punishing those guilty of collaboration with the enemy through carrying out their functions and of purging government, business, and the professions of elements judged undesirable in the context of restoring democratic order.

The case of government officials was an especially thorny one, to the extent that the Vichy regime had an apparently legal basis. From 1941 on, the principle of purging the government was explicitly included in the legal steps to be taken against the Vichy regime. An ordinance of the Provisional Government of the French Republic of June 27, 1944, defined the principles of that purge. It contemplated those persons who had "served the enemy's purposes," those who had "worked against the war effort of France and its allies" (that is, who had opposed the Resistance), those who had "brought harm to constitutional institutions or to fundamental public liberties," and those who had "knowingly received a material benefit" from their participation in the governments in power from June 16, 1940, to August 25, 1944. As may be seen, the interpretation of this text could include a very large number of officials, notably all

[42] These speculations, which may appear risky, result, as may be understood, from the lack of complete and reliable data, at least at this stage of the research, subject to the mistakes or the ignorance that the historian cannot completely avoid and are amply demonstrated in this chapter. In particular, it is difficult to argue on the basis of partial indications that mix the stocks (number of those detained at regular intervals, taking the detentions and releases into account) with the flows (number of detained at regular intervals, taking the detentions and releases into account). Nevertheless, these data are presented as a precaution, especially to preclude fantasy exaggerations (innocent or otherwise) of the purge totals.

officials in a position of authority. The interpretation was part of the Liberation's political context and, moreover, renewed a long tradition. Since 1789, France had known waves of purges, especially under the Convention, during the Hundred Days, and again at the beginning of the Third Republic, without, of course, omitting the purge conducted by the Vichy regime.[43]

However, the order that set the administrative purge in motion ran counter in its application to a contrary principle calling for the restoration of public order. This was revealed in a circular sent to the commissioners of the republic concerning the purge of provincial and departmental governments: "it is good to show intransigence, but in such a way as not to disturb government operations."[44] Here too, there is a lively controversy on the extent of the governmental purge and the number of high officials who were "saved" at Liberation in order to maintain a certain continuity in the government. The figures are often contradictory in this case as well.

Generally, of about 1 million to 1.5 million officials in government agencies and national corporations, including the railroad but excluding the military and agents of national defense, the figure most frequently given for the number of sanctions imposed by the purge commissions, which operated in each ministry, was 16,113. This included about 6,500 definitive dismissals, layoffs, and retirements, that is, the severest sanctions. If we count only officials properly speaking, those in the governments, 11,343 would have been affected by the purges, of whom more than 6,000 by various types of removal from office. However, these are official figures, given by the government to Parliament between 1948 and 1950 and taken up by historians without verification.[45] As with the judiciary purge these figures are quite undervalued, because they include neither the officials already sentenced by the courts of justice and removed from office, nor those of the local governments, and probably not the temporary or contractual officials.

[43] Glaude Goyard, "La notion d'épuration administrative" (The idea of administrative purges), in Paul Gerbod et al., *Les épurations administratives – XIX et XX siècles* (Administrative Purges in the 19th and 20th centuries), Geneva, Droz, 1977, pp. 5ff.

[44] Cited by Étienne Dejonghe and Daniel Laurent, *La Libération du Nord et du Pas-de-Calais*, Paris, Hachette, 1974, p. 180. Cf. François Rouquet, *Une administration française face à la Seconde Guerre mondiale; Les PTT*, vol. 3 (in collaboration with C. Scalisi); *L'Épuration*, Dissertation, University of Toulouse-le-Mirail, 1988, p. 137 (published under the title *L'Épuration dans l'administration française: Agents de l'État et collaboration ordinaire*, Paris, CNRS Editions, 1993).

[45] The figure of 16,113 with the details on the sanctions was given by the Prime Minister's Office at the time of a written response to a question from Deputy Albert Schmitt, *Journal officiel*, Parliamentary Debates, National Assembly, session of August 2, 1948, p. 5230. The figure of 11,343 was given in a response by the minister for the civil service to a question by Deputy Louis Rollio, *Journal officiel*, Parliamentary Debates, National Assembly, session of January 25, 1951, p. 408. François Rouquent offered an extremely detailed analysis of the problem of the administrative purge on the appearance of his thesis: "L'Épuration administrative en France après la Libération: Une étude statistique et géographique," *Vingtième siècle: Revue d'histoire*, no. 33, January–March 1992, pp. 106–17.

However, according to sources in the secretariat of state for governmental employees in the prime minister's office, the number of punitive actions imposed on government officials was between twenty-two thousand and twenty-eight thousand, nearly half of which were dismissals of all kinds. These data include only a part of the ministries and public bodies – the most important one – and doubtless do not include dismissals imposed after a criminal sentence. In other words, there, too, the number of those purged from the administration is double that given by the government in 1948. There was an astounding statement from François Rouquet: this official figure did not include the Interior Ministry, where the rate of sanctions was by far the highest. The minister responsible for answering questions from the deputies in Parliament was undoubtedly aware of this omission.[46]

Under these circumstances, these upwardly revised figures lead to serious issues of interpretation. First of all, the sources remain imprecise despite all efforts. This is especially true for the actual number of officials under the Occupation, not only on the stocks – the number of officials in 1944 – but also on the flows – the total number of officials employed between 1940 and 1944, including those who left before 1944. Here again there is a classic problem of statistical evaluations. This makes the understanding of the purge in terms of percentages difficult. Then again, a high number of sanctions depends either on a significant number of officials who really did collaborate, there being no doubt about their attitude, or on the particular severity in this or that administration, due to the personality of the purge commission members, that is, the ministers then in office. In the picture painted by François Rouquet, the highly exposed ministries of the interior and of information were unsurprisingly at the head. However, the high rate of war veterans purged, which took third place, but with absolute figures that were low despite everything, raises questions. Did the Ministers Laurent Casanova, of the French Communist Party, or François Mitterrand, issue directives? By way of comparison, the Communist Marcel Paul in industrial production did not issue specific instructions for purging his administration, which was among those less affected, even though Jean Bichelonne's ministry was at the heart of state economic collaboration, and even though the ministry had numerous Resistance fighters. Finally, the last uncertainty, which applies to the purge as a whole – how many of these officials were actually dismissed and how many reinstated immediately afterward, especially after certain decisions of the purge commissions had been overruled by the Council of State? Here again, there is a whole section of the purge's history that remains to be written, provided that it is regarded as an extensive social phenomenon with medium- and long-term effects, in particular in the differentiated renewal of the elites. This topic has been treated often, but on a basis that is more than uncertain.

The army was also affected by the administrative purge. Following the principles laid down by General de Gaulle, military personnel were not simply

[46] F. Rouquet, *L'Épuration, cit.*

obligated to the "duty of noncooperation" with Vichy or with the Germans, but actually to the "duty to resist." In addition, on several occasions, the soldiers of the Vichy "armistice army" had fought against free French forces, especially in the Empire. Complete information is available only concerning army officers, which has been recently studied. Of thirty-five thousand active army officers in 1939, two thousand were killed and ten thousand captured in the campaigns of 1939–40. Of the remaining twenty-four thousand [*sic*], about six thousand immediately joined Free France and the Resistance. The army purge commission examined a total of 10,270 cases, that is, nearly half the officers still on active duty in 1944. Among these, 6,630 were taken back into the army, 2,570 were relieved, and 650 were retired. In other words, a quarter of the officers processed were punished, approximately one officer in eight among all active-duty officers. The general officers were more affected since only 39 of 181 cases examined were not punished.[47]

THE ECONOMIC PURGE

Economic collaboration had been most important and most extensive, but its repression was more than moderate. The purge in this area was a major event of the first months of the Liberation. The Communist Party and several Resistance organizations demanded it, both to punish big business and to establish the conditions of a "new economic democracy," such as the program that the National Resistance Council called for. However, as with administrative collaboration, it worked against the logic of economic reconstruction. An excessively weak purge could aggravate social conflicts, whereas if the purge were too strong, it could deprive the country of the economic elites it needed. Moreover, the sectors that had collaborated most, whether voluntarily or through necessity, were often the same ones that were indispensable for the country's reconstruction.

In the first weeks of the Liberation, part of the country was heavily involved in an atmosphere of "social war." The union organizations, especially the General Confederation of Labor (CGT), as well as many Resistance movements, wanted to take their revenge on a business class suspected of having desired, during the Occupation, to take its own revenge on the social conquests of the Popular Front. This frame of mind took the form of the incarceration of a few principal exponents of big business. The most famous case was that of Louis Renault. It also took the form, in exceptional cases, of confiscating factories and offices (in Berliet near Lyon, twenty-two firms were confiscated, including Aciéries du Nord at Marseille), and of creating workers' management committees, or patriotic business committees with the Communist Party's support. These "spontaneous" committees had the task not only of purging the multitude of firms suspected of collaboration, but, in some cases, of filling a void where the firms' leaders and officials were often absent, in hiding, or in flight for fear

[47] Jacques Vernet, *Le Réarmement et la réorganisation de l'armée de terre française (1943–46)*, Vincennes, Service historique de l'Armée de terre, 1980, pp. 121ff.

of reprisals or because of the fighting. For some, these committees and requisitions were a prelude to the large-scale reforms to come. As Raymond Aubrac, the regional commissioner of the Republic at Marseille, said several years later: "I can say it now: the requisitions in Marseilles derived from two illusions: at first I believed in the purge, and then in the structural reforms."[48] The Christian Democrat justice minister Pierre-Henri Teitgen always opposed this view: "I do not have the right to use the purge for making structural reforms."[49] In fact, these self-governing committees served as the basis for the business committees established by the ordinance of February 22, 1945, which explicitly specified that it was a question "of legalizing and expanding the existence of these organizations."[50]

This "uncontrolled" economic purge of the first weeks was therefore limited. There were approximately one hundred cases, mostly in Paris, Marseille, and Toulouse. Generally the situation rapidly returned to normal, and of all the nationalizations occurring at the Liberation, only that of Renault and those of certain sectors such as the mines were directly connected to a purge process.[51]

Although the hope for this "new economic democracy" to which the Resistance fighters aspired was not based on a purge, it nevertheless remains that the economic purge had begun, at least formally. An ordinance of October 18, 1944, established departmental committees for confiscating illicit profits, intraprofessional regional purge committees (CRIE), and the National Interprofessional Purge Commission (CNIE). The departmental committees for confiscating illicit profits were charged, as after World War I, with studying the cases of firms that had carried out lucrative financial operations during the war and the Occupation and had made significant profits. The intraprofessional regional purge committees had the task of cracking down on collaboration in professional activities other than in government.

The interprofessional purge committees were composed equally of employers, managers, workers, and government representatives, and they were presided over by a judge. These committees had the authority only to order expulsions from professions (removals, prohibitions against exercising management authority and sitting on boards of directors, etc.) or national degradation if the accused had not appeared before the courts of justice or the civil courts. However, several obstacles to the economic purge soon arose. First, it was slow; the committees could not really operate until 1946. By that time, political opinion inclined rather to clemency and rapid settlement of the cases. Also, only individuals' deeds were considered and not their property. The head of a business could lose the right to lead his firm, but he continued to hold its capital and receive dividends as a shareholder; that limited the sanctions'

[48] Cited by Pierre Guiral, in P. Gerbod et al., *Les Épurations administratives, cit.*, p. 100.

[49] Cited by J.-P. Rioux, *La France de la Quatrième République, cit.*, p. 60.

[50] Claire Andrieu, Lucette Le Van, Antoine Prost (dir.), *Les Nationalisations de la Libération: De l'utopie au compromis*. Paris, Presses de la Fondation nationale des sciences politiques, 1987, p. 98.

[51] *Ibid*. See also Grégoire Madjarian, *Conflits, pouvoirs et société à la Libération*, Paris, C. Bourgois (coll. 10/18), 1980.

effectiveness. Further, all professional categories were subject to the same procedures, with flagrant inequalities of treatment. An employer had the benefit of all technical and legal assistance, unlike the employee or the worker. Because of this, these committees, whether regional committees under the commissioner of the republic or the national commission under the minister of industrial production, suffered from significant absenteeism; often every second or third meeting was cancelled. There were ideological confrontations in which two radically different concepts of the economic purge confronted each other. On one side, the employers' representatives, most often supported by the ministerial experts – who played a decisive role in cases, that were often very technical – recommended a moderate purge. They strongly insisted on the need not to penalize the firm while condemning its leaders, who were, moreover, indispensable in the phase of economic reconstruction that was getting under way. On the other side, the union representatives, beginning with the General Confederation of Labor (CGT), recommended a more radical purge under the rubric of "economic democracy." From 1947, when these committees had settled barely two-thirds of the cases, the dismissal of the Communist ministers served to slow their activities even more. The CGT delegates undertook a breakaway strategy.[52]

For example, the regional purge committee in Paris, one of the few to have been studied, examined 4,889 cases, of which 22 percent concerned workers, 12 percent employees, 45 percent managers and technicians, and 21 percent employers. Of this total, 2,596 persons were punished, about half the individuals concerned, and 1,681 others were released. The rest were dismissed or transferred to other jurisdictions.[53] This number is relatively low, considering that Paris and its surrounding area constituted a major center of economic activity and that most company headquarters were located there.

The national purge commission (CNIE) examined only 1,538 individual cases. More than 70 percent of the persons examined belonged in the company leader category – president, director general, and members of the board of directors. The rest was composed almost equally of engineers, managers, workers and shopkeepers, and independent artisans.[54] Of this total, 1,024 cases were dismissed without any investigation or – about 150 – transferred to other jurisdictions; 323 were cleared after investigation; and only 191 were sentenced, 45 of them only to "national degradation." This was an extremely low number, even if some prominent figures among French employers found themselves deprived of their managerial position after testifying before the committee; but they constituted only a tiny minority.[55]

[52] On these debates, see the archives of the CNIE: *Archives nationales, Fonds du ministère de la Production industrielle*, especially F 12 9550.

[53] Jean-Pierre Bertin Maghit, "Le comité interprofessionel d'épuration de Paris," *La Gazette des Archives*, 136, 1987, pp. 29–40.

[54] On this point, see R. Aron, *Histoire de l'épuration, cit.*, vol. 3, *Le Monde des affaires (1944–1953)*.

[55] See especially the case of purges in the banks in Annie Lacroix-Riz, "Les grandes banques françaises de la Collaboration à l'épuration," 2, "La non-épuration bancaire, 1944–1950,"

Last but not least, the national purge commission (CNIE) was so small a threat that the heads of firms themselves often requested to appear before it in order to be officially cleared. The commission issued a great many certificates, most often with no examination of the cases.[56] This leads to the supposition that in many cases, far from playing a role of repression or renewal of the managerial elites, the economic purge – or nonpurge – on the contrary, served to restore certain reputations.

It must not be forgotten that in some professions the purge at Liberation was infinitely less than the one carried out by Vichy. For example, among the cinema professionals, only 1,087 persons were punished – 25 percent severely – in a profession that numbered 60,000 in all. This was one-tenth of the anti-Semitic exclusions that operated in this sector because of the Vichy laws.[57]

TOWARD AN INTERPRETATION

The overall total of the purge in France appears controversial at first. It was unequal in time and space; it was sometimes incoherent, notably in leaving aside the more important – economic – collaboration. It was also incomplete in many ways.

The crimes committed within the framework of the Final Solution, notably by high-ranking Vichy officials, were never judged as such. Likewise – but this is true for most of the occupied countries that underwent a purge – the idea of "crimes against humanity" defined by the London agreement of August 8, 1945, which provided for the pursuit of Nazi accomplices and collaborators, was not applied before the 1960s, that is, after Adolf Eichmann's trial in 1961.[58] It was not until 1964 that a French law actually recognized the existence in French jurisprudence of a crime against humanity, declaring that the statute of limitations did not apply to it. It was not until 1979 that the first indictment was pronounced for crimes against humanity. This was against a former Vichy official, Jean Leguay, who died without ever being tried. In 1987, Klaus Barbie was the first actually condemned for such a crime. And today (1992), three Frenchmen, the militia member Paul Touvier; the former secretary-general of the Vichy Police, René Bousquet; and not forgetting Maurice Papon, are subject to a similar condemnation. Beyond the specific issue raised by these cases, it

Revue d'histoire de la Deuxième Guerre mondiale 142, 1986, and Claire Andrieu, *La Banque sous l'Occupation: Paradoxes de l'histoire d'une profession*, Paris, Presses de la Fondation nationale des sciences politiques, 1990.

56 AN, F 12 9562. File on requests for certificates addressed to the CNIE.

57 Cf. Jean-Pierre Bertin-Maghit, *Le Cinéma sous l'Occupation: Le monde du cinéma français de 1940 à 1946*, Paris, Orban, 1989.

58 Cf. Pierre Mertens, *L'imprescriptibilité des crimes de guerre et contre l'humanité, etude de droit international et de droit pénale comparé* (No statute of limitations for war crimes and crimes against humanity), Brussels, Centre de droit international de l'Institut de sociologie, Éditions de l'Université de Bruxelles, 1974.

is clear that half a century later, the purge in France remains a problem in suspense.[59]

In quantitative terms this was a large purge, especially if one admits that it was undervalued. If we sum up the essential data currently known and more or less reliable, we have

- 8,000 to 9,000 extralegal executions, 1,000 to 2,000 of which at a time when the legal purge was under way
- 311,263 cases sent to the courts of justice alone, indicating perhaps 350,000 persons threatened with legal action
- 124,613 persons judged by the courts of justice, 76.5 percent of whom were sentenced
- 1,500 to 1,600 death sentences that were carried out
- more than 44,000 persons sentenced to prison by the courts of justice alone
- more than 50,000 persons sentenced to national degradation by the courts of justice and the civilian courts
- from 22,000 to 28,000 officials punished, half of whom were dismissed or fired (partial statistic, which does not include all the ministers and officials sentenced under criminal law, or those of the local administrations).

To this total must be added that of the "administratively interned," that is, those who were arrested and detained, especially in the camps like the one at Drancy, either as a preventive measure pending examination of their case or as protection against reprisals. There, too, the files are incomplete; in December 1944, the total of those interned (whether French or foreign, most of the latter Germans) was approximately forty-six thousand persons; in July 1945, this total was thirty-nine thousand persons, eighteen thousand of whom were foreigners and twenty-one thousand French, among whom were twelve thousand from Alsace and Lorraine, arrested after December 1944.[60]

These data indicate the number of those interned on two dates that are certainly meaningful – in the midst of the process and at its end, since most were released or imprisoned after the summer of 1945. However, these data do not tell us how many persons of the total were interned, so that it is difficult to have an exact count of those coming in or going out between these two dates. For example, we note that for the Seine department the total of persons interned was 16,000, a high number[61] that leads to the supposition that for France as a whole, the total number of Frenchmen interned administratively undoubtedly exceeded 60,000 or 70,000, or perhaps more than 120,000.[62]

[59] See H. Rousso, *Le syndrome de Vichy, cit*.

[60] AN, F 7 15086. These figures are from the Ministry of the Interior. I thank Denis Peschanski for informing me of them.

[61] AN, F 7 14969.

[62] M. Baudot cites the figure of 126,000 interned between September 1944 and April 1945, based on an "administrative report" dated April 28, 1945, with no further reference. Cf. "La répression à la Libération, *cit*, p. 769.

It must be added that most of those interned were amnestied between 1947 and 1953 and only some of the sentences were effectively carried out because most of the collaborators benefited from early release after the amnesty. The number of those held for collaboration progressed as follows:[63] 29,179 in 1946, 18,384 in 1948, 975 in 1954, and 9 in 1960.

In making international comparison without going into detail, the case of France is atypical. The purge there was among the most severe, considering the death sentences, and among the least extensive when one takes account of the prison sentences in nations whose situation was similar.

In Germany and Austria, there were at least 1,450 death sentences, 850 of them in the Allied Zones, later the German Federal Republic. There were undoubtedly more in the Soviet Zone, later the German Democratic Republic. There were 500 to 1,000 death sentences in Italy, about 150 in the Netherlands, 30 in Norway, 250 in Belgium, and about 50 in Denmark. With respect to the populations of these countries, these data place France at the head of the list with nearly thirty-nine death sentences per million inhabitants, closely followed by Belgium (twenty-nine), Holland (seventeen), Denmark (thirteen), and Norway (ten). Note that most of these countries had many collaborators, notably because of the massive enlistments in German military units; there is no possible comparison between the very high number of people compromised in Germany, Austria, and Italy and the minority who collaborated in France.

Concerning prison sentences, France was very much toward the end of the list, even counting the underestimations. It had twelve prison sentences per ten thousand inhabitants, as opposed to sixty in Norway, fifty-five in Belgium, fifty in Holland, forty in Denmark, and so on.

As to extralegal purges, everything depends on the numbers to which they are compared. With respect to the other countries of Western Europe, France and Italy are the only countries that underwent a phenomenon of this type: ten thousand to fifteen thousand victims. On the other hand, in comparison to the countries that had genuine civil wars (Yugoslavia and Greece), the number of victims in France is infinitely less and therefore not comparable.[64]

One of the aspects most worth reexamining is the tendency to make a clear distinction between extralegal and legal purges. At the time it was a political, ethical, and legal issue of capital importance. By tradition and with the purpose of breaking down the myth of the "bloody purge," historians have again taken up this distinction. Hence, once the facts were set out, the distinction did not always seem justified – for three reasons.

[63] M.-D. Barré, *op. cit*. Novick gives much lower figures, gathered from successive statements by ministers of justice to the National Assembly, *op. cit.*, pp. 297–98. These latter figures are those I gave in *Le Syndrome de Vichy, cit*.

[64] Most figures cited here serve as orders of magnitude since there are several uncertainties, especially for the rate of executions actually carried out and for the figures from the Soviet Zone. Cf. K.-D. Henke, H. Woller (eds.), *op. cit*. For Belgium, the work of Luc Huyse and Steven Ohondt, *La Répression des collaborations, 1942–52: Un passé toujours présent*, Brussels, CRISP, 1993.

First, concerning the victims of extralegal purges, there is a great difference between those who were cut down before the end of the progressive liberation of France, and thus in the midst of combat, and those killed after the fall of 1944, when some legal procedures had been set up. In this latter phase, there was an alternative that permitted both avoiding unjustified summary executions and offering most of the judicial guarantees that were more or less normal in the case of arrested collaborators. However, in the two initial phases, one may ask whether it would be justifiable to speak of "purges."[65] Assassination attempts against collaborators before June 6, 1944, were mostly acts of war, or of partisans against a pitiless enemy. Executions between June 6, 1944, the date marking the start of the "national insurrection," and the end of the liberation of this or that region were part of the tragic context of a civil war. Strictly speaking, and in some specific cases, such as the execution of the militiamen of Grand Bornand, they could be counted as war crimes if the militiamen and other auxiliaries of the Germans had been considered as combatants. The Resistance, in the logic of what it was fighting for and especially in the logic of what extreme collaboration was, could not consider them other than as traitors. In addition, we have seen that many victims would have been executed in any case if they could have been subject to a regular procedure, given the charges against them. This of course does not excuse the settling of scores nor the inadmissable character of these executions if one admits that the continuity of the republican state, General de Gaulle's guiding principle, meant the continuity of law in the state, despite the dramatic context. However, it was asking a lot of a country that had undergone four years of bloody occupation to believe it capable of avoiding such an excess. In other words, the only really "uncontrolled" or "extralegal" purges were the ones that took place when there was an effective legal alternative. One must include in this category not only the summary executions, but also the shearing of the women, which was nothing but a discriminatory, symbolic lynching.

Second, the transition from the courts-martial of the maquis, then the legal courts-martial – that is, covered by an authority, a military delegation, or a commissioner of the Republic – then the regular military tribunals, before the courts of justice were set up, is far from clarified. In any event, there are no elements that allow satisfactory distinctions and make it possible to state that among these different military jurisdictions there were clearly defined "degrees of legality."

Third, finally, the extralegal executions were not all carried out by isolated Resistance fighters or uncontrolled assassins. Many were carried out by the FFI or the FTP, operating outside any legal formality, which certainly should not be encroached upon in time of civil peace. Their legitimacy in the troubled

[65] Even the purge term *extra-judiciaire* (extralegal), used here to avoid other terms that would be even less appropriate is not without a certain ambiguity since it implicitly leaves the impression that these acts were performed in parallel with a legal process; for three-quarters of the cases, that is is not true.

circumstances of the time and because of the transitory character of the new political authorities was not actually different from the legitimacy of the courts of justice, which were also composed of Resistance fighters, often the same people. In other words, the purge, if we take this term at its traditionally accepted meaning, possesses a profound unity. Both its extralegal and its legal phases, in the last analysis, raise the question of the Resistance's legitimacy. One may accept this legitimacy or oppose it; that is an ideological debate. However, for the historian, it is the legitimacy of the Resistance – simultaneously against the Nazi occupiers, against Vichy, and against the collaborators – from which the progressively legalized power of General de Gaulle emerged. This combat took various forms in 1944 and 1945, and as the entire purge did, formed the most important issue.

CONTRADICTORY PURPOSES

The difficulty of grasping all aspects of the purge is perhaps explained by the fact that it served multiple and sometimes contradictory purposes, where the objective dilemmas in which those responsible were caught up and the vision of a country that projected their hopes and fears were simultaneously expressed.[66]

This difficulty served a security purpose. The internments and the executions (summary or legal) of the first few months had as their main goal to prevent the adversaries of the Resistance from threatening the insurrection under way behind them. The threat was partly real because some collaborationist movements in exile had planned to form a "white maquis."

The purpose served as an outlet, meeting a genuine need for violence expressed in public opinion. The shorn women thus channeled this irrational need, which had been conditioned by the Occupation's violence, as did certain conspicuously staged public executions.

It imperfectly served the purpose of reparation and justice for the benefit of the direct victims of the collaborators, and for the benefit of the nation as a whole. However, the purge left the victims of the Final Solution out of the picture. The fact that this purpose of reparation is still current half a century later demonstrates that it expresses a deeply felt need.

It served a purpose of social regulation by preventing the agitation of the first weeks from expanding, even serving as a distraction from the persistent, especially economic difficulties.

It served a purpose of legitimation by affirming the power of those who were purging in the name of the nation. From this derived the rivalries among the various political components of the Liberation and the race among the various powers.

[66] This topology of "purposes" is based freely but extensively on the contribution by Pierre Laborie to the colloquium of the IHTP, "Les pouvoirs en France à la Libération," *cit.*, which has been of great assistance to me in elucidating certain questions touching on the very nature of a purge process.

Finally, the purge served a purpose of national identity and reconstruction. This was the meaning of the sentence of "national degradation" instituted by the ordinances of 1944. By eliminating traitors to the fatherland, the nation, *and* the Republic, France could hope to base its future on a rediscovered identity. "A country that fails its purge fails its renewal," wrote Albert Camus, making the point well.[67]

But by their very nature, these different purposes have raised inevitable contradictions and dilemmas which can be observed today, in an entirely different context, in the new democracies of Eastern Europe:

- How can you respect what is right and what is legal in a situation bordering on civil war and in the face of enemies who do not recognize the Republic's values? The dilemma was either imperfect justice or revenge against the conquered. The first solution was chosen.
- How do you find a point of equilibrium between a necessary and required purge and the need to interrupt the process so as not to prolong the fratricidal wounds? To what degree of responsibility should it be taken? "The purge must have its limits, both in time and in extent." Otherwise: "A pure person always finds someone purer to purify him" and "it's never finished," wrote Yves Farge, the commissioner of the Republic at Lyon, who was not afraid of the issue.[68]
- Could one attack the economic, administrative, or political elites with impunity without risking being in the court of the replacement elites? The absence of an economic purge or the relative moderation of the administrative purge is explained by the need to affirm the continuity of the state and to give the best opportunity for reconstruction. This was a choice of realism over political romanticism, that of restoration over revolution.

Finally, was it not dangerous to base the reconstruction of national identity on a procedure of exclusion, even a justified one? The amnesty, which gave rise to such violent debates barely five years after the Liberation, was eventually inevitable. It was as inevitable as was the persistence of unhealed wounds half a century later, after the "discovery" of former collaborators – even some who had served their sentences – in that firm or that government office gave rise to recurring waves of long-lasting rancor, when the purge, and its corollary the amnesty, had the precise purpose of liquidating the Occupation's liabilities through law. In that sense, too, the purge's history remains and will remain incomplete.

[67] Albert Camus, *Combat*, January 5, 1945.

[68] Yves Farge, *Rebelles, soldats et citoyens: Carnet d'un Commissaire de la République*, Paris, Grasset, 1946, p. 224.

6

Political Justice in Austria and Hungary after World War II

István Deák

Austria was Nazi Germany's first victim and Hungary its last; paradoxically, the two countries were also Germany's final allies. To put it more precisely, in March 1938 the Austrian republic was the first European sovereign state to be occupied and annexed by Nazi Germany, and six years later, in March 1944, Hungary was the last European sovereign state to be occupied and subdued by the German army. In recognition of Austria's loss of independence, the three Great Allies solemnly declared in Moscow, on November 1, 1943, "Austria was the first free country to fall victim to Hitlerite aggression," and "It shall be liberated from German domination."[1] In turn, the Soviet Red Army, while conquering Hungary between September 1944 and April 1945, asserted that its purpose was to liberate the Hungarian nation from the German Fascist yoke. Meanwhile, however, hundreds of thousands of Austrian generals, other officers, and men continued to fight in the uniform of the German Wehrmacht, and hundreds of thousands of Hungarian generals, other officers, and men continued to serve on the German side until the final surrender in May 1945.[2] Anti-fascist resistance activity in both Austria and Hungary was heroic but barely noticeable.

A democratic Hungarian coalition government was constituted, at Soviet orders, in liberated eastern Hungary in December 1944, which then declared war on the Third Reich. But the old, pro-Nazi Hungarian government and parliament continued to function as well, until fleeing to Germany in March

[1] Cited in Robert H. Keyserlingk, *Austria in World War II: An Anglo-American Dilemma* (Kingston, Ont., 1988), p. 152.

[2] On the war's end in Austria, see especially Manfried Rauchensteiner, *Die Grosse Koalition in Österreich 1945–1966* (Vienna, 1987), and, by the same author, *Die Besatzungszeit in Österreich 1945 bis 1955* (Vienna, 1979). On Hungary at the same time, see Cecil D. Eby, *Hungary at War: Civilians and Soldiers in World War II* (University Park, Pa., 1998), and Krisztian Ungváry, *The Siege of Budapest: 100 Days in World War II*, foreword by John Lukacs, translated from the Hungarian by Ladislaus Löb (New Haven, Conn., 2005). Please note that sources in Hungarian are listed in the Notes only when no publication in a Western language is available.

1945 and finally surrendering to the advancing American troops. Add to this that, while the Great Allies officially proclaimed the Hungarian and Austrian nations to be victims of Nazi aggression, both nations were punished by the same Allies for having been in the service of Nazi Germany. Hungary was forced to sign a punitive peace treaty at Paris in February 1947, and Austria was kept under four-power occupation until May 1955.[3] Inevitably, this strange combination of officially assigned guilt and officially proclaimed victimhood tainted postwar retribution in the two countries.

Retribution for war crimes, treason, and collaboration initially affected a very large part of both populations, but in Austria it was of short duration; in Hungary it soon became intertwined with the persecution of non-Nazis.[4] In effect, both governments hoped to demonstrate to the victorious great powers that the number of fascists and other enemies of the people had been relatively small in their respective countries; that these elements had been dealt with effectively by the police and the courts; and that there was no reason why their country should not now become a full-fledged member of the new world order. By 1948, Austria had begun to rehabilitate its former Nazis; in Hungary, where public rehabilitation never formally took place, the process of punishing the former Right and far Right was diluted by the ever-widening purge of thousands of non-Rightists suspected of hostility to the Stalinist regime. In both cases, and this will be my main argument, the prosecution and punishment of war criminals, traitors, and collaborators gradually lost political and moral significance: in Austria, because it was shown that democracy could flourish even if administered mainly by former Nazis; in Hungary, because the purge of democrats, Social Democrats, and even many loyal Communists soon took precedence over the purge of former fascists.

The new Austrian government used the ex-Nazis to run an efficient parliamentary system based on respect for the law; in Hungary, the Stalinist leadership

[3] On the immediate postwar history of Austria, see Rauchensteiner, *Die Grosse Koalition*, and *Die Besatzungszeit*, as well as Erika Weinzierl and Kurt Skalnik, eds., *Das neue Österreich: Geschichte der Zweiten Republik 1945–1970*, 2 vols. (Graz, 1975). On Hungary in the same period, see Charles Gati, *Hungary and the Soviet Bloc* (Durham, N.C., 1986), and Peter Sugar, ed., *A History of Hungary* (Bloomington, Ind., 1990), chapter XX, as well as László Kontler, *A History of Hungary: Millennium in Central Europe* (New York, 2002), pp. 387–406; and Paul Lendvai, *The Hungarians: A Thousand Years of Victimhood*, translated from the German by Ann Major (Princeton, N.J., 2003), chapter 34; and László Borhi, *Hungary in the Cold War, 1945–1956: Between the United States and the Soviet Union* (Budapest, 2005), pp. 1–110.

[4] Retribution in Austria and Hungary was, for a long time, much neglected by historiography. Recently, however, scores of younger historians have begun to unearth documents and to publish books and essays on the subject. Their investigation of postwar retribution is often related to the study of the Holocaust in their respective countries. Some of the most productive Austrian historians on the subject are Gerhard Botz, Winfried R. Garscha, Claudia Kuretsidis-Haider, Anton Pelinka, Oliver Rathkolb, Dieter Stiefel, and Erika Weinzierl. In Hungary, much work has been done by Elek Karsai, László Karsai, Tibor Lukács, Judit Molnár, Péter Sipos, Tamás Stark, László Varga, and Tibor Zinner. Those working on the subject abroad include Randolph R. Braham and István Deák (New York) and Margit Szöllösi-Janze (Munich).

bolstered the membership rolls of the formerly minuscule Communist Party with lesser members of the radical Nazi Arrow Cross Party; all this was done so as to enable the Communist leadership to mount its lunatic campaign against the so-called kulaks, Trotskyites, Titoist agents, and other imaginary enemies.[5] In both cases, the result was the same: the intended lessons of postwar political justice were largely lost. In Austria, the public generally approved of the more and more lenient policy of the newly independent government; in Hungary, the public at large refused to distinguish between fascist and non-fascist defendants in the courts. It saw them all either as victims of Communist terror or, in left-wing circles, as bourgeois enemies.[6]

Postwar Austria and Hungary were linked not only by their somewhat similar wartime fates; more importantly, they were linked by history, although this common history was also marked by profound differences. Historical commonalities and differences surfaced in the actions of the tribunals prosecuting war criminals and traitors after the war.

For the last four centuries before 1918, the Hungarian kingdom and the several provinces constituting today's Austrian republic formed parts of the Habsburg family's personal possessions. Hungarians and Austrians fought side by side in the wars of the dynasty, but the Hungarians also periodically rebelled against Habsburg rule. The last time they did so was in 1848.

Hungary formed an autonomous unit within the Habsburg realm; the several Austrian provinces had much less autonomy. There was always a Hungarian kingdom, with a Habsburg as its constitutionally crowned king. Austria, however, did not exist; the term simply designated a dynasty. When, finally, an Austrian Empire was created, in 1804, it included not only the lands of today's

[5] Before the war, the underground Hungarian Communist Party may have had no more than 400 members, some of them secret police infiltrators. Around 1942 only around 20 Communists were at liberty; in December 1944, membership numbered about 2,500, and in October 1945, more than 500,000. A large part of the latter was made up of former lower-level Nazi Arrow Cross party members, the so-called *kisnyilasok*. See the statistical tabulation in Gati, *Hungary and the Soviet Bloc*, p. 82. On the history of the Hungarian Communist Party (CP), see Bennett Kovrig, *Communism in Hungary from Kun to Kádár* (Baltimore-London, 1970), and Miklós Molnár, *From Béla Kun to János Kádár: Seventy Years of Hungarian Communism*, translated from the French by Arnold J. Pomerans (New York, 1990).

[6] Please note that, for the sake of simplicity, I am using the terms *Nazi* and *fascist* rather indiscriminately. In Communist parlance nearly every right-winger qualified as a fascist, yet, at the same time, the Communists attempted to distinguish between such groups as Austrian Nazis and Austrian clerico-fascists, Hungarian feudal conservatives, and Hungarian right-wing radicals. Similarly, I use rather cavalierly such terms as *retribution*, *political justice*, and *purges*. *Retribution* will generally denote all acts aimed at punishing those who were held responsible for Hungary's or Austria's plight during the war. *Political justice* will refer to the trial and punishment of traitors, collaborators, war criminals, as well as those who were said to have committed "crimes against the people." Finally, *purges* will refer to such nonjudicial procedures as imprisonment without a trial, internment, deportation, official police surveillance, dismissals, the denial of pension, and the suspension of civic rights.

Austrian republic but also today's Czech Republic and such faraway lands as Galicia and Dalmatia.

The pre–World War I Austrian Empire and the pre–World War I Hungarian kingdom, both under the rule of Emperor-King Francis Joseph, were constitutional states. Hungarians enjoyed a vigorous parliamentary life, despite – or because of – its domination by a Hungarian-speaking landed oligarchy. In the multinational Austrian half of the Dual Monarchy, no class and no ethnic group was able to assert itself. The result was anarchy, which forced the emperor to govern the Austrian Empire bureaucratically.[7]

In 1918, Hungary gained full independence, although within drastically reduced borders. The ensuing peace treaties deprived the country of two-thirds of its territory and 60 percent of its population, among them more than 3 million ethnic Hungarians. But, at least, no Hungarian doubted that the country should remain independent and that it should try to recover some of its lost territories. Not so in Austria, where a republic was stitched together from provinces and half-provinces left over after the dissolution of the Habsburg monarchy. Immediately this new, Social Democrat–led state declared its intention to abolish itself and to unite with democratic Germany. Because this was forbidden by the victorious Entente, Austria became a most reluctant state. Obviously, such developments would profoundly influence the post–World War II courts deciding whether to punish those who, in the 1930s, had betrayed this reluctant Austria to Nazi Germany.

Post–World War I Hungary continued to be politically dominated by a noble oligarchy with a parliamentary life less vigorous than before the war. Ominously, however, the country's conservative-liberal elite was being increasingly threatened by a socially and politically radical (mostly lower-middle-class) Right. Both conservative elite and radical Right were anti-Communist and anti-Semitic, but whereas the former ended up by protecting the lives of the country's relatively large (6 percent of the total), and economically as well as culturally enormously successful Jewish population, the latter aimed at the expulsion if not the extermination of the Jews. Thus it happened that as late as March 1944 – that is, immediately before the German military occupation of the country – 825,000 persons whom the anti-Semitic laws considered as belonging to the Jewish race lived in relative safety and comfort in Hungary, and that Hungary had a working parliament in which sat, among others, a few Social Democrat deputies. The alpha and omega of Hungarian policy was territorial revisionism, to which even the most cautious conservative, anti-Nazi aristocrats were committed. This caused Hungary to enter the war on the German side in

[7] Some of the better histories of pre–World War I Austria and Hungary are Charles Ingrao, *The Habsburg Monarchy, 1618–1815* (Cambridge, 1994); Andrew C. Janos, *The Politics of Backwardness in Hungary, 1825–1945* (Princeton, N.J., 1982); C. A. Macartney, *The Habsburg Empire, 1790–1918* (London, 1968); Alan Sked, *The Decline and Fall of the Habsburg Empire, 1815–1918* (London-New York, 1989); and Sugar, ed., *A History of Hungary*, chaps. VII–XV.

June 1941, but it also caused the government to try to keep its German ties as loose as possible and to be prepared for all political eventualities.[8]

Interwar Austrian democracy quickly deteriorated into a near civil war in which Social Democrats ranged against different varieties of Catholic, conservative, rightist, and anti-Semitic groups, some of whom were for and others against the continued existence of the state. In 1934, Austria became a one-party clerical-Catholic dictatorship in which both Social Democrats and Nazis were driven underground but in which Jews, for instance, continued unharmed. The German-enforced Anschluss of Austria, in March 1938, was celebrated by an overwhelming majority of Austrians, including many Social Democrats who, in 1945, would sit in judgment over traitors to the state.[9] In fact, after the Anschluss, hordes of Austrians attempted to prove that they had been members of the pre-1938, illegal Nazi Party and even that they had suffered persecution. The Nazi authorities proved accommodating: they recognized many false claims, with tragicomic consequences. After the war, when documents proved that the pre-1938 underground party had had only about seventy thousand members, the courts met with the dilemma of how to handle the cases of another thirty thousand individuals who, in the Nazi era, pretended to be members of the illegal pre-Anschluss party.[10]

National Socialist rule devastated the Hungarian and the Austrian Jewish communities. In Hungary, after the German occupation of the country in March 1944, the very same Hungarian functionaries who under the previous conservative regime had generally protected the Jews now rushed to do the bidding

[8] On interwar and World War II Hungary, see especially Ignác Romsics, *Hungary in the Twentieth Century*, translated from the Hungarian by Tim Wilkinson (Budapest, 1999). Also, Mario D. Fenyo, *Horthy and Hungary: German-Hungarian Relations, 1941–1944* (New Haven-London, 1972); Gyula Juhász, *Hungarian Foreign Policy, 1919–1945* (Budapest, 1979); C. A. Macartney, *October Fifteenth: A History of Hungary, 1929–1945*, 2 vols. (2nd ed., Edinburgh, 1961); Thomas Sakmyster, *Hungary's Admiral on Horseback: Miklós Horthy, 1918–1944* (New York, 1994); Rudolf L. Tokes, *Béla Kun and the Hungarian Soviet Republic* (New York, 1967); and István Deák, "A Fatal Compromise? The Debate over Collaboration and Resistance in Hungary," in István Deák, Jan T. Gross, and Tony Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath* (Princeton, N.J., 2000), pp. 39–73.

[9] On interwar and World War II Austria, see Elizabeth Barker, *Austria, 1918–1972* (Coral Gables, Fla., 1973); Barbara Jelavich, *Modern Austria: Empire and Republic, 1800–1986* (Cambridge, 1987); and Karl R. Stadler, *Austria* (New York, 1971), as well as Weinzierl and Skalnik, *Das neue Österreich*.

[10] Some of the best studies on postwar retribution in Austria are Winfried R. Garscha, *Die Verfahren vor dem Volksgericht Wien (1945–1955) als Geschichtsquelle* (Vienna, 1993); Winfried R. Garscha and Claudia Kuritsidis-Haider, *Die Nachkriegsjustiz als nicht-bürokratische Form der Entnazifizierung: Österreichische Justizakten im europäischen Vergleich* (Vienna, 1995); Anton Pelinka and Erika Weinzierl, eds., *Das grosse Tabu: Österreichs Umgang mit seiner Vergangenheit* (Vienna, 1987); Oliver Rathkolb, "U.S.-Entnazifizierung in Österreich zwischen kontrollierter Revolution und Elitenrestauration (1945–1949)," *Zeitgeschichte* (Vienna), 11/9–10 (June–July 1984), pp. 302–325; Dieter Stiefel, "Der Prozess der Entnazifizierung in Österreich," in Klaus-Dietmar Henke and Hans Woller, eds., *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg* (Munich, 1991), pp. 108–147; and Dieter Stiefel, *Entnazifizierung in Österreich* (Vienna, 1981).

of Adolf Eichmann and of the new, even more rightist government installed at German orders. Between May and July 1944, 430,000 Hungarian Jews, that is, all the women, children, and older men of the countryside, were deported to Auschwitz, where the vast majority were gassed. Of those not gassed only a minority, mainly younger women, survived.

But not all the Hungarian Jews had been deported: men between eighteen and forty-eight were doing labor service within the armed forces and, in 1944, the previously anti-Semitic army high command generally protected lives. Nor had the more than two hundred thousand Jews of Budapest been deported. They suffered grievous losses, especially under the Arrow Cross regime that had overthrown Regent Miklós Horthy's regime in October 1944; still, the survival rate among the forced laborers and among the Jews in Budapest was relatively high. All in all, nealy 40 percent of Hungarian Jews survived and two hundred thousand or so continued to live in Hungary after the war. Many survivors emigrated immediately and many others returned to areas that now again formed parts of Czechoslovakia, Romania, and Yugoslavia. These powers retook, at the end of the war, all the territories they had lost to Hungary during the war. Because many Jews, especially from among the nearly one hundred thousand converts, had never reported to the authorities one way or another, and because of the drastic boundary changes in Central Europe after the war, statistics regarding Jewish survival are at best learned estimates. It is enough to know that in sheer numbers Hungarian Jews, next to Romanian Jews, formed the largest group of survivors in Europe.[11]

Jewish survivors in Hungary included a disproportionate number of former labor service men. Some among them felt gratitude to the former Hungarian elite, which had enabled them to stay alive; others, who had lost their entire families, were bent on revenge. The majority of Jewish survivors felt neither gratitude nor hate but wanted either to reassimilate into the once so hospitable Hungarian society or to turn their backs on both Hungary and Europe. Only a minority of Jews entered the Communist Party or volunteered for service in the Communist-led new political police; still, as Charles Gati writes: "Even more than in Romania and Poland, people of Jewish origin led the Hungarian Communist party and the notorious, Communist-dominated political police for over a decade after World War II."[12] These people never publicly recognized their Jewishness; they were atheists, and they unhesitatingly persecuted other Jews; still, the public perception of that period as dominated by Jews could never again be wiped out.

Unlike the scene in Hungary, the number of Jewish survivors in Austria was very small. To begin with, the proportion of Jews had always been lower in Austria than in Hungary. Also, after 1938, Adolf Eichmann and his SS consorts forced the emigration of the majority of Austrian Jews. Of those who

[11] The best work on the Hungarian Holocaust is Randolph L. Braham's monumental *The Politics of Genocide: The Holocaust in Hungary*, 2 vols. (2nd ed., New York, 1994).

[12] Gati, *Hungary and the Soviet Bloc*, p. 100.

remained behind, nearly all were killed. It is not without significance therefore that whereas in Budapest tens of thousands of Jews survived by hiding with Christian families, in Vienna only a few hundred Jews survived the war in hiding. This was far fewer than, for instance, the number of Jewish survivors in Berlin. Inevitably, postwar political justice in Hungary was heavily influenced by the high number of Jewish survivors in the police, in the democratic and Communist Parties, in the judiciary, and in public life in general, whereas in Austria political justice functioned in the near-total absence of Jews.[13]

In 1944–45 both Austria and Hungary fell into ruins but, because the military campaign lasted longer in the latter country, Hungarians suffered more than the Austrians. Budapest, in particular, was in worse shape than Vienna, yet because Hungary was a heavily agricultural country, food became available almost immediately. Also, the Communist leadership, returning from Moscow, at first encouraged the recovery of capitalist industry, a policy that led to a highly active black market and to rapid reconstruction. In Austria, which was under four-power occupation, the economy was more socialistic and made almost no progress for years. Thus, the political trials in the two countries took place in vastly different economic circumstances.

In both Austria and Hungary, the occupation forces created a coalition of anti-fascist parties and ordered it to set up a government and a national assembly. For this, politicians had to be found in jails and in concentration camps or emerged from hiding. Some led minuscule or freshly created parties; others, such as the Austrian Social Democrats and the conservative Catholics, attempted to recreate what had once been mass parties.

The difficulties were enormous. In the eyes of Austrian Social Democrats, the Catholic conservative People's Party was responsible for the pre-Anschluss clerico-fascist dictatorship and the persecution of the workers and Social Democrats. In turn, the People's Party argued that had it not been for Dollfuss's and Schuschnigg's dictatorship, the Nazis would have seized power in Austria much earlier than 1938. It was the self-sacrifice of Austrians, the People's Party argued, that enabled the Western powers to prepare for war. In Hungary, a vast ideological and historical chasm separated the left-wing anti-fascists from the more moderate and conservative anti-fascists. Within both coalitions, the most active and most aggressive were the hitherto illegal Communist parties. It was these coalitions that were now ordered by the occupation forces to engage in the political purification of their country.

Not that the occupying powers themselves were without a role in the process! In Hungary, the Red Army felt free to arrest anyone it wished. For instance, the NKVD, the Soviet secret police, took away Hungary's most important former prime minister, Count István Bethlen, who was a conservative and an anti-Nazi. Bethlen ended his life in Soviet captivity. In Austria, it was especially the

[13] On the Austrian Jews during the Holocaust, see Bruce Pauley, *From Prejudice to Persecution: A History of Austrian Anti-Semitism* (Chapel Hill, N.C., 1992), and Herbert Rosenkranz, *Verfolgung und Selbstbehauptung: Die Juden in Österreich* (Vienna-Munich, 1978).

American occupation forces who took matters in hand. Some of the main Austrian war criminals, such as Ernst Kaltenbrunner, former head of the SS Security forces, and Kurt Seyss-Inquart, former governor of the Netherlands, were tried as major war criminals in Nuremberg. Thousands of other Austrians – and Hungarians – were tried and sentenced by Soviet, American, French, British, Czechoslovak, and Yugoslav military courts.

In Austria, it was the Americans who were particularly interested in denazification. They ordered every former Nazi Party member, and even members of Nazi mass organizations, to answer the famous – or infamous – "Questionnaire." The Americans insisted that those who failed the test be tried in American or Austrian courts or that they be dismissed from their job. Unfortunately by 1946 when the Americans handed over to the Austrian courts the completed questionnaires, only about one-third of the eighty thousand had been read.[14] The Austrian authorities preferred not to go on reading.

Postwar retribution was a firm goal of the anti-Nazi world alliance, enunciated on multiple occasions. The Allies made clear that Germany's former allies would be required to assist in the arrest, the handing over, and the trial and sentencing of their own war criminals. This demand was enunciated in the four Austrian zones by decree; in Hungary it figured as Article 14 in the armistice agreement of January 20, 1945. Accordingly, the creation of People's Courts became Law VII of the new democratic Hungarian state.

By the time the law was published in Hungary, on September 16, 1945, the People's Courts had long been in operation.[15] As in all other European countries, the People's Courts in Austria and Hungary found themselves in an ambivalent situation. On the one hand was the desire of the Allied Powers, including the Soviet Union, for war criminals to be tried in a way that would contribute to the restoration of law and order. On the other hand was the

[14] Stiefel in Henke and Woller, *Politische Säuberung*, p. 113.

[15] On postwar retribution in Hungary, see László Karsai, "The People's Courts and Revolutionary Justice in Hungary, 1945–46," in Deák, Gross, and Judt, *The Politics of Retribution in Europe*, pp. 233–251; Tibor Lukács, *A magyar népbírósági jog és a népbíróságok 1945–1950* (Statutes regarding the People's Courts in Hungary and the People's Courts) (Budapest, 1979); Margit Szöllösi-Janze, "'Pfeilkreuzler, Landesverräter und andere Volksfeinde!': Generalabrechnung in Ungarn," in Henke and Woller, pp. 311–357; and Tibor Zinner, "Háborús bűnösök perei: Internálások, kitelepítések és igazoló eljárások 1945–1949" (The trials of war criminals: Internments, resettlements, and screening processes 1945–1949)," *Történelmi Szemle* (Budapest), XXIII, 1985/1, pp. 118–137.

The records of two of the most important trials are reprinted in Elek Karsai and László Karsai, eds., *A Szálasi per* (The trial of the [Arrow Cross leader Ferenc] Szálasi) (Budapest, 1988); and László Karsai and Judit Molnár, eds., *Az Endre-Baky-Jaross per* (The trial of Endre-Baky-Jaross) (Budapest, 1994). Lászlo Endre, László Baky, and Andor Jaross were the principal organizers of the deportation of the Hungarian Jews to Auschwitz. They were hanged in 1946. See also the memoirs of Ákos Major, one of the most important people's judges: *Népbíráskodás – forradalmi törvényesség* (People's jurisdiction – revolutionary legality), ed. Tibor Zinner (Budapest, 1988).

In the following analysis most of my information is based on the sources cited previously, my own research, and personal communications by László Karsai.

desire of the anti-fascist parties, of the Soviet, and often also of the American authorities to eliminate the old social, political, and economic elite.

Both Hungary and Austria seemed ideal places for the realization of a new society because the majority of representatives of the old order either were dead, had fled abroad, were in prisoner of war (POW) camps, or had been thoroughly discredited and terrified. All this facilitated the creation of a new elite. The trouble was that far from all Austrians and Hungarians were enthusiastic about the recent changes. It seems that the majority of the population in both countries did not feel that the old regime had committed monstrous crimes against the people. Rather, they resented the foreign, especially the brutal Soviet, occupation. Because people were not in a revolutionary mood, it was necessary, the new leadership felt, to create a revolutionary political atmosphere. The first step in this direction was to persuade the population that they had been victimized by their former rulers. The best instrument for this appeared to be the People's Courts.

Permit me, at this point, to separate the discussion of the Austrian and Hungarian purges. Comparisons can be carried only so far without becoming frivolous. Indeed, while Hungary under Soviet occupation veered gradually toward totalitarian Stalinist rule, Austria under the occupation of the four powers, even in the Soviet zone, moved toward parliamentary government.

In order to democratize as well to revolutionize a rather reluctant Hungarian public, the Social Democratic minister of justice, Istvan Ries, insisted in 1945 on the need both to observe strict legal procedure and to exercise revolutionary political justice. Ries, who was later to die under torture at the hands of the Communist police, demanded that the people's judges not behave as professional judges; that they unmask twenty-five years of Hungarian fascism; that they defend the interests of the new, democratic people's Hungary; and that they assist in the building of the new people's state.

Accordingly, every major indictment stated that those being tried represented a discredited regime which had come to power illegally in 1919 through a counterrevolution. These criminal, "antipeople" (*népellenes*) activities had led inevitably to an alliance with Germany, to war, and to the country's devastation. All this did not, however, prevent the courts from distinguishing between various forms of antipeople activity. Service in the regime of Regent Miklós Horthy between 1919 and October 1944 was not considered a crime by itself, but service in the post-Horthy Arrow Cross regime was. Members of Szálasi's illegal Arrow Cross government were found guilty and often sentenced to death for the crime of having rebelled against Regent Horthy's illegal government on October 15, 1944.

Retribution took many forms in post–World War II Hungary, as it did in all the other countries that had once been a part of Hitler's Europe. Some collaborators were tried in judiciary courts; others were sent to concentration camps; yet others were expelled from the country; and a large number of people were fired from their job, were evicted from their home, lost their pension, or were deprived of their civic rights. Some of these people would undoubtedly be

acquitted by the courts of any democratic country today; others amply deserved their punishment.

Retribution served several purposes beyond punishing those held responsible for the nation's wartime humiliation and suffering. It was designed to legitimize the power of the new rulers, to reduce to impotence those groups that might stand in the way of postwar reconstruction and the reorganization of society, and to help in the redistribution of wealth.

Let us first consider the numbers.

According to official statistics, published in the Communist period, between February 3, 1945, and April 1, 1950, the Hungarian People's Courts investigated more than ninety thousand cases and tried nearly sixty thousand persons charged with treason, war crimes, or crimes against humanity. Twenty-six thousand defendants were found guilty, of whom 476 received the death penalty and 189 were executed. In addition, between 1945 and 1949, about forty thousand Hungarian citizens were held without charges in concentration camps, officially termed internment camps,[16] and the denazification commissions dismissed more than sixty thousand public servants.[17] Finally, more than two hundred thousand Hungarian Germans were expelled from the country under the universally accepted principle of collective guilt.

The expulsion of the German Hungarians took place by invoking Article XIII of the Potsdam Agreement concluded in June 1945. In it, the four great powers authorized the deportation of Germans from Poland, Czechoslovakia, and Hungary. The major reason why the Hungarian democratic government availed itself of this opportunity was that it tried to make place for ethnic Hungarians who had fled from the neighboring countries or were to be evicted from Czechoslovakia. The deportation of the Germans had little to do with an individual's previous political affiliation; the process either was chaotic or aimed at farmers whose property was judged valuable.[18]

Altogether, between three hundred thousand and four hundred thousand Hungarian citizens, or over 3 percent of the country's total population, suffered some kind of punishment during the postwar purges. Considering that those involved were mainly adult males, we can say that about one in ten adult male Hungarians was subjected to a punitive measure. Or if we include the families of

[16] No two statistics agree on the number of those purged in Hungary. My data are a combination of statistics contained in Sándor Balogh and Sándor Jakab, *The History of Hungary after the Second World War, 1944–1980* (Budapest, 1986), p. 19, and Zinner in *Történelmi Szemle*, XXIII, 1985/1, p. 125. See also, Major, *Népbíráskodás*, pp. 158–159.

[17] Szöllösi in Henke and Woller, *Politische Säuberung*, p. 343. There is no agreement on the precise number of those who were dismissed from their job. László Karsai maintains that not 60,000 but 103,000 public servants and about the same number of private employees were dismissed for political reasons. László Karsai, "Crime and Punishment: People's Courts, Revolutionary Lawfulness, and the Hungarian Holocaust," unpublished manuscript, 1999, p. 9.

[18] The expropriation and expulsion of the Hungarian Germans are discussed by Szöllösi in Henke and Woller, *Politische Säuberung in Europa*, pp. 345–354, and by Ágnes Tóth, *Telepítések Magyarországon 1945 és 1948 között* (Population displacements in Hungary between 1945 and 1948) (Kecskemét, 1993).

those who were punished, then at least one million of nine million Hungarians were affected. Their fall from social and political grace enabled lower-class Hungarians to take their place.

The high number and large proportion of those purged are all the more remarkable if we consider that the majority of those likely to be charged for war crimes had left Hungary with the retreating German army in 1944–45 and could not be tried at home. Exceptions to this rule were the 390 higher political and military leaders whom the American CIC had handed over to the Hungarian authorities in October 1945[19] as well as such accused war criminals as had returned voluntarily to Hungary.

The trouble with the official statistical data is that they encompass the entire period from February 1945 to the dissolution of the People's Courts in the spring of 1950. Thus, they include not only those tried and sentenced for war crimes but also many nonrightist victims of the Communist-dominated People's Courts. In Hungary, as elsewhere in Eastern Europe, the prosecution of war criminals and collaborators almost imperceptibly merged into the persecution of anti-fascists, democrats, Social Democrats, Communists. Many victims of the People's Courts were Jews, especially Jewish Communists, hounded to death by the Jewish leadership of Stalinist Hungary.

Tragicomically, the Communist minister of interior László Rajk, responsible for the arrest and mistreatment of thousands of real or alleged war criminals, was himself sentenced to death by a People's Court, in a show trial held in September 1949. His judge was the same Péter Jankó who in 1946 had presided over the trial of the Hungarian Arrow Cross Führer Ferenc Szálasi. Rajk, who had fought in Spain on the republican side, who had been in and out of Hungarian prisons during the old regime, and who was a long-standing loyal Bolshevik, confessed to having been, among other things, a Gestapo agent and a wartime traitor to Hungary. There were differences between the two trials, however: in 1946 Ferenc Szálasi was allowed to defend himself and refused to confess to any wrongdoing; in 1949 László Rajk confessed to the vilest possible crimes and begged to be hanged. Moreover, whereas Szálasi was not tortured in prison, Rajk was. Small wonder then that when the rehabilitation of the Rajk group was begun in 1955 – by the same Communist regime that had him executed – Judge Jankó committed suicide.[20]

We gain a better picture of the anti-Nazi activities of the People's Courts in Hungary if we stop the clock earlier than the official closing date of 1950. According to official figures, up to March 1, 1948, 322 persons had been sentenced to death by the People's Courts in Hungary, 146 of whom were actually executed.[21] Supposedly the great majority of these people were tried for crimes

[19] Braham, *The Politics of Genocide*, p. 1340.

[20] On László Rajk and his show trial in 1949, see George H. Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954* (New York, 1987), as well as Erzsébet Strassenreiter and Péter Sipos, *Rajk László* (Budapest, 1974).

[21] Szöllösi-Janze in Henke and Woller, *Politische Säuberung in Europa*, p. 332. Miklós Gárdos, *Nemzetvesztők: Magyar háborús bűnösök a népbíróság előtt* (Those who caused the ruin of the

committed during the Nazi and not during the Soviet era. The list of those hanged or shot by a firing squad included four former prime ministers, one former deputy prime minister, nine other former cabinet members, as well as a great number of generals and high-ranking civil servants. Hungary's was, indeed, a very substantial retribution.

The People's Courts in Hungary were made up of delegated representatives of the anti-fascist coalition. Only the presiding judge was a professional, selected from the meager list of such lawyers and judges who had not completely compromised themselves under the old regime. However, the presiding judge had no right to vote – not that it mattered very much, since the guidelines for sentencing had already been established, often after much internal wrangling, by the anti-fascist coalition. But at least the judges were often able to lessen or to aggravate the recommended sentence by a majority vote. In all this, the Communists were not always the most severe; at times it was the Social Democratic and other judges who insisted on a harsh sentence. Only the more conservative Smallholder Party members were generally lenient, not that it made much difference either. After the Smallholder Party had gained the absolute majority of votes at the free national elections of November 1945, the party composition of the People's Courts did not change: Smallholder judges and prosecutors remained in a minority.

Lawyers for the defense could be chosen by the defendants themselves but only from an approved list. Ominously, pretrial detention, originally limited to five months, became unlimited in 1946. In the same year, persons trained in law were no longer allowed to become people's judges – except, of course, the professional who presided over the procedures.

The revolutionary character of the courts was established at the very outset when, on February 4, 1945, the People's Court sentenced to death and hanged, on a public square in the center of Budapest, two noncommissioned officers. They had been charged with the massacre, in the fall of 1942 on the Eastern Front, of more than a hundred members of a punitive labor company, made up mostly of Jews and Communists. What is so dramatic about this trial, besides its Jacobin backdrop, is that it occurred when large parts of Budapest were still in German hands and that, for the first time in the postwar era, the court rejected the defendants' claim of "superior orders." The same crucial stand was taken later by the Nuremberg court.

When it came to the main trials, directed at former members of the government and other political and military leaders, the dignity of the proceedings was no more and no less observed than, for instance, at the trials of Marshal Pétain and former prime minister Laval in France. The defendants were not tortured; they were fed no worse than the population of Budapest; they were given some time to prepare their defense; and they all had their say in courts. The Arrow Cross Führer Ferenc Szálasi not only showed no repentance but

nation: Hungarian war criminals before the people's court) (Budapest, 1971), p. 19, presents data somewhat different from those of Szöllösi.

argued, hour after tedious hour, the justice of his cause. Former prime minister László Bárdossy was allowed, although probably for lack of vigilance on the part of the presiding judge, to justify Hungary's military occupation, in April 1941, of such parts of Yugoslavia as had once belonged to Hungary by alluding to the Nazi-Soviet Pact and the Soviet occupation of eastern Poland in 1939. As Bárdossy pointed out, in both cases the interventionist power legitimized its act by claiming that the country in question had ceased to exist and that intervention was therefore necessary to protect one's fellow nationals.[22]

Neither in Hungary nor in the rest of Europe did the courts accept the defense's claim of *nullum crimen et nulla poena sine lege*: there can be no crime and hence no punishment without a preexisting law. Even though Bárdossy's entry into the war against the Soviet Union in 1941 without consent of parliament was not legally a crime when the act took place, the court ruled that it was now to be considered a crime. The defense had to accept the reality of a new, retroactive criminal law, as it had to accept it at Nuremberg, where the international court rejected the defense's claim that conspiracy to commit aggression had never been considered a punishable act either by German or by international law.

Nor did the Hungarian court – or any other court in Europe – accept the defense of tu quoque, that is, the claim that those sitting in judgment had committed the same acts as the defendant. Thus, for instance, the Hungarian People's Court condemned the taking and shooting of hostages in connection with the massacres the Hungarian army perpetrated in northern Yugoslavia in January 1942. Yet in 1944–45, in some cities, Hungarians could read warnings exhibited by the Soviet Red Army Command, according to which ten Hungarian civilians would be shot for the killing, or even the wounding, of a single Soviet soldier.[23]

What must have aggravated much of the public was that the select audience at the trials noisily agitated for the execution of every defendant. Observers agree that the audience at the war crimes trials included many Jewish survivors. Consequently, as even one of the most famous or infamous people's judges, Ákos Major, has noted in his memoirs, the general public perceived the war crimes trials as "retaliation on behalf of the Jewish victims."[24]

Public opinion of the war crimes trials was further affected by the fact that several judges and prosecutors were also of Jewish origin, mainly lawyers from Budapest. This was quite natural, considering that the Jews alone had not

[22] Trial records cited in László Jaszovszky, ed., *Bűnös volt-e Bárdossy László?* (Was László Bárdossy guilty?) (Budapest, n.d.), p. 68. See also, Pál Pritz, *The War Crimes Trial of Hungarian Prime Minister Bárdossy*, translated from the Hungarian by Thomas J. DeKornfeld and Helen D. Hiltabidle (New York, 2004).

[23] The text of one of these announcements is reproduced in Elek Karsai and Magda M. Somlyai, eds., *A felszabadulás krónikája, 1944 ősze–1945 tavasza* (The chronicle of liberation, fall 1944–spring 1945) (Budapest, 1970), p. 50. The announcement, posted in the city of Csongrád, also threatens to burn down the house from which the shot was fired.

[24] Major, *Népbíráskodás*, p. 186.

been in a position to compromise themselves in the former pro-Nazi regime. The presence of a large number of Jews in court was noted and bemoaned by, among others, the Communist journalist Géza Losonczy. He protested indignantly against such gaffes as when court president Péter Jankó asserted to a defendant, in one of the main trials, that the wartime Hungarian government should have followed the advice of Jews by turning against Nazi Germany:

> "You see, this would have been much better. It would have been in the interest of the country had you listened to the Jews, who most decidedly resisted the war." [Applause in the audience]. And then again: "[T]he Jews were right. If the country had followed the road designated by the Jews . . . then today we would find ourselves in the camp of the victorious powers."[25]

Géza Losonczy rejected this argument, insisting that the trial should be seen as that of the entire Hungarian people against the defendants. Incidentally, the more often I read these lines, the more I feel that the non-Jewish court president Jankó was reviving here, whether deliberately or unwittingly, the fully unjustified wartime anti-Semitic charge that the Jews were sabotaging Hungary's war effort and should, therefore, be viewed as enemies.[26]

The unruliness of the trial audience was overshadowed by the prejudice and vulgarity of the contemporary press. The papers of the period often used the same bombastic and hysterical language that had characterized their anti-Semitic, far-Right predecessors. During the trials, newspapers regularly referred to the German – or, in the case of Szálasi, the alleged Armenian – origin of the defendants. The press called the defendants by such names as *vermin*, *jackal*, and *butcher*; it speculated on the defendants' sexual preferences, and it depicted the accused as corrupt and stupid psychopaths. In reality, as the historian László Karsai has pointed out, many of the defendants were intelligent, educated, and incorruptible.[27] This, rather than diminishing, increased their moral and criminal responsibility. "The raging beast on a stretcher" (*a fenevad hordágyon*) was a typical caption under the photograph of an accused war criminal who arrived in Budapest too ill to stand on his feet. We must note, however, that the style of Hungarian newspapers did not differ in any significant way from the style adopted, for instance, by the French and Danish press at the time.

László Karsai and fellow researchers have recently demonstrated that the thousands of other, mostly minor People Court's proceedings lacked the relative decorum of the major Budapest war crimes trials. The defendants were often beaten by the police; indictments were often superficial, based on hearsay. It is also true, however, that the Appeals Court of the People's Court, made up of professional legists, squashed some unfair sentences. The trouble was that

[25] Judge Jankó's statement is reprinted in Karsai and Molnár, *Az Endre-Baky-Jaross per*, p. 38.
[26] Géza Losonczy's article is in ibid., pp. 482–483.
[27] Karsai in Deák, Gross, and Judt, *The Politics of Retribution in Europe*, p. 235.

many of those whom the Appeals Court had acquitted were rearrested by the political police the moment they left the court building.[28]

No doubt, the methods and behavior of the People's Courts located in Budapest and in a dozen or so county seats would be unacceptable in Hungary today. We must remember, however, that the country was in ruins, and that a million or more soldiers, Jews, and other Hungarians were dead. We must bear in mind also that thousands upon thousands of Hungarians had committed atrocious crimes against their fellow citizens. Now a select number of them had to pay the price for these crimes, if for no other reason than to lift the responsibility from the shoulders of the other Hungarians. Ultimately, someone also had to pay for Hungary's having lost a war for the second time in thirty years.

The question remains whether those who set up the People's Courts and directed the purges achieved their purpose. The initiator and planner of the process was the Communist Party; it definitely achieved its goal of reducing to impotence the few remaining members of the old social and political elite. But then the machine of the People's Courts ran away with the Communists, destroying in the process not only the Hungarian Nazis and collaborators but also the Communists' democratic allies and, finally, even a large part of the Communist elite. The result was the inability of the public to differentiate between war criminals and victims of Stalinism. Even today, after several of the executed war criminals have been judicially rehabilitated, few people in the country care to know what the war crimes trials were about and whether or not they served the cause of justice. In sum, the political trials served more the interests of the new elites than the interests of the people or of that abstract concept called justice.

Historians divide the process of Austrian retribution into several historical periods. Perhaps we should term it the process of self-punishment since a vast majority of Austrians had been involved in the Nazi system, one way or another. The Social Democrat Karl Renner, who was post–World War II Austria's first president, had voted publicly, in 1938, for the Anschluss and, before the plebiscite, had offered to propagandize on behalf of Germany's annexation of Austria. This, according to post–World War II Austrian law, was high treason, which deserved the death penalty. The sentence, incidentally, could be commuted, in the last instance, only by the president of the republic.

In the period April–June 1945, political justice was entirely in the hands of the occupation forces, whose main concern was security. Remember the long-standing Allied fear of the Alpine Nazi Redoubt and of young Werwolves cutting the throat of Allied soldiers! In fact, neither of these fears was justified.

Between June 1945 and February 1946, denazification was still handled mainly by the Allies but Austrian People's Courts were also passing out sentences, including capital punishment. The main trouble at that time was lack of clarity regarding what type of cases belonged to the Allies and what to the

[28] Zinner in *Történelmi Szemle*, pp. 120–121.

Austrian courts. Between February 1946 and May 1948 denazification and retribution were the sole responsibility of the Austrian courts and authorities, with an attempt at a drastic reform introduced in February 1947. Finally, the time between May 1948 and 1957 is often referred to as the Period of Amnesties.

The situation in 1945 was quite terrible. Of Austria's 6.6 million inhabitants, 247,000 had been killed in the war, 236,000 Jews had perished in the Holocaust or had been forced to emigrate, and 450,000 Austrians were in POW camps. On the other hand, the country harbored 400,000 refugees, foreign workers, and former concentration camp inmates. But at least, and unlike in Germany, Austria had a government and a provisional National Assembly.[29]

In order to deal with the problems of denazification and retribution, Austria adopted two laws, one on war criminals (Kriegsverbrechergesetz), which set up the People's Courts, and the other on "prohibitions" (Verbotsgesetz), whose aim was to deal with Nazis in public and private positions. More than half a million Austrians had belonged to the NSDAP or had tried to belong to it but had been put on a waiting list. According to the new law, all former party members, party candidates, and members of affiliated organizations were to be denazified, meaning that they were to be fired from their position as state functionaries, including teachers and customs agents. In general, former party members were to be removed from all responsible positions. Members of the pre-1938 illegal party were judged particularly odious and were to be treated as traitors.

As has been said before, denazification was not a matter for the Austrian authorities alone. Before February 1946, the Allies arrested eighteen thousand Austrian citizens, more than half of them in the American zone of occupation. Surprisingly, by far the smallest number of arrests, less than a thousand, occurred in the Soviet zone, as the Red Army Command had taken a rather pragmatic view of the situation. What counted for the Soviets were the restarting of the economy and the removal of Austrian machinery and industrial products to the devastated Soviet Union. As in Hungary, the Soviet authorities and the tiny Austrian Communist Party wished to accommodate the "little Nazis"; this was unsuccessful because, in a country occupied by four powers, former Nazis had no interest in embracing communism. At the November 1945 national elections, the Austrian Communists received a dismal 4 seats of the 165 seats in parliament. Thereafter, it seems, the Soviet leadership gave up the idea of introducing communism in Austria.

As in Hungary, members of the People's Courts were delegated by the antifascist coalition: Communists (KPÖ), Social Democrats (SPÖ), and the Catholic conservative People's Party (ÖVP). Fortunately, there was still no Freedom Party (FPÖ) in Austria; the latter party was created only in 1956, by former Nazi leaders, for former Nazi Party members.

[29] For statistical data on immediatly post-1945 Austria, see Erich Bodzenta, "Gesellschaft im Wandel," in Otto Schulmeister, ed., *Spectrum Austriae* (Vienna, 1980), p. 275, and Eduard Stanek, *Verfolgt, vertrieben – Flüchtlinge in Österreich* (Vienna, 1985).

The composition of the Austrian People's Courts was less revolutionary than that of their Hungarian equivalents: here three of the six judges were professionals. The trouble was the desperate shortage of reliable judges: before 1945, almost all judges belonged to the NSDAP, and most were enthusiasts. On the basis of the new laws, more than half of the judges were now fired and a few judges returning from exile were reemployed. Still, one-third of the judges charged with prosecuting former Nazis were themselves former members of the NSDAP.

Austria had no government between 1938 and 1945; many leading Austrian Nazis, including the very numerous Austrian concentration camp and Einsatzgruppe commanders, were tried in other countries or, as good Catholics, had been expedited by the churchmen abroad, unless they were hiding comfortably in Austria. For all these reasons, Austria had comparatively few major political trials, the most important that of Guido Schmidt, Austria's foreign minister under Chancellor Schuschnigg in the two years preceding the Anschluss. Schmidt was charged with having systematically tried to play Austria into the hands of the Austrian NSDAP and the government of the German Reich. The trial lasted four months; hundreds of major witnesses were heard, and it ended in acquittal in 1947. It is unclear whether or not Schmidt was innocent.[30]

What at least some of the People's Courts did with genuine dedication was to try individuals who had committed major crimes shortly before the end of the war. Their chief victims had been Hungarian Jewish deportees, who, in many places in western Austria, were murdered by youthful or elderly paramilitary men or were clubbed to death by peasants. But there were many Austrian victims as well, especially political prisoners.

In the last weeks of the war, several Austrian Nazi Gauleiters issued what were often referred to as Nero decrees, ordering the devastation of Austria's infrastructure and the killing of domestic enemies. In the words of the Gauleiter of Ober-Donau, one must act ruthlessly "so that the Allies would find no forces ready to participate in the reconstruction of the Alpine provinces." Acting on this type of suicidal order, one Leo Pilz, an SA officer, entered the prison complex Stein in Lower Austria, on April 6, 1945, and ordered the killing of all the inmates. Because the prison warden, Hofrat (Court Councilor) Franz Kodré, himself a Nazi Party member, refused to obey the order, as did several of the guards, Pilz and a much larger number of guards murdered the warden and five guards as well as 229 prisoners. This was not the end of Pilz's devastations or that of other Nazi fanatics. In the night of April 16/17, 270 political prisoners, deported from Vienna, were executed in Mauthausen, and on April 28, so were a final 33 prisoners.

In the so-called Stein trial, the Vienna People's Court, in August 1946, sentenced Pilz and three guards to death by hanging. A number of other guards were given either life or three years imprisonment. The four were executed

[30] The trial of Guido Schmidt is discussed by Stiefel in Henke and Woller, *Politische Säuberung*, pp. 139–140.

immediately; those who had been given a life sentence were released in 1953–54, and those who had been given three-year terms were freed in 1948.[31]

Altogether, the Austrian People's Courts handled 136,829 cases; sentences were pronounced on 23,477 individuals, of whom 58 percent were found guilty. There were forty-three death sentences, of which thirty were executed.[32] This was far less than in Hungary, but similar to the number of traitors and collaborators executed in Norway,[33] and, in view of what happened in Austria later, it showed an initial enthusiasm for administering justice.

The grave shortage of democratic judges and prosecutors manifested itself in the so-called Staudacher case in Lower Austria, which much later became the subject of an Austrian television documentary. The farmer Staudacher, a well-known anti-Nazi in Lower Austria, was murdered on June 7, 1945. According to the local prosecutor's report, Staudacher had equipped himself with a gun after the fall of the Nazis, surrounded himself with Russian POWs and concentration camp survivors, and swore to take revenge for past injustices. Fearing such an event, a posse of local notables stalked him and shot him dead. What is remarkable about the case is not what actually happened and why, but the style and concepts of the local prosecutor's report. It sided entirely with the murderers, using a language inherited from Nazi times. For instance, the concentration camp survivors in Staudacher's house were referred to as a *lichtscheues Gesindel*, translatable as "riffraff afraid of the light of day." The murderers were never prosecuted.[34]

Whereas the People's Courts often did their duty, the real failure was purification. True, by July 1946, 270,000 former party members had been fired in Austria, mostly from public service. But then it turned out that the country had been left with too few teachers, postmen, policemen, bureaucrats, engineers, and judges. Partial rehabilitation was inevitable if the country was to be reconstructed, but rehabilitation soon became an epidemic. Amnesties were first authorized by the occupation forces and later by the Austrian government. By 1948 the vast majority of criminal cases had been closed; by the 1949 national elections nearly 481,704 of the 523,833 registered National Socialists had been reenfranchised, and in 1957 a final amnesty was issued.[35]

In Austria, well-known mass murderers continued to draw their officer's pension while anti-fascist political parties, very much including the Social

[31] On the massacres in Stein prison, see Gerhard Jagschitz and Wolfgang Neugebauer, eds., *Stein, 6. April 1945: Das Urteil des Volksgerichts Wien (August 1946) gegen die Verantwortlichen des Massakers im Zuchthaus Stein* (Vienna, 1995).

[32] On executions in Austria, see Stiefel in Henke and Woller, *Politische Säuberung*, p. 140.

[33] Purges in Norway are discussed by Stein U. Larsen, "Die Ausschaltung der Quislinge in Norwegen," in Henke and Woller, *Politische Prozesse*, pp. 241–280.

[34] The Staudacher Affair is discussed by Dieter Stiefel in "'Law and Disorder': Zur Problematik der österreichischen Rechtsspechung im Jahr 1945," unpublished conference paper, presented in Vienna in 1993.

[35] On the successive waves of amnesty in Austria, see Stiefel in Henke and Woller, *Politische Säuberung*, pp. 141–144.

Democrats, competed for the Nazi vote. To mention just two examples: in 1975, the "Nazi hunter" Simon Wiesenthal demonstrated with documents that Friedrich Peter, then the chairman of the Freedom Party (FPÖ), not only had been a Waffen SS officer, of which Peter liked to boast in any case, but that his SS unit had as its major occupation the murdering of Jews in the East. Yet Peter continued as party chairman; his prominent defender at that time was the Social Democrat chairman and later federal chancellor Bruno Kreisky, himself of Jewish origin.

Another case was that of the former "illegal Nazi" Walter Reder, who in 1944 was responsible, as a Waffen SS officer, for the massacre of the inhabitants of Marzabotto, a northern Italian village, suspected of collaboration with the local partisans. His death sentence in a postwar Italian court was commuted to life imprisonment, and he was released in 1985. Even though legally Rener was not an Austrian citizen, his expenses in and out of court had always been paid by the Austrian government. Upon his arrival in Austria, he was given a hero's welcome by a huge crowd headed by the Austrian minister of defense.[36]

Between 1938 and 1945 institutionalized lawlessness reigned in Austria; in Hungary, the same situation lasted at least until the early 1960s. By this we mean that innocent citizens were arbitrarily deprived of their civil rights, their property, and often their life.

In Austria, the principal victims of these measures were Jews as well as the mentally and physically handicapped, but they also included a lesser proportion of Gypsies, homosexuals, so-called asocials, Jehovah's Witnesses, conscientious objectors, and nazism's not so numerous political enemies. Remarkably, institutionalized lawlessness ceased in Austria with the liberation of the country by the Soviet, American, British, and French troops. Not even in the Soviet zone were groups persecuted or oppressed for what they happened to be.

In Hungary, before 1945, the main victims of official persecution were Jews and, to a much smaller extent, Gypsies as well as members of some ethnic minorities. After the liberation of the country by the Soviet Red Army, the persecution of Jews and the non-German ethnic minorities ceased, but soon these people were replaced by an ever-widening circle of new victims. The latter included the German-speaking inhabitants of Hungary, large landowners, bankers, manufacturers, and mine owners; later also the medium and small landowners, merchants, house owners, aristocrats, and other members of the former social, political, and military elite; monks and nuns; many of the Catholic and Protestant clergy; members of the free professions, especially lawyers; all those who happened to live close to the border with Tito's Yugoslavia (from which almost all the inhabitants were deported to the interior of the country or into concentration camps); and, of course, the real or suspected enemies of the Communist regime. According to the Institute for the History of the 1956 Revolution in Hungary, in 1951, "around one-tenth of the

[36] On the Peter and Reder Affairs, see Anton Pelinka, "The Post-1945 Political Functions of Austria's Anti-Nazi Resistance," unpublished conference paper presented in Vienna in 1993.

population of Hungary was affected by police terror. . . . Between 1950 and 1951, a significant proportion of the urban middle class, primarily in Budapest, was compulsorily resettled in the countryside . . . often in the most appalling conditions; over 100,000 people were affected."[37]

The number of those forbidden to practice their profession or fired from their job for political reasons must have been much larger still. Because their places were taken by others, often members of the lower classes, but also by persons who had already been or would later be persecuted, there occurred a repeated and truly extraordinary redistribution of power and wealth. One should add, however that, unlike the Nazis, the Stalinists killed only a very limited number of their victims, probably fewer than a thousand. These included real and alleged counterrevolutionaries as well as an astonishing proportion of Communists. But then the wartime Nazi and the peacetime Stalinist persecutions are difficult to compare.

Compensation and restitution for what in hindsight appears as government-directed highway robbery and murder occurred in small waves or it did not occur at all.

The postwar Austrian government proudly referred to the Moscow declaration, which had called Austria a victim of German aggression. This meant that, in Austrian eyes, their state and people were not responsible for Nazi crimes even if committed by Austrians. Nor did the state owe compensation to anyone. This principle was firmly maintained in the first decades of the republic; thus, for instance, the eighty thousand Jewish owners or renters of Vienna apartments were never compensated for their losses. Later, however, efforts were made to compensate at least some of the victims, especially after the Waldheim affair in the 1980s.

At all times, Austria was good at paying pensions. Thus condemned Nazis received their pension as state functionaries or "police officers" even when in prison for mass murder. Later the state began to pay pensions to its former Jewish functionaries, their widows, and their children. Even later, pensions were handed out to anyone who had been forced to emigrate from Austria in 1938 and had consequently lost income or property. The pensions amounted to a few thousand dollars yearly.

In Hungary, after the war, the property of Jewish survivors was not returned, but their civil rights were reestablished; contracts signed under duress were nullified, at least theoretically; and, most importantly, the new inhabitants of Jewish-owned or -rented apartments were ordered not to prevent the Jews from returning to them. Conversely, Jewish survivors were forbidden to evict those who were now occupying their home. This led to some harrowing situations but was still a wise and humanitarian measure, especially in view of the large-scale destruction of housing during the war and the enormous number of Hungarian

[37] György Litván, ed., *The Hungarian Revolution of 1956: Reform, Revolt, and Repression, 1953–1963*, translated from the Hungarian by János M. Bak and Lyman H. Legters (London–New York, 1996), p. 19.

refugees and expellees from neighboring Romania, Yugoslavia, and Czechoslovakia.[38]

In 1953, after the death of Stalin and the appointment of the reformist Communist Imre Nagy as prime minister, peasants who had been forced into collective farms were allowed to reprivatize their property, and some of them did. However, beginning in 1959, in a new wave of collectivization, the same peasants were persuaded or forced to rejoin the kolhozi. Also, after the death of Stalin, many political prisoners were released and the Communists among them were compensated financially as well as being offered new jobs.

After the 1956 revolution, hundreds were executed and many thousands were sent to prison, but amnesties in the early 1960s benefited those who had not been sentenced for murder, that is, those who had not fought against the Soviet Army with weapons in hand. Thereafter, and very gradually, "socialist legality" was established, meaning that, even though there was no real freedom, there were few if any arbitrary arrests, all internment camps were dissolved, and the survivors of previous persecutions were allowed to return to their job. Many became private entrepreneurs in the increasingly liberal socialist economy.

In 1989, the country's Communist leadership peacefully handed over power to a coalition of opposition politicians. The question of restitution and compensation was broached in parliament almost immediately, but, quite obviously, the difficulties were enormous. Not only was there no money to compensate adequately the victims of previous waves of terror, but their properties had often become unrecognizable. Also, they had passed through many hands.

Consider, for instance, the case of the Hungarian Weiss Manfréd Works, in the southern suburbs of Budapest, which was the largest steel and armament plant in the country. In 1944, the Jewish owners of this and many other closely related major factories and mines sold their property to the German SS, in exchange for Hungarian passports and exit visas forged by the SS, equally forged Portuguese entry visas, and about US $1 million. In June 1944 the SS expedited these families, fewer than fifty persons, in Lufthansa planes to Portugal.[39] This meant that a large part of Hungary's industrial plants had passed into German hands behind the back of Hungary's pro-Nazi government. In 1945, these and all other German properties were taken over by the Soviets; they were only gradually returned to the Hungarian state.

Under Communist rule, the Weiss Manfréd and related plants grew immeasurably. Today, however, they all suffer from the problems common to the antiquated and state-owned Central and Eastern European heavy industry. What then could possibly be returned to the heirs of the former owners of these factories?

[38] On the situation of Jews after 1945, see Braham, *The Politics of Genocide*, pp. 1295–1331.

[39] On the extraordinary business deal between Jewish capitalists and the SS, see Gábor Kádár and Zoltán Vági, *Self-Financing Genocide: The Gold Train, the Becher Case and the Wealth of Hungarian Jews*, translated by Enikő Koncz and Jim Tucker (Budapest, 2004).

Post-1989 Hungarian politics have been alternating between, on the one hand, conservative, nationalist, somewhat anticapitalist right-of-center governments, and socialist-liberal, free-trade-oriented, left-of-center governments. Both regimes fully rehabilitated the former victims of communism. In addition, the right-of-center governments, under pressure by their small-farmer coalition partners, have attempted to compensate the victims of Communist expropriation of farmlands. This meant that only those who had lost their agricultural property after June 8, 1949, could expect some financial restitution. In contrast, the left-of-center parties were interested not only in the rural victims of Stalinism but also in other victims, especially in the victims of nazism. Thus, new laws adopted in 1992 promised compensation to all those who had lost property after May 1, 1939, that is, when the second, more severe anti-Jewish law was adopted.

Ultimately, thousands of former victims of uncompensated expropriations, whether Jewish or non-Jewish, have been given so-called compensation vouchers, which represent modest sums and are quoted on the stock market. This is only fair and just.

Today, the principal claimants for restitution are not the heirs of the Jewish victims but the churches: their pressure has led to the return of many schools and other church buildings nationalized in 1949. The trouble is that few of the churches, especially few of the monastic teaching orders, have the money and the trained nuns and monks to run these schools. Jews, meanwhile, have been receiving some compensation from Germany. Industry and agriculture have been largely reprivatized since 1989, but the new owners are often foreign corporations or domestic business groups. Many are headed by former Communist functionaries and technicians.[40]

Has retribution been a failure in both countries? Not if measured by contemporary international standards or by today's practices in Eastern Europe, where no one is being punished for crimes committed during the Communist period. In both Austria and Hungary, vast resources were mobilized to deal with Nazi crimes. Hardly any procedure lived up to what are today's democratic expectations, but no procedure was as vile as that which took place in other nearby countries. In Greece, Royalists and Communists dealt with each other in kangaroo courts created during the civil war that followed World War II. In Yugoslavia, Bulgaria, Poland, and the Soviet Union, postwar justice was a parody of the term. No doubt, thousands escaped punishment, especially in Austria, and thousands of innocents were punished, especially in Hungary. But many of those who had committed abominable crimes received their just deserts.

Paradoxically, Austria emerged from the chaos a much better country. Its foreign occupiers quietly accepted what was also the practice in Konrad Adenauer's

[40] Changes in Hungarian property relations after 1938 and the diverse attempts at compensation and restitution are well explained in István Pogány, *Righting Wrongs in Eastern Europe* (Manchester–New York, 1997).

Germany, namely, that relatively few Nazis would be punished in exchange for the nation's acceptance of democratic practices. Even though the "overcoming of the past" occurred much later in Austria than in Western Germany, if indeed it has ever occurred, Austrian democracy, based on newfound Austrian patriotism, has been a conspicuous success. As for the Hungarians, they were forced to struggle another forty years until they, too, had their democratic state and society. It is a democracy not imposed by others, but a wholly domestic product. This is roundly to be applauded.

7

Dealing with the Past in Scandinavia

Legal Purges and Popular Memories of Nazism and World War II in Denmark and Norway after 1945

Hans Fredrik Dahl

To be able to return to peace after the upheavals of World War II both Denmark and Norway passed through a period of rigorous and far-reaching legal purges during the years 1945–50. Alone among the Scandinavian countries these two kingdoms had been overrun by Nazi Germany in 1940 (Sweden managed to stay neutral and Finland waged its own wars with the Soviet Union) and were liberated only through the general German surrender in May 1945. During the parliamentary elections, which took place in both countries in the fall of 1945, all political parties, together with the triumphant Resistance movement, demanded an immediate, swift, and thorough purge of those citizens who had defected the national cause during the war. Popular emotions ran high, demanding draconian punishments of any traitor, any offender of the national cause. It was as if a wave of public rage swept through the formerly occupied countries demanding a heavy cleansing of society before normal policies could be pursued.

In any modern country that has experienced enemy domination – militarily, politically, or even economically – the return to normalcy quite regularly presupposes some sort of legal purge, conducted through a process of extraordinary justice so as to emphasize the quality of transition, of passing from one state to another. After World War II the scope of these purges may be summarized as follows for the German-occupied countries in Western and Northern Europe (*penalized collaborators per 100,000 inhabitants*):[1]

[1] Belgium, France, the Netherlands: Data adapted from Luc Huyse, Life after Prison. Conference Paper from Remarque Institute, New York University 1997. Denmark: Data from Ditlev Tamm, *Retsopgøret efter besættelsen* (1985) II, pp. 776f. Norway: S. U. Larsen, "The Settlement with Quisling and His Followers in Norway," in Larsen, Ed. *Modern Europe after Fascism* (1998), pp. 1512–1516.

	Belgium	France	The Netherlands	Denmark	Norway
Executions	3	2	0.4	0.7	1
Prison sentences	582	90	553	333	573
Milder sanctions	378	217	697	—	1.083
Total ratio of punished	963	309	1.250	333	1.657

With Denmark and France on the milder side, and Norway and the Netherlands on the more severe side of the spectrum, these figures altogether show a rather uniform tendency of measuring out punishments for Nazi fellow travelers in these countries: enormous purges occurred, swelling the normal prison population in the years immediately after the liberation. In Norway, some thirty persons each year in the 1930s received prison sentences of three years or more, whereas in the years 1945–46 more than five thousand persons received that punishment.[2]

Much has been written in recent years about the place and the role of the Second World War in popular memory in Europe. "The war" certainly made an impact of tremendous importance in nearly every country, not least so in Denmark and Norway.[3] Less has been written about the specific role of the legal purges in this connection. A purge of the proportion shown previously – lasting for years and measuring out punishments of almost unheard severity – certainly must have affected collective memories in a specific way. A purge brings forth both the overwhelming evidence and the abhorring verdicts that tend to mold popular opinion of the events for years to come. After 1945, in both Denmark and Norway the popular concepts of "nazism," "treason," and "collaboration," as well as "patriotism," "national values," and a host of more diffuse concepts, were influenced at least for one generation ahead by the memory of the purges after the war.

This chapter investigates some aspects of this problem as seen from the Danish and Norwegian experience. The purpose is not to give an overall description of the purges in all their breadth and depth, but to focus on some items that may be of interest in the discussion of the influence of legal actions in the formation of such a huge and complicated phenomenon as the public memory of nazism and war in Europe.

LAW AND EMOTIONS

Legally speaking, the European postwar purges rested on a restoration of the rule of law pure and simple. The German assaults were normally considered as violations of international law, particularly the Briand-Kellogg pact and other agreements of the interwar period, which defined Germany as "the enemy"

[2] Andenæs, "Rettsoppgjøret i dag," in *Rettsoppgjørets kriminalpolitiske og sosiale problemer No. 1* (1946), p. 13.

[3] A major work on Denmark, very comprehensive and with a wealth of material, is Claus Bryld and Anette Warring, *Besættelsestiden som kollektiv erindring* (1998). On Norway there is Anne Eriksen, *Det var noe annet under krigen* (1995).

in a strict legal sense, and the assaults as the opening of "theaters of war" in the exact meaning of both civilian and military penal codes all over Europe. Even the puppet regimes subsequently set up on German demand in the occupied countries or at least established by German consent and underpinned by their heavy military presence were considered unlawful and hence the subject of legal retorts as soon as the legitimate authorities were restored after the liberation of 1945. The same went for the widespread collaboration from within the occupied countries. Collaborators en masse assisted the Germans both in their conduct of war and in the subsequent reign of occupation, both economically and politically, in nearly all occupied countries. In principle any country's penal code was of course quite clear on the question of treason and other cases of enemy support. The purges of 1945 then simply came about by the reintroduction of the rule of law after the fall of nazism, thus making the settlement with the collaborators an act of cool justice.

Still the immense emotional outbursts of demands for revenge and tougher punishments than those prescribed in the laws, combined with the tendencies of lynching or *exécutions sommaires*, which in some way or other were felt in all liberated countries, constrained justice to a considerable degree.[4] "Human rights simply do not apply to former Nazis," a member of the judicial committee of the parliament in Norway told his voters soon after the liberation.[5] Lawyers of course had to ignore such purely emotional outbursts. To them, restoration of the rule of law meant the reintroduction of universal and definite principles such as those laid down in the United Nations declaration of human rights, which was under preparation. Still emotions were a fact of public life and made conditions difficult for a proper legal conduct of the purges.

Emotional strains made themselves felt above all in the measuring out of fair and equal sentences. In cases that attracted great attention, courts worked under enormous pressure in this respect. Even questions of principle – among them legal definitions and more fundamental concepts of justice – were affected. It turned out in practice that simply restoring the principles of prewar rule of law could not pursue justice. In many cases legal authorities felt they had to compensate for the most obvious shortcomings of the traditional legal structures in dealing with the modern phenomena of ideological and political warfare of such a scale as had been applied by the Germans. Even the old notion of a "theater of war" seemed totally obsolete under modern conditions. A theater of war in the legal sense was no longer local, a geographical or strategical entity; it was ubiquitous. In total war, the "theater" is wherever air attacks, psychological warfare, espionage, contraespionage, provocation, and fifth columnism

[4] In Denmark and Norway no mob lynchings were reported. However, altogether some fifty persons were killed during arrests and interning, according to data obtained from Prof. Claus Bryld (Denmark) and Dr. Inger Cecilie Stridsklev (Norway). In addition, the numerous uncontrolled and violent attacks against women suspected of "horizontal collaboration" bear every mark of a lynching attitude by male mobs and crowds in both countries. See Anette Warring, *Tyskerpiger under besættelse og retsopgør* (1993), and Käre Olsen, *Krigens barn* (1998), pp. 362ff.

[5] *Friheten*, Oslo, July 23, 1945.

are displayed.[6] For this reason the purges after 1945 had to invent new measures, new concepts of justice. This meant they had to apply retroactive justice in some sense or other.

Retroactive justice in principle violates the doctrine of *nulla poena sine lege* and was of course shunned by lawyers and explicitly forbidden in the Norwegian as well as in many other national constitutions. Still it had to be applied in some way or other, and settling the scope and reach of retroactive measures certainly made an opening through which emotions and rage kept pouring into the judicial realm. After the demands from the resistance movement many a government decided that anyone found guilty of treason according to the existing penal code could be additionally sentenced to – say – comprehensive confiscation and damage claims "even if the illegal act has been committed before the promulgation of this law," as the relevant paragraph proclaimed in the Norwegian Provisional Decree on Supplements to the Penal Code of December 15, 1944.[7]

In the Danish and Norwegian purge laws alike the *terminus post quem* was fixed to the day of the German assault, April 9, 1940. Any act of treason or unpatriotic behavior would be punished retroactively from day one of the German occupation. The Danish law, however, made an exception for acts committed in the period April 1940 to August 1943, when Danish authorities had functioned in agreement with the Germans. "Furthering German aims or consciously harming national interests" in that period would be considered not punishable if committed according to laws and decisions from the "legal Danish authorities" of that period – except in some special cases. Although "the war" in Denmark started April 1940, it had full legal effect only in August 1943, when there was a complete breach in the relations between the Danish government and the Germans. In this way the Danes solved the awkward problem of their own bowing to the German Diktat by submitting to German military demands: there was a latent state of war all the time, even if life went on as normal until August 1943; from that time, however, the state of war was manifest. Or as the prominent lawyer Dr. Stephan Hurwitz put it: the period between the Diktat of 1940 and the breach of 1943 could be regarded as a state of truce followed by "renewed fighting," 1943–45.[8]

In Norway, where the government took to arms on April 9, 1940, in a short but unsuccessful campaign, there never was any problem of defining real state of war. Norwegian resistance and legal authorities alike always held that the war lasted from April 9, 1940, to May 8, 1945. Theirs was not the only opinion, however. Quite a number of Norwegians thought the war had ended on June

[6] John Lyng, in *Lagtingstidende* (1946), p. 229.

[7] § 51 in Provisorisk anordning om tillegg til straffelovgivningen om forräederi (Provisional Decree on Supplements to the Penal Code), December 15, 1944.

[8] Stepahn Hurwitz, "Var Danmark i krig?" in *Nordisk Tidsskrift for International Ret* 1945, pp. 140ff. Also H. F. Dahl, "Besettelse, dansk og norsk." *Historie* (Århus) 2001, pp. 386ff.

10, 1940, when the Norwegian High Command officially surrendered to the Germans and the Norwegian authorities in Oslo started to prepare for peace negotiations with Germany, albeit the king and his cabinet ministers had fled to London. Young men in the thousands recruited as volunteers to fight with Germany on the Eastern Front to suppress Bolshevism in Russia were told by their officers that there were no legal obstacles to their joining this theater of war, as the claims of the king and the cabinet in London that they carried the legitimate sovereign authority and fought on the side of the Allies were null and void. (Altogether some ten thousand Norwegians and Danes volunteered in the German war in the East.). Most Norwegians by 1945, however, and certainly all lawyers participating in the postwar purges, considered the legality of the London government beyond discussion and consequently made their provisions retroactive from the very beginning.[9]

After the purges were over, the Norwegian parliament passed laws so as to reform the penal code with regard to the challenges of modern warfare. The so-called emergency laws of the early 1950s almost exactly matched the situation experienced in 1940 and the circumstances surrounding the German attack and occupation. Paragraph by paragraph the authorities tried to build walls to deter traitors of the 1940 kind, so as to be prepared for the eventualities of modern political warfare – this time threatening to become a reality through the Korean War. By 1945, however, they had to carry through the transition with fairly insufficient legal means – so at least it was felt at the time – and therefore also to respond to the prevailing public emotions and the sense of justice displayed at the moment.

Contrary to the principles of justice, emotions are nonenduring, particularly those expressed during and after a major war. Many countries experienced the wisdom of Aristotle's observation that emotions are those things "through which, by undergoing change, people come to differ in their judgments." The degree of change varied, however. Hatred – for instance, hatred against Germans in general – turned out to be a pretty enduring feeling, whereas anger – as in the case of national traitors – was not. Public hatred toward the Germans endured for some twenty years in Denmark and Norway in the sense that the political question of "Germany" remained touchy and delicate, always stirring up strong emotions. Anger, on the other hand, is a mixed emotion, consisting of the pain caused by the enemy as well as the pleasure arising from the expectation of revenge. When revenge has been achieved, anger wanes.[10] Emotions thus are affected by experience in a most direct way. In the Danish and Norwegian purges this phenomenon became particularly evident in the question of the death penalty.

[9] The authoritative interpretation is Frede Castberg, *Norge under okkupasjonen: Rettslige utredninger 1940–1943* (1945).

[10] Aristotle, *Rhetoric*, book 2. I am indebted to the discussion of these and other points by Jon Elster in his *Alchemies of the Mind: Rationality and the Emotions* (1999), pp. 52ff.

THE DEATH PENALTY

Capital punishment was introduced and applied retroactively in both Denmark and Norway after 1945. The actual number of executions ran to no higher figure than eighty-three in the two countries combined – compared to the tens of thousands of sentences passed in all. Still the use of this ancient form of punishment was one of the most spectacular elements in the staging of the great purge after 1945, and certainly one that affected the public memory of nazism. The point was that by 1940, the death penalty under peacetime conditions was long since abolished in both countries – in Norway by 1902, in Denmark by 1930. In fact, the last executions were events of a remote past, of the 1870s and 1890s, respectively. Capital punishment was regarded as inhumane, inefficient, and unworthy in modern jurisprudence. Immediately after the liberation of 1945, however, both parliaments restored the death penalty, and during the purges public prosecutors demanded death sentences in several hundred cases, although it turned out that courts were hesitant to adopt the ultimate penalty now that peace had been restored. The relatively low number of actual executions was moreover determined by the fact that in both countries the resistance movement had killed quite a number of dangerous collaborators and informers during the last two years of the war – the Danes some four hundred, the Norwegians around one hundred in the years 1943–45. Quite a number of cases in which the prosecution would have demanded a death sentence were in fact settled in advance though these *exécutions sommaires*.[11] In addition, pardons were frequent. One-third of the death sentences were changed to life imprisonment. For all these reasons the number of actual executions in 1945–50 was modest, and much smaller than had been foreseen.

The reintroduction of the death penalty under peacetime conditions was justified by the fact that during the state of war in 1940–45, when the penal codes of both countries technically allowed for death sentences, they could not be applied for political reasons. Hence they had to be carried out retroactively. Legislators could simply not have foreseen the present situation when they abolished the death penalty in time of peace, the argument went. Previously clear-cut legal categories of "war" and "peace" were simply blurred by the events of World War II, when sheer military pressure was used to underpin unlawful political regimes that lasted for years and tended to attract support from a multitude of murky sources – from, among others, violent youth gangs or sadistic individuals who from sheer adventure created reigns of local terror in their eagerness to support the German Gestapo. How the German police, an organization that in earlier days had been the model for the national police forces of most European countries and even now upheld normal relations with

[11] The exact number of resistance executions and the warrant for them have been among the most hotly debated World War II issues in both Denmark and Norway. For Denmark, see Tamm (1985) II, pp. 660–695; for Norway, Andenæs in *Tidsskrift for rettsvitenskap* (1948 No. 1), pp. 1ff. Further see Egil Ulateig, *Med rett til å drepe* (1996), and Arnfinn Moland, *Over grensen? Hjemmefrontens likvidasjoner, 1940–45* (1999).

neutral Sweden, could lower itself to accepting such support is among the mysteries of German nazism and its appeal to violence and decivilizing instincts. In any case, the years of occupation displayed such phenomena as the Danish Brøndum and Peter groups or the Norwegian Rinnan gang, young murderers and torturers of appalling brutality who clearly were the product of war in some sense or other and whose actions were more or less unheard of in previous times. For reasons that have never been fully explored the gang phenomenon was particularly common in Denmark.

Under these circumstances legitimate authorities simply felt they had to get around the legal reforms of prior generations and bow to prevalent popular demands for a rougher justice and the use of capital punishment. Even in official documents the chief reason for reintroducing the death penalty was simply that people wanted it and that the authorities had to adjust to that sentiment regardless of prior principles. The restoration of capital punishment was "the wish of every loyal citizen" and a "sound and healthy wish at that," the Norwegian government in London declared when broadcasting their first provisional act of the reintroduction of the old maximal penalty in October 1941.[12] Various other acts followed, widening the scope of this extraordinary measure so as to make the death penalty applicable even to such cases of police misbehavior or torture as left no lasting bodily signs or scars. When the Norwegian parliament endorsed these provisions after the liberation, the arguments of "sound and valid instincts" in favor of executions were repeated.[13] In Denmark, where the constitution curiously enough carried no clause ruling out retroactive justice, the death penalty was made part of the general supplementary law to the penal code concerning "acts of treason and other acts injurious to the nation" that was drafted by a committee of lawyers and representatives from the resistance's Freedom Council during the war and passed by parliament immediately after the liberation in 1945.[14]

Inevitably the reintroduction of the death penalty encountered opposition and debate. Perhaps no single issue was more intensely contested during the purges as this one. However, there was a conspicuous shift of opinion over time. By 1945 intellectuals and politicians who opposed shooting people in times of peace were rather few. Some of them preferred to remain silent when well-known collaborators stood trial. The press as such was overwhelmingly in favor of capital punishment, as was public opinion in general. There would have been "a revolution" in Norway if the government had pardoned the leading Nazi criminals, Prime Minister Einar Gerhardsen stated in hindsight.[15] Still, many

[12] Quoted in H. F. Dahl, "Dødsstraffen i Norge," in Hannu Takala and Henrik Tham, Eds., *Krig og moral* (1987).

[13] Ibid.

[14] The main source for the Norwegian laws concerning treason, etc., is Erik Solem, *Landssvikanordingen* (1945). The Danish law of 1945 is reprinted in Tamm (1985) and discussed in C. C. Givskov, "The Danish Purge Laws," in Neil J. Kritz, Ed., *Transitional Justice II* (1995), pp. 129ff.

[15] *Dagbladet*, Oslo, October 24, 1985.

individuals thought it unwise to apply such a measure. The Danish Freedom Council had actually thought of disregarding such a measure altogether, so as to make the purge an expression of human and democratic values as against the barbarities of fascism. The attitude of the layers of the resistance changed in the course of 1944, however. The German occupation, which until 1943 had been conducted through peaceful cooperation with the traditional political machinery and thus relied on a fundamental understanding with the traditional elites in Denmark, became much harsher after the breach of this agreement in August 1943. During the following year, Danish patriots took to sabotage by blowing up railways and plants useful to the Germans. Resistance flared up and the Germans answered by destroying Danish property and shooting prominent people as a retaliatory measure or as warnings. In this atmosphere of growing hostility the demand arose for capital punishment to be used against German war criminals and their Danish supporters alike, and from there it was implemented in the general supplementary law to the penal code of 1945.[16]

Capital punishment was applied retroactively, but in a less extensive sense than other punishments. When the Norwegian government in London promulgated capital punishment in October 1941, it was explicitly made retroactive from April 9, 1940. But as it turned out nobody was shot for crimes solely committed prior to the date of promulgation. Just as in Denmark the cases of extreme violence, of vicious informing and torture, were relative few in the early years of the German occupation but tended to increase at the end of the war. For this reason the courts avoided the problem. In Norway only one single convict in the capital punishment group had displayed more vicious and violent behavior prior to October 1941 than later. In a split vote the Supreme Court ruled for the death penalty retroactively – whereupon the convict was pardoned and submitted to a life sentence.[17]

During the purges the prosecution was under heavy public pressure to demand the death penalty, and in quite a number of cases it gave in to that pressure, according to the authoritative treatise of Tamm.[18] In the Danish purge, contrary to the sequence of events in Norway and many other countries, the most heavy cases, those of the pro-Gestapo gangs that entailed many death sentences, were brought to trial rather late in the settlement, because of the complicated police investigations of the secret networks and bizarre patterns of actions involved. The last executions of gang leaders occurred as late as 1950, and still with considerable public support. In a poll of June 1949 a majority of 55 percent supported the executions, as against only 18 percent directly opposed to the idea of continuing the use of capital punishment. Still the tendency toward pardoning was growing after 1947, when convicts who some years before almost certainly would have been shot were pardoned. Thus the reintroduction of the death penalty in Denmark indeed gave substance to the

[16] Tamm, in Larsen, E. (1998), p. 1472.
[17] Lars-Erik Vaale, *Dommen til døden* (2004), pp. 123ff.
[18] Tamm (1985) I, pp. 363ff.

traditional humanist claim that the fatal character of this punishment is incompatible with strict justice, as full equality in the fixing of sentences is impossible and arbitrariness thus unavoidable.[19]

In Norway, where the phenomenon of collaboration expressed itself in more direct political terms than in Denmark, the sequence of events with regard to serious versus milder cases operated in the opposite order. Leading collaborators were sentenced rather early in the settlement. Thus most executions took place in 1946 and 1947, the last one in 1948. Only one gang comparable to the more common Danish ones was brought to trial and punished by more than one death sentence – in this case ten – by 1947.[20] For this reason opposition to the use of capital punishment developed more rapidly than in Denmark. By 1945, the reintroduction of the death penalty was opposed by only a handful of votes in parliament. One year later the vote was 113-11. At that time, the attorney general announced that death penalty sentences would be sought in 208 cases altogether. By 1947, when the majority of the death penalty cases had passed through the courts, opposition grew remarkably. The minister of justice announced that no more claims would be laid – the actual number of claims had by then been reduced by a third. The shift in public opinion was stated as the official reason for pardoning three convicts – the first pardons that had occurred in the course of the trials. A poll in September 1947 indicated 62 percent opposition to further executions nationwide, and by June 1948 there was nearly a majority in parliament (sixty-two to forty-three) who advocated abolishing capital punishment altogether as a matter of principle. Explicitly it was now stated that as sentiments had changed and the rage over the collaborators had waned since 1945, capital punishment no longer was in accordance with the predominant sense of justice in the population. By that time it was obvious that actions that had been sentenced to capital punishment in 1945 or 1946 now received much milder sentences. Thus even in Norway the classic arguments against the death penalty asserted their relevance in the course of the purges. By the 1970s, capital punishment even in time of war was deleted from the penal code altogether.[21]

THE ROLE OF THE MEDIA

A particular aspect of the emotional rage surrounding the settlement with the collaborators was displayed by the news media. With the press almost unanimously on the emotional side, demanding swift and harsh justice, the purges in Denmark and Norway were carried through without the normal participation of the media as critical observers of court proceedings and correctional practices alike. If one should accept the old watchdog argument that the media actually function as a safeguard for justice and the rule of law, then one might

[19] Ibid., II, pp. 718ff.
[20] John Lyng, *Forræderiets epoke* (1948); Vaale (2004).
[21] Andenæs, *Det vanskelige oppgjøret* (1998), pp. 202ff.

say that the public emotions shared and sometimes even whipped up by the press adversely affected the standards of justice displayed in the legal settlement. There was certainly no "critical reporting" of the court proceedings after 1945, a 1994 study of the press coverage in Norway concluded. On the contrary, the press normally reacted instantly and with anger to any statement of the defendant or against arguments presented by the council for the defense. Courtroom footage was entirely on the prosecutors' side, thus making the years 1945–50 "a time of emergency" in the question of press ethics, the study maintains.[22] Although the question of the media coverage of the trials does not seem to have been investigated in Denmark, there is little to suggest that conditions in the Danish press were much different.

With the tens of thousands of prison convicts pouring into the correctional system in the years 1945–47 penal institutions soon became crowded. The emergency institutions established to receive most of the collaborators quite often were staffed by inexperienced persons and suffered from a scarcity of basic nutritional supplies and medical care. Conditions were quite bad in many camps and prisons, particularly for women prisoners. Accounts of the sometimes appalling conditions experienced by the inmates soon began to circulate in the form of letters of complaint or in other forms. Such complaints were seldom published or reported in the press. Most editors obviously thought such information irrelevant in view of the numerous reports from the German war camps and prisons that were just now catching the world's attention. When one such complaint was published privately in a book printed at the author's expense, a leading newspaper promptly demanded a police investigation and legal suppression of the book.[23] Actually, quite a number of authors of booklets and articles critical of the legal settlements as seen from the convicts' side (all of them published privately) were officially prosecuted for libel offenses and given addition sentences for having voiced unreasonable or unjust critiques of the purge. Libel actions seldom are brought to court in Norway on the initiative of the attorney general. In this case, however, when the issue at stake was the legal settlement with the collaborators and the way in which it was carried through, the authorities thought it appropriate to silence critiques in this extraordinary way. Public opinion and news media alike endorsed this attitude. The cases were seldom reported in the press.[24]

The reason why the press suspended its normal role of watchdog of the authorities is quite simple: the media were themselves part of the emotional structure demanding the "cleansing" of society before normal conditions – including the normal role of the press – could be restored. Not only in what the

[22] Skjalg Fremo, *Presseskikk: En rapport om presseetikk og personvern* (1994), chptr. 8.

[23] *Fremtiden*, Drammen September 7, 1945. The book in question was Marta Steinsvik, *Frimodige ytringer* (1946), which later was found to contain some disturbingly accurate charges about the treatment of inmates that were taken seriously by the attorney general. *Norsk krigleksikon 1940–45* (1995), entry, "Steinsvik."

[24] H. F. Dahl and H. G. Bastiansen, *Ytringsfrihetens historie i Norge* (1999), chptr. 6.

press wrote, but obviously in its omissions, the media harbored and reflected public sentiments and preferences, demonstrating how deeply the need to *purge* the national deviants permeated the fabric of society. The present wave of trials, a leading newspaper stated, was like "a cleansing bath from which our people will rise revived and rejuvenated." The need to "clean" and "cleanse" society of these "inferior" elements was expressed in popular art by depicting the Nazi collaborator in the shape of a rat.[25]

POLITICS AND CRIMES

In Denmark and Norway alike the purges of the wartime criminals contained an element of past politics, inasmuch as the local Nazi Party played a special role in the settlement. The way in which the two countries dealt with their collaborationist party sheds light on a question of a more general nature: how far and to what extent can an ordinary party member be considered a criminal when the party itself is deemed illegal?

Contrary to Soviet rule in Eastern Europe after 1945, which was conducted through the institution of the Communist Party and its affiliated organs, German domination of Northern and Western Europe during World War II followed no uniform pattern from one country to the other. Looking around on the map one would find almost any form of domination, from strict military rule in Belgium and parts of France, to political agreements with existing regimes as in Denmark and partly in Vichy France.

In all occupied countries there were local Nazi Parties. Most of them had been formed in the early 1930s. None was very successful before the war, though most were represented by a handful of members of parliament (MP). During the war they all tried to obtain power, but German policies toward those local supporters varied widely. In Vichy France and in Denmark organized local Nazis played only minor or limited roles, whereas in the Netherlands they were of some importance, as the party führer Mussert rose to the position of leader of the Dutch people. Norway was the only country where the occupational regime rested formally on the local NS party as such; in fact, the NS or Nazi Party in the country had exactly the same status constitutionally as did the NSDAP in Germany: it was the only party allowed to exist, absorbing the assets of all other parties; it was constitutionally defined as the pillar of the state – *Staatsträgende Partei* – acting as a power structure ranging above the civil service of the state. It was headed by a leader acting on the führer and Reichskanzler model: Vidkun Quisling, carrying the dual function of prime minister and party leader. Indeed, in the strange family of Germany-dominated countries in Northern and Western Europe, Norway stood out as a rather special case – a National Socialist mini-Germany. Thus the Nazi Parties in Denmark and Norway, although almost identical in size and structure, played entirely different roles during the five

[25] *Dagbladet*, Oslo, as quoted by Andenæs (1946), p. 16.

years of German occupation. Transitional justice in these two countries thus took different courses.

In Denmark, *collaboration* was defined as any acts of enemy support unless the legal Danish authorities had endorsed such acts. Courts after 1945 had to decide each incidence of collaboration individually and find out whether it had been improper.

In Norway, Nazi Party membership as such was defined as an act of treason subsumed under the rules of the penal code. In addition, a lot of incidents of enemy support were of course punished regardless of party membership. As matters turned out, however, the major group of cases brought to court as illegal acts of collaboration concerned party membership as such. The offense of having been an ordinary rank-and-file Nazi was punished by fines, sometimes by prison, and always by the loss of civic rights.

There was of course a problem here. How could membership in a political party that had been legal since the early 1930s suddenly become a crime after 1945? The reason given was that the party, although perfectly legal in the 1930s, transformed into a conspiracy in violation of the criminal law from the date of German arrival in Norway – April 9, 1940. The conspiracy came into operation on two levels, it was argued: first during the German invasion in 1940, then during the occupation, when party members collectively assisted the enemy in dominating the country.

The notion of local Nazis' acting as fifth columnists for the advancing German army was widespread during the 1940s, nourishing suspicions of a comprehensive Nazi conspiracy during many of the purges in Europe. Fifth columnism was said to be part of modern warfare and almost everywhere governments expected to reveal ugly examples of it. During the Quisling trial in Oslo in 1945 particular efforts were invested to look into the charges that the NS had been an auxiliary force for the German troops. Evidence showed that Quisling himself had conducted secret talks with Hitler in December 1939, but apart from this episode most suspicions amounted to nothing. The contacts between the Norwegian party's youth movement and Germany in 1939, believed to be a preparation for the invasion, turned out to be a completely innocent tourist trip. In Denmark most charges that the DNS local Nazis AP had helped to stage critical situations and threatened to overrun the legal government or their basic agreement with the Germans, a commonly accepted belief during the occupation, had to be dismissed by the courts.[26] The verdict in the Quisling case – that the Norwegian Nazi leader had actively and insistently persuaded Hitler to occupy Norway and hence carried direct responsibility for the German operation – was shown by later historical research to be grossly exaggerated. All over Europe, the alleged dangers of fifth columnism turned out to be based

[26] H. F. Dahl, *Quisling: A Study of Treachery* (1999), chptr. 10; Tamm, in Larsen, Ed. (1998), pp. 1464ff.

more or less on myths, as demonstrated definitively by the distinguished Dutch historian Louis deJong in 1959.[27]

As for the five years of German occupation, the NS Party in Norway undoubtedly assisted the enemy in many ways, far beyond rendering mere political support to the German cause. The NS enjoyed a full political monopoly, as the German *Reichskommissar*, Hitler's representative in charge of the country, ruled out all other parties. Through substantial German support a National Socialist Party machine of considerable strength and competence developed. The Quisling movement in fact reached a degree of bureaucratic professionalism that was quite unusual in Scandinavia. Right up to 1945 it continued recruiting new members through various branches and offshoots. The fact that this was the work of covert German agents was unknown at the time; ordinary members thought the party was their führer's accomplishment. Moreover, the party obtained authority to perform a substantial number of state functions ordinarily performed by the civil service, as by 1942 the Germans considered it strong enough to have full formal responsibility as the "state-carrying party." From this position the NS actively promoted German victory in a much wider sense than by giving verbal support, and for this reason resistance movement lawyers judged (the party) to have committed collective treason. Still, judging every member to have "assisted the enemy" in the sense covered by the penal code seemed far-fetched, as the law considered this an extremely serious crime with a minimal punishment of three years of prison, obviously not intended to be used against a whole mass organization of more than fifty thousand members. The dilemma was solved by passing the 1944 Provisional Decree on Supplements to the Penal Code, which stated that party membership as such should be punished by fine or by a prison term of up to three years – apart from other sanctions such as confiscation of property, compensation of victims, and loss of civil rights. Leading party members or other collaborators could of course be charged additionally with the more serious articles of the penal code proper.

Thus during the purges of the late 1940s the notion prevailed in courtrooms as well as in popular opinion that Nazi Parties were conspiracies rather than ordinary political groups. For this reason party membership was defined as a crime and the purges in Norway became directed primarily against the fifty-five thousand members of the Quisling party. The labeling of NS members as prime targets of the purges was in fact quite unusual; in the Netherlands members of the local Nazi Party NSB were purged also, but through special tribunals that made ordinary membership no crime in the strict traditional sense.[28] Much

[27] deJong, *Die Deutsche finfte Kolonne im Zweiten Weltkrieg* (1959). For Denmark, see Tamm in Larsen, Ed. (1998), pp. 1464f. For Norway, Magne Skodvin, *Striden om okkupasjonsstyret* (1956); Dahl (1999), chptr. 10.

[28] Jan Bank, "Post-war politics and the legacy of nazism in the Netherlands," in Larsen, Ed. (1998), pp. 1389ff.

the same happened in Belgium with the adherents of the Rex movement.[29] In Denmark only civil servants who had joined the NS Party were brought to court for this membership; in Norway, however, every party member – passive or active, obscure or in the forefront, regardless of personal motives – was liable to punishment.[30]

There was in fact no direct precedence for this line of action in Norway itself. To that date legal actions against political criminals or extremists had avoided making the party or the organization as such responsible. In fact it was traditionally considered legal to formulate even illegal ideas jointly with others; only individual attempts to realize and carry out unlawful acts were considered punishable according to legal traditions in Norway.[31] Even if a party organization through its leadership committed a crime, ordinary members were not normally charged with paying the bill. Such had been the case from the famous Thrane uprising of the 1850s to the more recent cases of sabotage against the draft service. In a mass organization members cannot be held directly responsible for what the leaders do. In particular that principle had been applied in dealing with Communists. By the outbreak of World War II Communist groups all over Europe had been charged with illegal acts inspired more or less directly by the leadership. In Norway Communists in the 1930s conducted shipping sabotage and other highly subversive activities. Nobody suggested the ordinary party rank-and-file should be held responsible for this.

With the Nazis, this was different. Their party members were saddled with a very widely defined liability of cooperation with the leadership's actions and dispositions. Normally criminal cooperation or complicity according to Norwegian penal law implies a very close relationship between the illegal act and the persons involved.[32] In this case, it was revealed in court that ordinary party members in fact carried no political influence whatsoever in the NS, as the party was tightly structured according to the "führer" principle, with no responsibility assigned to the members and lower echelons. This was in line with Fascist and Nazi Parties in general. In this type of organization there was less reason than elsewhere to assume that ordinary members held any actual responsibility for the acts of the organizations as such, as they enjoyed almost no political influence at all. There were no internal voting, no collective decisions, and no elections at all, neither in the Danish, the Dutch, the German, nor the Norwegian NS Party, as everything was in principle arranged top down. Still, party members were charged with responsibility for their leadership's acts of treason on the account that their mere entrance into the rank and file had promoted their leaders' powers and positions.

[29] Luc Huyse and Steven Dhont, *La répression des collaborations 1942–1952* (1961).

[30] Provisorisk anordning om tillegg til streffelovgivningen om forräederi (Provisional Decree on Supplements to the Penal Code) of December 15, 1944, § 1.

[31] Frede Castberg, *Rett og revolusjon i Norge* (1974).

[32] Johannes Andenaes, *The General Part of the Criminal Law of Norway* (1965), pp. 273ff.

WORK AS COLLABORATION

The rule of ordinary NS members' liability by cooperation with the leadership stood in stark contrast to the attitude shown toward workers who had assisted the enemy by taking up jobs of importance for the German Wehrmacht. In principle "improper labor for the enemy" was considered a crime on a par with NS Party membership in the Norwegian Provisional Decree, irrespective of the level of business responsibility. It was, however, rendered not punishable if the person in question was "a worker or a subordinate office clerk." Some 200,000 manual laborers who had taken part in the construction of German airports, harbors, and fortifications or had participated in a host of other related enterprises were thus exempted from the postwar purge because they were subordinates and therefore carried no responsibility for the acts of the leaders of the firms in question.

In Denmark, too, ordinary workers were exempted from the settlement with regard to economic and industrial collaboration. The law against improper economic collaboration with the Germans was explicitly restricted to persons in "leading positions or with substantial economic interests in the enterprises in question."[33] Among the radical or left-wing members of the Freedom Council the purges within trade and industry were originally intended to do away with typical "capitalists," whereas the moderates wanted to restrict the economic purges altogether. It soon became apparent that the large-scale confiscation of improper profits envisaged immediately after the liberation came to almost nothing. Convictions for economic collaboration were limited – as opposed to those for political collaboration of NS members – in Norway.[34]

There is a tradition both in Denmark and in Norway of assuming that big fish escaped the purges whereas small fish had to pay for their follies, in line with the normal "populist" interpretation of the way law functions in society. There is little to demonstrate that this actually was the case during the purges, as legal actions normally hit harder the further up the defendant stood. However, time played a role in such cases. Complicated charges of economic collaboration were normally brought to courts comparatively late in the purges, with the defendant profiting from the overall rule that the further away in time, the milder the sanctions.

THE LIMITS OF FREEDOM OF EXPRESSION: THE HAMSUN CASE

An aspect of the Norwegian purges relevant to the formation of popular memory was the restriction of the freedom of expression embedded in the purges.

In fact, the principle of freedom of speech or freedom of expression was never invoked either by defendants or by the courts as a defense against the charge of supporting the Germans or the NS Party, simply because it was not seen as

[33] Law No. 406 of August 28, 1945, § 3, cit. Tamm (1985) II, p. 761.
[34] Tamm (1985), pp. 144–158, II, pp. 469–498.

an act of expressing one's political preferences at all, but as an act of treason in time of war when – as the Supreme Court put it in a memorable phrase – "the demand on every one of us of unconditional obedience and loyalty to the legal authorities becomes absolute."[35] The quest for loyalty in time of war simply undercut any claim of freedom to criticize or oppose the king or the government in exile. How far this principle extended became particularly clear in the famous case against the Norwegian Nobel laureate in literature Knut Hamsun.

One would perhaps have thought that the 1859-born Hamsun's well-known preference for authoritarian regimes, his praise for Quisling, and his enthusiastic support for Hitler right up to the bitter end of 1945 would have been interpreted as expressions of his personal opinions, however disgusting. After all, he was a writer living in the realm of ideas, and when he participated in public affairs he actually tried to make the best out of the situation by mitigating German repression, by assisting victims of war and even by trying to steer Hitler himself onto a less extreme course. Hamsun certainly supported the NS in the sense deemed criminal by the law, that is, by "advocating German victory," and he would undoubtedly have been found guilty if he had been tried; forensic psychiatrists found, however, that he was not fully responsible in the sense required by the penal code because of his age, his lack of mental alertness, and his overall state of mind. Instead he was sentenced to pay damages according to the general damage clause, which demanded that NS members pay for the party's crimes each according to his means. This clause of the law, however, restricted itself explicitly to NS members and did not include fellow travelers, applicants for membership, and the like; the idea was that only formal members of the party could be held responsible for the tort of supporting an organization that benefited the enemy.

Now, Hamsun was not an NS member, formally speaking. He never filed a membership application, though he once signed a questionnaire of a related kind. He held no card, paid no membership fee, shared none of the duties assigned to members. Still the Supreme Court ruled that he *had* been a member during the greater part of the occupation, because he had publicly stated he was "Quisling's man" and had carried a badge indicating his NS preference. The proof of his membership lay only in his statements about his ideas and opinions, not any formal connections to the organization.[36]

There is hardly any verdict from the Norwegian legal settlements after World War II more revealing than this one as to the deeper emotional reasons for the purge: the urge to silence those who had helped bring about the sufferings

[35] *Straffesak mot V.A.L.J. Quisling* (1946), p. 465.

[36] The Hamsun trial is most recently discussed in Anine Kierult and Cato Schløtz, *Høyestrett og Knut Hamsun* (2004). The trial is recorded fully in Sigrid Stray, *Min klient Knut Hamsun* (1979). A more polemic account is Thorkild Hansen, *Prosessen mot Hamsun* (1978). See also Robert Ferguson, *Enigma*: *The life of Knut Hamsun* (1978), and Ingar S. Kolloen, *Hamsun*: *Erobreven* (2004), part V.

of enemy occupation so as to restore public communication, undisturbed by unwanted voices – and hence to nourish popular memories of the war without interference from rival versions of those out of line with majority opinions. The quest for unanimity, so writes the folklorist Anne Eriksen, is at the core of "the myth of the war" as it functions in Norwegian society as a model for coming generations to teach them to distinguish good from evil.[37]

However, there are signs that the achievements of the memory processes in this respect are fading away. During the 1990s Norway experienced the phenomenon of the emergence of "the Nazi children" – that is, the sons and daughters of those fifty-five thousand NS party members collectively punished as criminals after the war. Increasingly, these children – most of them now around fifty years of age – have stepped forward publicly to air their bitterness about growing up as pariahs in the years after 1945. At least two different organizations have been formed nationwide, claiming compensations or demanding apologies from Norwegian officials for the hardships they suffered during their adolescence, with parents in prison and an atmosphere of hatred and contempt coloring their life.[38] There has been no similar mass organization of "Nazi children" in Denmark, for which reason we may see the phenomenon as related to the particular scope and character of the Norwegian purges. Remarkably, these organizations have been met with understanding and sympathy, quite extraordinarily, in fact, in view of the harsh judgments passed on their parents' mainstream memories of the war. Perhaps the "Nazi children" bear witness to the fact that political trials inevitably throw long shadows through the generations. But still shadows only: reminiscences of emotional impressions, those things through which, according to Aristotle, "by undergoing change, people come to differ in their judgments."

[37] Anne Eriksen, op. cit. (1995), p. 153.
[38] Baard H. Borge, "*De kalte oss nazi-yngel*": *NS-barnas historie 1940–2002* (2002).

8

Belgian and Dutch Purges after World War II Compared

Luc Huyse

INTRODUCTION

Dealing, once the war was over, with those who collaborated with the German invader has taken a wide variety of forms: extrajudicial executions, purges in the private sector, trials by criminal courts. The analysis in this chapter on Belgium and the Netherlands is restricted to the activities of public authorities, such as the executive and the judiciary. This is a considerable limitation of the scope. The chapter, on the other hand, broadens the view by including the policies that were developed to reintegrate the black sheep after they had served their time in prison. Looking exclusively at the sanctions that were handed out produces, indeed, a one-sided view on the purges. Several measures were taken, some as soon as in 1946–47, to reduce the impact of the punishment.

A comparison of Belgium and the Netherlands is a reasonable and rewarding enterprise. These countries have had a common history during several episodes of their life. Their sizes, geographically and demographically, are similar. But societal and political development during and shortly after the war have taken different courses.[1]

[1] Publications on collaboration include for Belgium, M. Conway, *Collaboration in Belgium: Léon Degrelle and the Rexist Movement*, New Haven, Yale University Press (1993); for the Netherlands, G. Hirschfeld, *Nazi Rule and Dutch Collaboration: The Netherlands under German Occupation 1940–1945*, Oxford, Berg (1988). Data on postwar purges are based, for Belgium, on L. Huyse & S. Dhondt, *La répression des collaborations 1942–1952: Un passé toujours présent*, Brussels, Crisp (1993). For Holland see P. Romijn, *Snel, streng en rechtraardig: Politiek beleid inzake de bestraffing en reclassering van "foute" Nederlanders, 1945–1955* (Swift, Severe and Fair Justice: Dutch Politics and the Purge of Collaborators, 1945–1955), Amsterdam, De Haan (1989). For a more general overview of the purges after World War II, see K-D. Henke & H. Woller (eds.), *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, München, Deutscher Taschenbuch Verlag (1991).

I. THE PURGE

The number of unpatriotic citizens who suffered punishment (by the authorities) in one or another form was about 80,000 in Belgium and 110,000 in the Netherlands.[2] Those who received prison sentences numbered 48,000 in the first country and 51,000 in the second. 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. Damages had to be paid to the state, out of the marital goods or from the heirs if necessary. The two countries also introduced some form of "national indignity," which implied a series of civic disqualifications and a prohibition on some kinds of professional activity. This sanction was in most cases an extension of a prison sentence. It was, however, also used independently as a "milder" punishment for the small fish. As such it was applied to 22,000 collaborators in Belgium and 56,000 in the Netherlands. In addition, special measures were taken to purge the national and local public administrations.

Similarities

1. A striking feature in the policy of Belgium and the Netherlands was the outspoken desire, especially evident in the months before and after the Liberation, to expel the collaborators from the society.[3] A much heard expression in political speeches was that "there was no place left for those who had betrayed their country."

2. A second trait lies in the tendency – especially in the early stages of the operation – 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. One explanation lies in the fact that the overthrow of the collaborating movements and individuals was mainly planned by governments in exile. They also devised the legal instruments with which the collaborators of the Germans would be judged and punished. Those governments were, because of their being outside their country, considerably handicapped by a lack of information and of a realistic assessment of the situation in their homeland. One source of misjudgment was the idée fixe that loyal and disloyal citizens could be sorted out in an unequivocal way. The result was that legislation that was manufactured made severe prosecutions and punishment almost inevitable.

3. 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 and Holland gave priority to firmness and

[2] All figures are approximate.

[3] I first advanced the arguments in this section in my article "Justice after Transition: On the Choices Elites Make in Dealing with the Past," *Law & Social Inquiry* (20, 1995): 51–78.

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.[4] Shortly after the liberation of Belgium the Cour de Cassation ruled that all the legislative measures taken by the government in exile had full legality, including the law that in December 1942 had considerably enlarged the scope of the 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 Holland retroactivity was clearly present in the reintroduction of capital punishment. The two countries also espoused the principle of collective guilt through the disqualification of people because of their membership in collaborationist movements. In the Netherlands, all members of pro-German military movements (and their spouses) automatically lost their Dutch citizenship. Their number 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 cases 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.[5] In addition, curtailing of 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. Lay judges participated in the activities of the tribunals that tried the collaborators. The Dutch set up some thirty-five Special Courts, with two of the five judges army officers. For the lesser cases of collaboration, tribunals staffed by two patriotic citizens and one professional judge were created. 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 the five members in every court were army officers.[6] Serious procedural irregularities thus occurred. But retrospective justice in Belgium and Holland occurred at an age 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

[4] Novick, after comparing the retroactivity question in postwar Belgium, France, Holland, 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." In each of these five countries legislative, administrative, and judicial tricks were used to camouflage the reality of retroactive justice (P. Novick, *The Resistance versus Vichy: The Purge of Collaborators in Liberated France*, New York, Columbia University Press, 1968, 209).

[5] C. Offe, "Coming to Terms with Past Injustices," *Archives Européennes de Sociologie* (33, 1992): 199.

[6] 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).

of Europe published its *Convention for the Protection of Human Rights and Fundamental Freedoms* in 1950. Later were 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.

4. When a regime ends violently because of a war against an occupying army or because of 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 summary executions and abuses in the camps where suspected collaborators were interned.

5. Economic reconstruction was a huge task in both countries, the industrial infrastructure of which was crippled by four years of German looting and several months of bombing by the allied forces. Providing food, clothing, and coal to the population was for more than a year an almost impossible mission for the political leadership. Of crucial importance was the unconditional cooperation of the economic, financial, and industrial elites. It was precisely at this point that the purge of the collaborators risked becoming counterproductive, as is demonstrated in the Belgian case. More than 110,000 complaints had been received on the basis (solely or partially) of Article 115 of the penal code, which made economic collaboration punishable. Nearly 60,000 of these files referred to blue-collar workers who volunteered to work in Germany. They were not at the heart of the problem. The other suspects were commercial and industrial people. The opening of a file was a serious handicap for most of the commercial and industrial businesses involved: it meant seizure of the books and sometimes required sequestration of goods and assets. All this could considerably mortgage the search for economic recovery. In May 1945, after nine months of hesitation, the government edited an a interpretative law in which Article 115 of the penal code underwent a substantial reduction of its scope. The prosecutor had to prove now that the wartime behavior of a businessman or of a plant manager was explicitly aimed at helping the German war machine. Completely in tune with Belgium's preference for delicately balanced compromises, the government also ruled to dismiss all charges against the 60,000 blue-collar workers. This double chirurgical operation caused in fact the decriminalization of much of the formerly punishable economic behavior: only 2 percent of all files resulted in a court case (against 43 percent for military collaborators, 33 percent for political collaborators, and 18 percent for police informers).[7] The Netherlands followed a similar course.

Differences

An adequate comparison of the purge figures requires taking the size of the population of both countries into account. That is done in Table 8.1. It shows

[7] The source is J. Gilisscn, "Etude sur la répression de l'incivisme," *Revue de Droit Pénal et de Criminologie* (1950–51): 513–628.

TABLE 8.1. *Penalized collaborators per 100,000 inhabitants*

	Belgium	Holland
Total number of punished persons who:	963 (100%)	1,216 (100%)
Were executed	3 (0.3%)	0.4 (0.03%)
Received prison sentences cum disqualification[a]	582 (60.5%)	553 (45.5%)
Received only civic disqualification	265 (27.5%)	602 (49.5%)
Received other sanctions	113 (11.7%)	61 (5.0%)
Population size in millions (1945)	*8.3*	*9.3*

[a] Judgments by default not included.

Sources: Belgium: J. Gilissen, "Etude sur la répression de l'incivisme," *Revue de Droit Pénal et de Criminologie* (1950–51), 513–628; Holland: A. D. Belinfante, *In plaats van Bijltjesdag*, Assen, Van Gorcum (1978).

TABLE 8.2. *Prison sentences*[a]

	Belgium		Holland	
Life imprisonment[b]	3044	6.3%	268	0.5%
15–20 years	2955	6.1%	578	1.1%
10–15 years	2878	6.0%	1284	2.5%
5–10 years	9177	19.0%	5987	11.6%
Less than 5 years	30244	62.6%	43302	84.2%
TOTAL	48298	100.0%	51419	100.0%

[a] Judgments by default not included.

[b] Not executed death penalties included.

Sources: See Table 8.1.

that a slightly larger part of the Dutch population was punished (1,216 per 100,000 inhabitants in the Netherlands, 963 per 100,000 in Belgium). But the table also indicates that collaborators in Belgium were on the whole less well off: there were considerably more executions and detentions. In addition prison sentences in the Netherlands were more restricted in time than in Belgium (see Table 8.2). Differences also appear in the area of civic disqualification. The total number of those who received this punishment (in combination with a prison sentence or as the only sanction) is approximately 70,000 in Belgium (or 847 per 100,000 inhabitants) and 107,000 for the Netherlands (or 1,155 per 100,000). But the impact of the sanction differed. In Belgium deprivation was in most cases lifelong and its scope was extremely large, including the right to take up public functions and jobs in the legal, media, and teaching professions. In the Dutch case this sanction was almost always limited in time (ten years) and restricted to the loss of active and passive voting rights.

II. REINTEGRATION

One year after the Liberation arguments were heard in both countries in favor of a controlled reinsertion into society of the convicted collaborators.[8] The idea was that a prolonged expulsion of such a large group of citizens was not without considerable ambiguity. There was no guarantee, it was said, that its effects would be merely beneficial for the reestablished democratic state.

The policy shift was based on a variety of considerations. Some were of a politico-strategic nature. It was feared that the ex-collaborators would be driven into social and political isolation. This in turn could result in the creation of subcultures and networks, which would almost certainly become hostile toward democracy. It was also felt that a lengthy exile of one particular category of collaborators, namely, administrative and managerial manpower, risked being very counterproductive as it could endanger the badly needed political and economic reconstruction of the country. In addition, the prisons had to cope with overpopulation and the many thousands of political criminals exerted an untenable pressure on public resources. Other motives were of a politico-moral order. All governments viewed clemency – the moral category that opened the door to reintegration – as a way to correct and efface shortcomings of the judicial process. One such shortcoming was the considerable inequality that had arisen because punishment had been much harsher in the first months after the war than one or two years later. Measures of magnanimity were also seen as a way of making reconciliation between the good and the bad citizens possible.

The return of convicted collaborators into the community at large was a twofold operation. The removal of legal and administrative obstacles was a first assignment. The active promotion of reintegration by way of resocialization and "after-care" programs was a second task.

Removing the Legal and Administrative Obstacles

1. The *obstacles* to reintegration were manifold in the two countries: detention; deprivation of nationality, of office, and of political and civil rights; financial sanctions such as the confiscation of money and goods; denial of war damage retribution and of military pensions.

[8] Adequate literature on the reintegration of collaborators is almost nonexistent. That is a somewhat paradoxical situation. Historians and social scientists have published abundantly on collaboration and its punishment in Belgium and Holland (see note 1). The return into society of those who were convicted has, however, been seriously neglected. Theoretical insights on the long-term effects of purges in general can be found in political science publications on transitional justice. See O. Kirchheimer's *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton, Princeton University Press (1961), which has a section on political amnesty, and L. Huyse's "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law and Social Inquiry* (20, 1, 1995).

The two main barriers on the return road were detention and the loss of certain rights. The height of the hurdles varied. It depended on the size of the sentence, For example, the length of the detention and the impact (in terms of time and scope) of the deprivation of rights.

2. The *measures* the authorities could take were of a great variety: amnesty; release on parole; reduction or remission of financial sanctions; restitution of nationality, of office, and of civil rights; rehabilitation.[9] Some of these actions were a prerogative of parliament, others of the executive.

Belgium

1. From mid-1946 onward convicted collaborators could benefit individually from conditional release, based on a law of May 31, 1888.[10] This measure was preceded by heated discussions inside parliament, in the press, and among the general public. Opponents argued that reeducation of the "friends of the Nazis" was impossible and that, as a consequence, the law was not applicable. By the end of 1949 about 25,400 of those convicted had been released on parole. Reduction of sentence was also possible through an individual petition for pardon. The Belgian Constitution gives the king (de facto the executive) the power to remit or reduce sentences. Between 1946 and 1953, 15,400 collaborators saw their prison time at least once reduced this way.

2. Policies were much less tolerant with regard to the reinstatement of political and civil rights. The sanction had struck 70,000 collaborations. They could follow two routes. One was rehabilitation, as was provided in the law. The initiative had to originate with the individual, implied the acceptance of guilt, and depended on a judicial decision. This way was slow, was unpredictable, and was perceived by many as a humiliating action. Figures here are absent. A second route was opened by two special laws (June 14, 1948, and February 29, 1952), which made individual reinstatement possible for some categories of collaborators. Between June 1948 and the end of 1955 some 10,000 collaborators had their rights fully restored; for another 20,000 reinstatement was partial. That means that ten years after the war more than 60,000 Belgians still suffered from a total or partial loss of several political and civil rights. Only in 1961 did the government – after being convicted by the European Court – make reinstatement of rights on a larger scale possible.

[9] There is a lot of confusion to be found in both official and academic publications on this matter. Notions that differ considerably in their content have been used as synonyms. An important source of ambiguity resides in the employment of the term *amnesty*. Amnesty is, strictly speaking, the most far-reaching measure. It removes the punishability of the acts of collaboration and, thus, abrogates crime and punishment. In this sense amnesty is a legally induced amnesia. An amnesty operation is also a collective and automatic maneuver. No country has gone that far in its forgiving and forgetting the wartime behavior of its disloyal citizens. Many officials and scholars use this notion, nevertheless, as a sort of catch-all term.

[10] According to this law a prisoner is eligible for early release if he has served at least one-third of his sentence and fulfills the requirement of "improvement" and resocialization.

The Netherlands

1. In contrast to events in Belgium, conditional release (after completion of two-thirds of the sentence) was applied to convicted collaborators from the very beginning in the Netherlands. In addition, the Dutch authorities made early release available on a larger scale through successive waves of individual and collective pardoning. The first move, intended to harmonize sanctions, was in July 1947. It reduced, on an individual basis, the prison sentence of some three hundred collaborators. One year later, at the occasion of the fiftieth anniversary of Queen Wilhelmina's accession to the throne, a royal pardon made early release possible for twenty-five hundred collaborators. On March 22, 1949, all convicts younger than eighteen were collectively released. Later that year a few hundred collaborators, whose imprisonment provoked severe family problems, were set free. Such actions were repeated twice between 1950 and 1951. A public debate was not totally absent. The judiciary, for instance, opposed several of the waves of individual and collective release. But a general consensus, both in the population at large and inside politics, was reached soon after the war.

2. In 1953 a law granted the 15,000 collaborators who had lost Dutch nationality the right to make an individual demand for reinstatement. In the years that followed some 8,000 men and women took advantage of this opportunity.

3. The question of the restoration of political rights was not dealt with in an explicit way. Since the duration of this sanction was limited to ten years, almost all collaborators won back suffrage in the second half of the fifties.

A Comparison

There was no formal amnesty in Holland. Here, the government preferred to reduce as fast as possible the prison population. Social exile through deprivation of political rights ended for most people ten years after Liberation. Measures were predominantly collective. In Belgium, every action of the authorities followed the path of individual decisions. Priority was given to early release, whereas reinstatement of rights was extremely slow and restricted. The effects of the various policies toward the convicted collaborators can be deduced from Table 8.3. It shows the timing of the gradual release of prisoners. There are some similarities. One is that by 1950 the remaining prison population was less than 30 percent of that in 1947. This is surprising. The number of collaborators whose sentence was at least five years was 18,054 in Belgium and 8,117 in Holland. One could expect that they were still in prison in 1950. But the real numbers are 6,115 for Belgium (or 33.9 percent) and approximately 3,000 in the Netherlands (or 37.0 percent). That is the combined effect of the measures discussed earlier. In 1960, fifteen years after the war, only a few collaborators remained in prison in either Holland or Belgium, although thousands of them had been sentenced to life imprisonment.

There are also differences. In Holland, only 38 percent of the original group of convicts were still in detention in 1948; this figure is 59 percent for Belgium.

TABLE 8.3. *Collaborators in prison (1947–1965)*

	Belgium		Holland	
1947	+/−26,000	100.0%	33,819	100.0%
1948	15,391	59.2%	13,027	38.5%
1949	10,349	39.8%	±5,000	14.8%
1950	6,115	23.5%	±3,000	8.9%
1955	487	1.9%	365[a]	1.1%
1960	102[b]	0.4%	49[c]	0.1%
1965	3[d]	–	3[e]	–

Note: Figures for January 1 of each year (if not otherwise stated).
[a]November 1955.
[b]December 1960.
[c]May 1959.
[d]December 1965.
[e]January 1966.
Sources: For Belgium: regional parliament of Flanders; for Holland: see Table 8.1.

The reason lies partly in the milder sentences in the Netherlands and in the explicit wish to reduce the duration of the physical exile.

Resocialization

A second aspect of a reintegration policy is the (eventual) promotion by public authorities of resocialization and reeducation programs.[11] Such policy was prominent in the Netherlands but was a "paper operation" in Belgium.

Belgium

Active preparation for life after release was two-edged. Those who had embraced unpatriotic ideas needed to be reeducated. And almost all convicted collaborators had lost a number of civil rights. That included for many of them the loss of their job. They had, thus, to receive new occupational training.

To this end the Dienst voor Wederopvoeding, Reclassering en Voogdij (Foundation for Reeducation, Resettlement, and Custody) was founded in November 1946. It was an ambitious project. One section had to organize leisure activities and entertainment in prisons and camps. Another was charged with the creation of vocational training centers. A third initiative, the Organization for Custody, would recruit and train thousands of "monitors" as a support system for collaborators on their return into society.

[11] "Resocialization is that process wherein an individual, defined as inadequate according to the norms of a dominant institution, is subjected to a dynamic program of behavior intervention aimed at instilling and/or rejuvenating those values, and abilities which would allow him to function according to the norms of said dominant institution" (D. B. Kennedy & A. Kerber, *Resocialization: An American Experiment*, New York, Behavioral Publication, 1973, 39).

In the end only the first initiative met with some success. The Foundation for Reeducation, Resettlement, and Custody was completely understaffed; it had no more than ten full-time people on its payroll. Moreover, the general public disapproved. In a radio speech in September 1946 Lilar, minister of justice, called all patriotic citizens to volunteer as monitors/custodians. His call met with little response. At the end of 1946 the number of monitors was 729; two years later it was 5,810. Reeducation totally failed. Many collaborators felt no guilt whatever. Besides, most collaborators belonged to the intellectual elite, and reeducating this group turned out to be a perilous undertaking with little prospect of success. But more importantly, as long as the authorities refused to restore political and civil rights, the ex-collaborators were confronted with a grave handicap upon their release from prison. Reintegration was also made considerably more difficult by the obligation to settle in a place far away from the ex-prisoner's home village or city.

The Netherlands

From the very beginning the Dutch authorities were convinced of the need to resocialize and reeducate the collaborators. In July 1945, an adviser of the Ministry of Justice wrote, "We are creating a huge threat to future social stability by producing a class of outcasts that will take revenge on society." To prevent that from happening, an ambitious resocialization program was launched. In the fall of 1945 a private foundation was created to monitor the release of political prisoners, namely, the Stichting Toezicht Politieke Delinquenten (STPD). The STPD convinced the government that social reintegration should prevail over severe punishment. Thanks to the support of most political parties, of the churches, of the trade unions, of some prominent judges and law professors, the foundation had a considerable influence on government policy.

One initiative of the foundation was directed to resocialization while the collaborators were still in prison. Since newspapers and magazines were forbidden, the foundation searched for other ways to keep contact with the outside world. It created the magazine *Uitzicht* (Outlook). Apart from the usual news bulletins the magazine contained articles that tried to convince the collaborators of the wrongness of their wartime behavior. In January 1947 newspapers and weekly magazines were reintroduced in prisons and camps. Reeducation sessions and conversations with clergymen and ex-members of the resistance were other means of preparing the return and of keeping up the morale. The foundation paid special attention to two groups of prisoners: the youngsters and the civil servants. After their release the ex-convicts were placed under the temporary supervision of voluntary monitors. The task of these supervisors, recruited with the help of the churches and other associations, was to help the ex-prisoners on their way back into their community. They actually offered assistance in the search for housing, for clothes and food, for financial support and reemployment, for restitution of confiscated goods. The foundation also lobbied for release on parole and rehabilitation and played an important role in delivering information to the courts and to the public. In January 1948 the foundation

counted about 320 staff members, 16,000 supervisors, and 42,000 "clients." In total, approximately 90,000 ex-collaborators were put under surveillance of the STPD. The foundation ended its activities in 1951. From that moment on its tasks were carried out by the prewar resocialization agencies.

III. HOW TO ACCOUNT FOR POLICY DIFFERENCES?

Similarities and differences in the policies of the Belgian and Dutch governments can be linked to three categories of explanatory variables:

1. The (Eventual) Presence of Earlier Reintegration Operations – with Regard to Both Ordinary and Political Criminal Offenders – and Their Perceived Efficacy

In the case of Belgium, the perception of World War II collaboration was affected by the memories of what happened in the aftermath of World War I. Many of the Belgians who between 1914 and 1918 collaborated with the German occupier and were granted amnesty afterward repeated the offense in 1940. In the eyes of many of their co-citizens leniency had led to recidivism. This circumstance made understanding and clemency for the collaborators of 1940–44 less probable. Prewar Holland, on the other hand, had built up a rich tradition in the field of the resocialization of criminal offenders. It had, when the war ended, a vast network of in-prison and after-care associations at its disposal. It was but a small step to use this equipment and the expertise that went with it for the reintegration of convicted collaborators. This was facilitated by the decision to view those who had sympathized with the enemy as "regular criminals."

2. The Degree of Politicization of the Reintegration Topic

The main feature of the Dutch policy regarding the fate of convicted collaborators was the speedy depoliticization of the problem via its transfer from the political arena to the domain of administrative agencies and to a pivotal private association (Stichting Toezicht Politieke Delinquenten), to which the Dutch government subcontracted the task of guiding the collaborators into "life after prison." Belgium followed another route: high politicization of the issue. It involved a confrontation between the traditional political elites and their competitors of the prewar period, between Flemings and francophones, and between Catholics and their anticlerical counterparts. This entangled state of affairs inevitably slowed the decision-making process.

Several elements can be mobilized for explaining the degree and the course of politicization. The first are the nature of the collaboration with the German invader and the prewar power position of the collaborators. A second element is the (eventual) link of the trials with older political cleavages.

Belgium

The issue of collaboration and its punishment immediately ended up in the political arena, where it would remain almost uninterruptedly for years. The purge was the subject of a bitter reckoning between elites that had already been fighting one another before the war. In the thirties, the New Order movements had manifested themselves as fearsome rivals of the three traditional political families (Catholics, socialists, and liberal-conservatives). In the parliamentary elections of 1936 the Vlaamsch National Verbond (VNV), a Flemish party supporting authoritarian ideas, obtained sixteen seats in the House of Representatives. Rex, a New Order movement that mainly recruited in French-speaking Belgium, obtained twenty-one seats. Both parties successfully meddled in local politics.[12] During the occupation, in a couplike manner and with the help of the Germans, they took over large parts of the political and the administrative apparatus. In 1943, 594 of the 1,074 mayors in Flanders and Brussels were members or sympathizers of the collaborating VNV. After the Liberation the traditional parties hit back forcefully. Large numbers of New Order members and sympathizers were imprisoned and, together with thousands of others, deprived for life of their political and civil rights. That was how the reestablished elites tried to block an eventual comeback of VNV and Rex. At that time there was, thus, no room for clemency and reconciliation.

The policy regarding unpatriotic citizens was also closely interwoven with the century-old conflict between Catholics and non-Catholics and with the ethnoregional cleavage between Flemings and francophones. Far from diminishing, political division actually intensified in Belgium in the war years. This reflected the policy of the occupier, which continued to develop the *Flamenpolitik* initiated during the interbellum period. The Germans were quicker, for instance, to repatriate Flemish prisoners of war. The impression quickly grew in the south of the country, moreover, that Flemings, and especially Flemish Catholics, were succumbing to the temptation to collaborate with the Germans. At the same time, resistance movements sprang up more vigorously in Wallonia than in Flanders, although geographical as well as ideological factors might have played a role here. All these factors combined to intensify the ethnoregional and politicoreligious cleavages.

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. In the first place, it is clear that the Belgian cabinet could not expect any sympathy, respect, or authority from the electorate on returning from exile. Their indecision in the months of May and June 1940 remained fresh in people's memory. They were also reproached for having kept themselves out of harm's way. This lack of legitimacy tarred the entire political class for months; nor was the monarchy completely blameless, because of the controversy surrounding the

[12] See W. Brustein, "The Political Geography of Belgian Fascism: The Case of Rexism," *American Sociological Review* (53, 1988): 69; M. Conway, *Collaboration in Belgium, Léon Degrelle and the Rexist Movement*, New Haven, Yale University Press (1993).

wartime behavior of King Leopold. The "Royal Question" was to be the subject of heated debate until 1950 and had the effect of holding back political reconstruction. 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 fora. 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.[13] 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.

The Netherlands

The Dutch tendency to reconciliation was not surprising. The NSB, the National Socialist Movement, never constituted a real danger to the traditional parties, neither before nor after the occupation. After the war no one suspected that the NSB would return as a political factor of importance. In addition, many Dutch politicians, civil servants, and religious and other authorities had the feeling that they had, before the war, allowed democracy to degenerate. They therefore found that they were partially responsible for the conduct of the collaborators. But their legitimacy was less damaged than that of the Belgian political class. In addition, in full contrast with the position of King Leopold, Queen Wilhelmina returned home with her prestige and authority enhanced.

3. The International Context

External threats sped up the urge to reincorporate former collaborators in view of a much needed national reconciliation. The beginning of the Cold War created such a situation in all three countries. (It also pushed the Communist Parties, the most prominent opponents of reintegration measures, into an isolated position.) Holland became, in addition, at the end of the 1940s, involved in a war in its Indian colony. That too accounted for the call for unity.

IV. POSTSCRIPT

Overcoming?

The passage of time has not fully exorcised the ghosts of the past. German occupation, collaboration, and the purge that followed still haunt these nations' collective memory.[14]

[13] See G. Warner, *La crise politique Belge de novembre 1944: un coup d'état manqué?*, Brussels, CRISP (1978).

[14] Both countries recently demonstrated their continued struggle with their 1940s by putting the restitution of property to victims of the Nazis on the political agenda. In March 1997 the Dutch

Belgium

The commotion in Belgium is like a chronic disease for which there is no actual treatment. It involves the war years of whole sections of the population (Flemings and francophones, Catholics and non-Catholics). Individuals, on the other hand, are mostly left undisturbed. A life history of (petty) collaboration did not prevent a Flemish politician from becoming a federal minister of finance. Some notorious Eastern Front war veterans have represented a Flemish regionalist party in Parliament.

Because official reintegration policies failed, many collaborators, particularly in Flanders, developed the tendency to rely heavily on networks of "colleagues" and sympathizers. Sometimes these networks became breeding grounds of bitterness, revanchism, and anti-Belgian and antidemocratic ideas. They also created a "victim culture": the belief that collaborators had fallen victim to victor's justice.

The Netherlands

In Holland emotion is like a fever that intermittently flares. Years of silence alternate with periods of heated unrest. The commotion is always centered around individuals, and the course of the event is predictable: the discussion involves the quality of the trials and of the official policy toward the collaborators. There is an explanation. The purge was dealt with in silence, hidden from the public. An open debate was prevented by restricting the flow of information and by emphasizing the urgent need to close ranks. Those who had sympathized with the enemy were "treated" by professionals: judges, civil servants, professors of criminal law or criminology, probation officers, and psychiatrists. From the seventies on, though, the forced silence on collaboration and the purge could not be kept intact. The grounds on which the postwar verdicts were based had not become part of the collective memory; that omission again and again led to questions of "how" and "why." There rose, at the same time, a "second-generation problem": many collaborators had, completely in tune

government installed a commission whose task it is to review and evaluate the postwar handling of the restitution question. Immediately after World War II the Council for Legal Redress (Raad voor Rechtsherstel) had been charged to identify the claimants of stolen property and to organize its eventual return to the individuals concerned. Approximately 220,000 files were discussed, of which some 35,000 dealt with Jewish citizens. The interim reports of the actual commission have thrown light on the shortcomings of the redress operation. The public debate these findings provoked is still going on. In Belgium a similar commission was created in July 1997. Its task was more limited that that of its Dutch counterpart. It was "to study the fate of the property that members of the Jewish community in Belgium lost to the German occupying forces and their collaborators." Restitution in Belgium was, half a century ago, the assignment of an Office for Economic Recuperation (Dienst voor Economische Recuperatie). The operation was a rather restricted one: only victims with Belgian nationality and blameless wartime behavior could apply for restitution. The consequence was that almost all Jews were automatically excluded since Belgium had restricted the opportunity for prewar Jewish immigrants and refugees to obtain Belgian nationality.

with the official policy of silence, hidden their war past for years. Since 1965, their children have been confronted with the how and why questions.

Remembering

Wars and their immediate aftermath never truly come to an end. In one sense or another, every war lives on in the countless pages of novels, poems, pamphlets, and academic studies. What happened in the Netherlands and Belgium between 1940 and 1950 is no exception. The way the two countries have wrestled with this past has, however, been very different.

It was back in 1983 that the Dutch historian Blom concluded his review of the historiography of the wartime Netherlands with the statement that this was one of the most – if not the most – studied and described periods in Dutch history.[15] Now, more than two decades and many thousands of pages later, his conclusion has undoubtedly become even more compelling. Nor has all this academic work hidden its light under a bushel. It has turned instead to the megaphone of popular editions and, to an even greater extent, audiovisual accounts of the war and occupation that have achieved very high ratings.

The flow of publications in Belgium has been considerably weaker. The production of academic insight was also much later in coming. The first solid work about the war, *L'an quarante* (Brussels, CRISP) by J. G. Libois and J. Gotovitch, was not published until 1971, and the subject only began to appear in the press and on radio and television in the early 1980s, by which time the Dutch television series *De bezetting* (The Occupation) was close to celebrating its twentieth anniversary.

How are these differences to be explained? War and occupation left much deeper wounds in the tissue of Belgian society than they did in that of the Netherlands. The period in question thus gives rise to much more delicate issues for Belgian researchers than for their Dutch colleagues. This is evident in the development of the Belgian Center for Research and Study into the History of the Second World War, which was set up much later than its Dutch counterpart, the National Institute for War Documentation. Its birth was an extremely difficult one, as all kinds of political balances had to be respected. The center continued to be handicapped in subsequent years by what has been referred to abroad as "Belgian mathematics" – so many research positions for French speakers, so many for Flemings, so many for Socialists, and so many for Catholics. In this way, politicization colored not only the society during and shortly after the war, but also the study of the war itself.

[15] J. Blom, *In de ban van goed en fout?* (In the Spell of Good and Bad?), Bergen (1983).

PART III

LATIN AMERICA, POST COMMUNISM, AND SOUTH AFRICA

Whereas all the post-1945 regime changes were caused by the defeat of Germany, the transitions that triggered reparation and restitution in the 1980s and 1990s did not have an obvious common cause. One might argue, perhaps, that a democratic Zeitgeist was the common factor underlying the fall of authoritarian or totalitarian regimes in Latin America, Eastern Europe, and South Africa, but no one has provided an explicit causal mechanism linking this supposed spirit to specific events. Although nobody likes to be an international pariah, the case of Myanmar is an example (among many others) that this discomfort is more easily tolerated than loss of power and the prospect of punishment. The causes of transition are more plausibly sought in specific national issues: a military defeat in Argentina, an economic crisis in Poland, a perception that the USSR would not intervene to uphold them in other East European countries, and the increasing bite of economic sanctions in South Africa. Why the Chilean junta abdicated from power when they could easily have held on to it is harder to understand. Perhaps Pinochet, as the Polish Communists did in 1989, miscalculated the level of support he would receive in the first presidential elections.

The dominant common factor in these transitions is that the outgoing elite managed to obtain considerable legal or de facto immunity from prosecution. In Latin America and South Africa, they achieved this goal through their military and economic power. In Czechoslovakia, Hungary, and Poland they achieved a more limited de facto immunity as a result of decisions that remain ill understood. Although none of these countries established truth commissions, the focus seems to have been more on exposing agents of the former regimes, notably by using the archives of the security police, than on punishing them. One should not underestimate the extent to which such exposure may lead to crippling forms of social ostracism and even to suicide. Thus in the spring of 1998, an unknown organization in Lublin (Poland) published the names of 119 persons who had allegedly cooperated with the militia before 1989. Two of the individuals named killed themselves (Kuk 2001, p. 209).

Except in South Africa, reparation in these countries occurred on a much more extensive scale than retribution. In the former Communist countries, reparation has largely taken the form of in-kind restitution of confiscated land. Exceptions are Poland, where farms remained private property throughout the Communist era, and Hungary, which chose to compensate former owners rather than giving the land back to them. In Latin America, the main form has been financial compensation to victims of the military dictatorships and their families.

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9

Paranoids May Be Persecuted

Post-totalitarian Transitional Justice

Aviezer Tucker

I distinguish three types of transitional justice (cf. a similar distinction in Huyse 1995):

1. *Democratic restoration* takes place in societies that had been democratic prior to becoming for a short period totalitarian or authoritarian, usually as a result of foreign occupation. During the nondemocratic phase, previously marginal groups become the new elite, while the old elite attempts to maintain its status, power, and property, occasionally at the cost of some collaboration. The short duration interval allows the transition back to democracy to be a *restoration* of old elites. Society is able to maintain its democratic traditions and easily resurrect civil society and the status quo ante by restoring or empowering old civil servants and politicians. The restoration of democracy in Western Europe after the Second World War is typical of this kind of transitional justice.

2. *Post-authoritarian transition* takes place when an authoritarian regime persists for more than half a generation, possibly in the absence of a previously well-established democracy. In authoritarian as distinct from totalitarian regimes, there is a residue of civil society that can spawn an alternative democratic elite. When the state's control of civil society, and of legal and educational institutions, is not total, there are some democratically oriented trained lawyers and judges and some other professionals and civil leaders who can operate some democratic institutions and some educators who can produce more of them. Since the transition to democracy results here usually from a negotiation process between two elites, in the presence of some kind of civil society and professional class, the final outcome depends usually on the balance of power during and after the negotiation process (cf. Nino 1996, pp. 118–27). Otherwise, all options, from Nuremberg-style trials to total clemency, are open. The transitions to democracy in Southern Europe (Spain, Portugal, Greece) and Latin America exemplify this type. South Africa combines this type with a scope of victimhood more characteristic of totalitarian regimes.

3. *Post-totalitarian transition to democracy* is characterized by the absence or feebleness of civil society. Alternative elites are small, weak, and inexperienced, as in the northern post-Communist countries, or do not exist, as in the southern post-Communist societies. Post-totalitarian governments are dominated either by members of the old elite who have a strong personal interest in ignoring the past or by new democratic elites that have hardly any democratically oriented trained legal profession to assist them, or loyal and obedient state bureaucracy, police, and security forces to serve them. There are no alternative legal, security, and bureaucratic elites. Transitional justice that has to rely on the rule of law, due process, and impartial police and state bureaucracy is impossible. Totalitarian elites even after relinquishing the government remain hierarchically united, comprising the higher echelons of the executive state bureaucracy which includes the judiciary, the managers of the economy, and the security forces.

This chapter concerns transitional justice in post-totalitarian, mostly post-Communist, societies. The geographic scope is East Central Europe. The former Soviet Union is excluded because with the exception of the Baltics, no form of transitional justice was attempted there. East Germany is excluded because after German unification its transition became a "democratic takeover," the replacement of the East German totalitarian elite with West German ones. The scope is further limited to negative sanctions against perpetrators (for positive sanctions, see my complementary article in this volume).

Generally, I adopt and adapt Elster's (1998) framework for the study of transitional justice, especially his typology of dependent and independent variables. I characterize each of the variables I study generally in all post-totalitarian societies. Then, I discuss individual variations among post-Communist countries. Finally, I examine the results of the political decisions concerning transitional justice in the former Communist bloc.

1. INDEPENDENT VARIABLES

1.1. *The political actors* in the post-Communist context are democratically elected representatives composed of non-Communists, former Communists, reformed Communists, and old Communists. The non-Communists are divided into former dissidents who were active in the opposition during late Communism, from the end of terror to 1989, and representatives from the "gray zone," mostly professionals who neither collaborated nor resisted but survived while making necessary compromises on the lower echelons of the totalitarian hierarchy. Former dissidents were critically important in the first stages of transition, when they were the only alternative elite in the northern post-Communist countries. Few survived politically the second post-Communist elections. Former Communists have non-Communist political affiliations, but they have special interests regarding transitional justice. Reformed Communists represent themselves as Western-style left-wing politicians. In the southern

post-Communist countries there were hardly any dissidents, so 1989 resulted mostly in a reshuffling within the old Communist elite. After decades of totalitarian oppression, the old elite has little competition. It will remain extremely powerful, as long as it remains united. In post-Communist countries the nomenklatura is the only well-organized group in society, with near-complete control over resources.

1.2. Political actors must make decisions within certain constraints.

1.2.1. The most significant constraint is the paucity of human resources necessary for the rule of law. Totalitarianism means that the executive, legislative, and judicial branches of government are united within a single hierarchy that holds a monopoly over all institutions and suppresses civil society, from which alternative elites could emerge. Entrance to and promotion within, this party hierarchy are closely controlled by the nomenklatura. Judges were on the lower rungs of the executive hierarchy; they were badly paid, were poorly trained (three months of Marxism-Leninism and solid working-class background were sufficient in the fifties, later to rise to two years), and followed political instructions. A broad nomenklatura class was literally above the law, above the judges in the hierarchy. Members of the nomenklatura elite were able to do as they wished with impunity, limited only by the balance of power within the elite itself.

The size of law schools in relation to population was small in comparison to that in democratic states that need lawyers to serve (or subvert) the rule of law. During the revolutionary fifties the entering class at the Law School of Charles University (the University of Prague) numbered ninety students. During late Communism in the seventies and eighties this number gradually increased to 450 and later 650. The entering class in 1934, during the democratic First Republic, was five thousand (Stein 1997, p. 191). Surely not all five thousand practiced as lawyers, but these graduates composed a huge human resource for the rule of law. Today, in the Czech Republic, the number of admissions in each academic faculty is determined by the Ministry of Education on the advice of the Ministry of Labor. These bureaucrats have not been systematically replaced since 1989, and they maintain the policies of the Communist regime that were designed to prevent the emergence of a professional middle class by limiting the number of students of law, the social science, and the humanities, while encouraging vocational technical secondary education and engineering schools to promote the growth of heavy industry (Tucker 2000b).

During the Communist era, admissions to law school depended mostly on political considerations, bribes, and family connections. Within law schools most of the education consisted of lectures without discussion, questions, reading, or creative writing. The school week consisted of as much as forty hours of dictations.The students were not trained in interpretation, litigation, and rules of evidence. To graduate, the student had to pass an oral defense that

consisted at best of memorized answers. There was hardly any original research. In Czechoslovakia obtaining the title of juris doctor (Ju.Dr.) took about three months beyond the law degree, an extra "rigorous" oral exam, conducted usually at the end of the summer, when the student graduated in the spring (Tucker 2000b). The form and style of legal education have not changed radically because if there are very few properly trained lawyers, there are certainly few competent law professors, though the loosening of state control increased corruption in admissions. The only possible source of employment for a lawyer was the state. All lawyers, including judges, were educated to be quite literally servants of the state. This resulted in a high percentage of convictions in comparison with legal systems with independent judiciaries. In the Soviet Union and Czechoslovakia, respectively, only 1 percent and 15 percent of trials resulted in acquittals (Scruton 1990, p. 206). Judges were instructed to implement political oppression against the enemies of the regime, to rule "in the interest of the working class," as Lenin put it. It was nearly impossible to be a judge for any period of time without dirty hands, though it was possible for some lawyers to avoid bloodying their hands. The selection of lawyers and judges was conducive to the creation of an obedient and professionally mediocre class of lawyers. The system of laws within which the totalitarian lawyers were operating was declarative rather than normative. Lawyers and judges were trained in relying obliquely on vague laws that fitted the interests of the nomenklatura hierarchy that was identified with the working class and ignoring those that did not (Scruton 1990). It took a dissident movement that had absurd artists as its leaders to base its struggle for human rights on a decision to behave as if the state really took its own laws seriously (Tucker 2000a).

These conditions cannot disappear overnight. It is possible to replace a few of the judges who have particularly bloody hands with other lawyers, but most of the judges have maintained their employment after 1989 with nobody to replace them. Though new judges are not as personally committed to absolving those who violated human rights under communism, they are still professionally mediocre and timid in their approach to former and present hierarchical superiors. In Poland, they could not find twenty-one judges to sit on a court of transitional justice in 1997 because all Polish judges are either loyal members of the old Communist nomenklatura or politically timid (Szczerbiak 2002). The last graduates of pre-totalitarian law schools in Eastern Europe had received their degrees before the Second World War: that is, by 1989 they were beyond retirement age. Likewise, the authority of the police was limited to those below them in the hierarchy, in which the police was the least powerful of the security services. They had power to oppress those below them, ordinary citizens who could be beaten up for minor offenses such as writing graffiti or riding a tram without a ticket, or arrested and convicted on trumped-up charges without recourse to due process. The absence of a democratically trained police loyal to democratically elected bodies and the rule of law implies that the old and new elites are literally above the law in a social hierarchy.

In the post-totalitarian context political decisions about transitional justice must be made in anticipation of judicial resistance; they reflect rather than create a state of lawlessness. Conversely, the decisions of judges depend much more on their reading of the hierarchy of power in their environment than on the content of any laws.

1.2.2. Post-totalitarian governments are constrained by *time*. All post-totalitarian governments face impossible popular expectations for tangible improvements. Popular patience runs out quickly. Therefore, all post-Communist governments had to act fast on all issues including transitional justice. Individual "precise" reviews of cases of collaboration, even had there been competent judges, would have taken too long. Time constraints are conducive to a rough but fast assignment of collective guilt.

1.2.3. Restrictions on *information* about cooperation with the secret police abound. The most readily available, the cheapest to obtain, evidence for membership in and collaboration with the secret services, is found in the files of the secret police. As Elster noted (1998; cf. Schwartz 1994, Huyse 1995), these files may include phony agents who were added by secret service officials to make their quotas (as in Graham Greene's *Our Man in Havana* or John Le Carré's *The Tailor of Panama*). The files are underinclusive in not listing the most important agents, who have been working directly for the Komitet gosudarstvennoi bezopasnosti (KGB) and are in their files in Moscow. During the revolutionary events of late 1989, some vigilante groups who may or may not have been controlled by Western or Eastern security services were raiding the offices of the secret police in several East European cities to prevent the destruction of the files or to cause their destruction under the guise of preventing it. In Czechoslovakia, the files remained within the custody of the unreformed secret service until June 1990, thus giving them at least six months to "edit" the files. As many as 90 percent of the files on domestic agents were destroyed or removed, as the Czechoslovak Constitutional Court noted (Kritz 1995, Vol. 3, pp. 349–50). In Poland as many as 80 percent of the files were destroyed (Palata 1998). In Bulgaria, some files were initially released on a very selective basis by the former Communist minister of interior, before being sealed (Kritz 1995, Vol. 2, pp. 696–97). In the Baltics, the KGB moved its files to Russia before the independent governments could take charge of them. It is possible to try to reconstruct some of the files through cross-reference with surviving files, but that requires time, resources, and skills that are also restricted. Once the reformed Communists return to power, or as long as the old Communists keep it, access to the files is blocked (e.g., in Bulgaria, Hungary, and Romania). Following usual police procedures of interviewing witnesses, arresting suspects, and offering them deals to testify against each other is impossible because there are no trained and loyal policemen. The information restrictions caused lustrations laws in Bulgaria, Poland, and Lithuania to sanction more leniently or not at all confessed informers to create an incentive for confession. In cases when confessed informers receive state amnesty, as in the 1997 Polish law, the sanctioning is

left to private citizens, as when the sanction is the publication of the list of informers.

1.3. Following the French moralists and Elster (1998), I divide the *motivations* of each group into passions, interests, and reason:

1.3.1. Former perpetrators irrespective of their current position (old, reformed, or former Communists) have a personal interest in avoiding transitional justice. They enjoy the solidarity of the nomenklatura class as a whole and the old and reformed Communist Parties. The Communist nomenklatura elite has maintained complicated relations of exchange in which they use their institutional positions, their "fiefdoms," to exchange goods and services. To maintain trust during corrupt transactions, "solidarity" evolved, according to which the elite takes care of its own and conceals its internal divisions from the outside world. A traumatic experience of common bloody collaboration, sacrifice of innocents, and closing of the hard-line Communist ranks such as that in 1956 in Hungary, in 1968 in Czechoslovakia, and in 1981 in Poland, served to solidify this solidarity. Since 1989, the nomenklatura knows even better that it hangs together or is hanged separately. When the managerial nomenklatura elite faced in 1990 a common threat from the new political situation, it realized that if it remained united it could survive the changes and prosper by spontaneously appropriating the properties it managed. In the Czech Republic it manipulated the privatization process to become wealthier and more dominant than before 1989 (Veçerník 1996, pp. 10–11). The dense networks of the nomenklatura allowed it to maintain control over cartels and monopolies in a society that has hardly any civil associations to balance their power. The long-term interest of all members of the nomenklatura in continuing to participate in corrupt exchanges further explains the universal solidarity against transitional justice. By contrast, when the Argentinian authoritarian elite divided against itself around the turn of the twenty-first century, democratic forces were able to use divisions within the military to institute far-ranging measures of transitional justice.

Under late Communism, rapacious greed was contained by several factors that disappeared with its collapse: the nomenklatura refrained from causing the total collapse of the system by excessive corruption; the amounts of embezzlement and theft were limited by the hierarchy that did not allow subordinates to steal more than superiors and by envy among peers in the hierarchy. It was difficult for members of the nomenklatura to steal and spend without the knowledge of their superiors. The Cold War made it difficult, though not impossible, to embezzle and deposit the proceeds in offshore and Western banks. The supply of commodities and services that could be bought by any amount of local currency in Communist countries was limited. All these controls disappeared in 1989, and new legal controls were not enforced because there are no independent and competent police and judges.Consequently the nomenklatura has since 1989 been stealing anything that can be moved. Some of the measures

that were presented as transitional justice were actually crude attempts to limit the nomenklatura's access to hard currency.

When a faction of the nomenklatura gained power in 1989 in the absence of any alternative elites, as in the southern post-Communist countries, it had an interest in applying transitional justice selectively to competing Communist elites, to use the former leaders as scapegoats for public anger at the regime (Kritz 1995, Vol. 2, pp. 706–13).

1.3.2. Some former dissidents with a lenient attitude to transitional justice base their conviction on a theoretical understanding of irresponsibility in totalitarian societies:

> The previous regime . . . made talented people who were capable of managing their own affairs . . . into cogs in some kind of monstrous, ramshackle, smelly machine whose purpose no one can understand. It can do nothing more than slowly but surely wear itself down, along with all the cogs in it. (Havel 1990)

The mechanization of the person led to loss of moral responsibility, as Havel had already analyzed in 1978 in *The Power of the Powerless* (Havel 1985; cf. Tucker 2000a, pp. 135–69). Alienation implies irresponsibility as well as the absence of guilt. As Havel put it at the outset of the transition process:

> When I talk about a decayed moral environment . . . I mean all of us, because all of us have become accustomed to the totalitarian system, accepted it as an inalterable fact and thereby kept it running. In other words, all of us are responsible, each to a different degree, for keeping the totalitarian machine running. None of us is merely a victim of it, because all of us helped to create it together.
>
> . . . We cannot lay all the blame on those who ruled us before, not only because this would not be true but also because it would detract from the responsibility each of us now faces – the responsibility to act on our own initiative. (Havel 1990)

As Nino (1996, pp. ix–x, 124, 166–70) analyzed, the greater the diffusion of responsibility for evil, the more difficult it is politically to implement transitional justice. Rupnik (2002) suggested that the Czech law that criminalized the Communist Party had in fact an adverse effect on transitional justice in a country where the Communist Party had 6 million different members between 1948 and 1989. The practical implication of Havel's analysis that was accepted by former Communist dissidents such as Adam Michnik in Poland is that those who cooperated with the Communist authorities should not be held responsible for their actions. Still, as Rupnik (2002) noted, by August 1990, Havel called for the removal of "incompetent and sabotaging nomenklatura."

1.3.3. Former dissidents and denizens of "the gray zone" who supported transitional justice listed the following reasons:

1. Retribution is just. Evil should be punished.

2. The success of democratic transition requires the replacement of those members of the elite who are likely to pose the greatest threat to reform and decent functioning of state institutions, that is, the higher echelons of the nomenklatura and the secret police. Before the ultimate collapse of the

Soviet Union itself, there were reasonable fears of a return of the status quo ante. After the Velvet Revolution the Czechoslovak State Security (StB in Czech acronym) instructed its agents to attempt to penetrate the institutions of government and the media by manipulating their existing networks to prepare a counterrevolution (Kritz 1995, Vol. 3, p. 349, Huyse 1995). Soviet troops were still stationed in Eastern Europe during the first years of transition and successful negotiations with the Soviets over the pullout of their troops could have been compromised by informers. The August 1991 coup in the Soviet Union substantiated such fears and gave the final shove for lustration in Czechoslovakia.

In the absence of a law-enforcing and competent police force, a rough measure for crime prevention could masquerade as transitional justice. Considering the absence of effective controls, removing or prohibiting the nomenklatura from occupying positions that allow them access to movable or liquid assets is a method for preventing massive theft. For example, the Bulgarian parliament attempted to prohibit former members of the nomenklatura and secret police from holding responsible positions in the banking industry. This measure was overturned by the Bulgarian Supreme Court (Kritz 1995, Vol. 3, pp. 293–95). Consequently, the Bulgarian banking and credit system collapsed. Much of the motivation in Hungary and Czechoslovakia and later in Lithuania and Poland for lustration was the vain hope that the former nomenklatura would be prevented from stealing the economy if excluded from certain state positions, after it had shown its true interests and abilities in the first stage of economic transition.

3. Politicians and commentators held that establishing popular confidence and trust in state institutions necessitates the purge and punishment of officials who worked previously against the citizens. Former agents are susceptible to blackmail by their former handlers, who can use their past to extract political or personal favors. As Williams and associates (2003) noted, the first lustration measures were proposed after exposures of the shady past of some members of parliaments and other government officials were aired in the media. Likewise, the discovery in December 1995 that the Polish prime minister Olesky was a KGB spy pushed for lustration there (Szczerbiak 2002).

1.3.4. The interest of new politicians and some former dissidents who did not become members of the new elite after 1989 is to create as many vacancies as possible within the existing elite for whatever reason, as well as to penetrate the glass wall of solidarity that the old nomenklatura erect to preserve their monopoly on power and resources including managerial jobs, state subsidies, and bank credit.

In the framework of political competition, political parties have an interest in associating their opponents with the former secret police. Rupnik (2002) and Williams and colleagues (2003) suggested that lustration has been a defining issue for right-wing parties to distinguish themselves from their opponents to the Left, from the Communist past, and, in the Czech case, from the Slovaks. This

is particularly significant in my opinion in political contexts in which cynical electorates suspect all ideologies, and the transition policies of the main governing parties are indistinguishable. In Romania, where the files have remained the property of the secret services, names of collaborating politicians were leaked to their opponents (Buruita 1998). In Hungary, a screening law was passed only in 1994, two months before the elections. There is a close association of the dates when lustration/screening bills were presented to parliaments and looming elections. Williams and coworkers (2003) counted ten cyclical attempts at lustration in Hungary and several cycles in Poland. When post-Communist parties returned to power in these countries, they did not always abolish lustration altogether but at times attempted to limit its scope, so these cycles are of expansion and contraction of scope. For example, the post-Communist Hungarian government limited the scope of lustration in 1996 to five hundred to one thousand positions, while the 2000 right-wing government expanded it to seven thousand to eight thousand. The Czech and Slovak Republics and East Germany were the only countries to escape this cycle, the first two because their Communist parties, shaped by the 1968 Soviet invasion, were unable to reform themselves, the last after Unification with East Germany.

Still, if most parties use such "negative campaigning," they may all lose by convincing the voters that the whole new political class is a covert extension of the old elite. The original lustration efforts in Czechoslovakia assumed that confronted with their past, parliamentarians who had collaborated would quietly resign. They did not expect that ten of them would deny the accusations and hang on. To avert such a reaction, non-Communist parties have an interest in referring the matter to an ultimate authority to end mutual recrimination.

1.3.5. Passion for revenge has often been attributed to former dissidents and other victims (e.g., Schwartz 1994). Nino (1996, pp. 121–24) suggested that the degree of passion for vengeance can be influenced by the intensity of the injustice, the number of victims, and the time elapsed since the original injustice. The severity and extent of injustices varied radically between the revolutionary fifties and late Communism, when the number of people who were jailed and tortured for their politics was much smaller (with the exception of the semisultanate Romania and Albania) and the usual sanctions consisted of discrimination in employment, housing, and education. Consequently, the older generation of victims may have a stronger tendency to demand revenge than the younger generation, despite the elapsed time. Since the social mobility of non-Communists was "frozen," unless rehabilitated and readmitted to the Communist party, the older generation of victims had not had the chance to improve their life once the extreme oppression of the fifties was lifted unless they emigrated. Now, they are too old to recover their life. Revenge in this sense would imply trials rather than noncriminal lustrations, since lustration does not affect people who are past retirement age anyway. Schwartz (1994) missed this point.

Some dissidents have improved their life considerably since 1989, as a new political and media elite. Others remain on the margins of society. The first does not sense the effects of past injustices though emotional scars may persist. Their sacrifices have been rewarded since 1989. Victory leads to magnanimity. Other former dissidents feel that the revolutions of 1989 were a great carnival, since which their circumstances have remained pretty much as they used to be because they still feel the effects of past economic and educational discrimination and the continuous domination of the nomenklatura elite. Elster (1998) and Rupnik (2002) suggested that the desire for revenge accords with the degree of desire for denial of cooperation with the regime. Rupnik explains the earlier and more extensive Czech (and East German) lustration in comparison with the Hungarian and Polish versions by the greater passivity and collaboration of the first two societies in comparison with the latter two.

1.3.6. According to opinion polls, between a half and three-quarters of Poles, about a half of the Hungarian population, and 80 percent of Czechs supported some kind of lustration (Williams et al. 2003). The following speculations seem plausible: The Communist regime encouraged egalitarian envy as a method of social control. Since 1989 that same envy is turned against those who encouraged it in the first place, those members of the nomenklatura who do well economically. The nomenklatura of course had already done relatively well for itself during the totalitarian era, but its wealth then was hidden and suspected rather than conspicuous. The political revolutions raised expectations of some people for a social revolution and personal mobility. When these hopes were dashed, when the gap between the nomenklatura and ordinary people conspicuously widened rather than contracted, pressure for political measures to achieve the elusive social revolution arose.

Totalitarian society was ruled by fear of the state, of the secret police, of the knock on the door at 4:00 a.m., of the informer, of the phone call to one's employer that can end one's career and one's children's chances for higher education. The fear does not subside immediately after the change of regime. Many ordinary people, including new judges and police, do not want to deal with the former Communists because they are afraid that those "mafias" may hurt them. Other people may want to deal with their fear by humiliating its source. Still, I think that these two passions are much weaker in comparison with ordinary people's immediate struggles to survive in the context of economic transitions. The survival skills they acquired over half a century of totalitarianism teach them to avoid political involvement, especially in the quarrels among elites. Once the economic transition and restructuring begin in earnest, all other issues become secondary for ordinary people (Holmes 1994). Demands for transitional justice reemerged only when it became clear that the old nomenklatura further impoverished the population through theft and asset stripping in the process of privatization.

Some Western commentators ascribed revenge passions to post-Communist societies. I beg to differ. At least among the northern post-Communists, there has not been a culture of vendetta. The cynical approach to revenge as

exemplified in Kundera's *The Joke* is typical. Communism did its best to destroy traditions, historical identities, and memories. It left behind amnesic societies.

1.4. *Beliefs*

1.4.1. Politicians, legislators, uninformed economists, and ordinary people were affected in their decisions on transitional justice by their belief that some members of the nomenklatura and their collaborators acquired through their elite positions technical, managerial, and administrative skills that are in short supply. The nomenklatura encouraged this belief to preserve their position (Schwartz 1994, Huyse 1995). Post-Communist economies require managers who know how to compete in a global market, innovate, be entrepreneurial, and create new jobs. This process requires encouraging innovation, modernization, restructuring, downsizing, finding of niches in the global market through market research, introduction of better marketing methods, and more, the sorts of processes people study in business school. Communist managers controlled monopolies. Except for a handful of companies that competed in the global market before 1989, such as weapons exporters, most firms and their managers are accustomed to monopoly conditions. Success in a monopoly economy required political rather than economic skills, lobbying for protection and subsidies. "Red" managers are experienced in embezzling subsidies and asking for more in return for kickbacks. Government officials were appointed on the basis of loyalty rather than skills. University professors were often politically loyal but rarely competent, so university diplomas do not indicate skills. In sum, the standard of living in Communist countries reflected a politically skewed assignment of employment. Nevertheless the belief in the technical competence of the nomenklatura affected decisions by supporting an argument for leniency to prevent damaging the functioning of the economy and the state.

1.4.2. Western visitors constructed unfounded beliefs that reflected their own world rather than post-totalitarian reality. They failed to recognize the institutional legacy of totalitarianism, the absence of rule of law and law-abiding bureaucracy. They projected Western concepts on an alien social reality. For example, a Western context "communism" is an ideology and "Communists" are a group of people united by convictions who join a political party. In Eastern Europe the first means a power hierarchy and the second opportunists. People Rupnik (2002) called somewhat stereotypically "New York human rights and media circles" promulgated myths about widespread "McCarthyist witch hunts (Weschler 1992). This "preposterous" (Rupnik 2002) myth reappears in the most bizarre places: In the context of opposing the purging of Baathist officials from the Iraqi government by the U.S. occupation forces, Ian Buruma (2003) stated, "After the Velvet Revolution in Czechoslovakia, the new government suspected that the Parliament was filled with informers and other agents of the old regime, and decided to purge officials from public life on the basis of their secret police files. And so old dissidents set upon other old dissidents; political scores were settled; files were abused and misinterpreted; and innocent lives were ruined. This, as most Czechs later acknowledged, was

not the way to go." Opinion polls actually put the popularity of lustration in the Czech Republic at 80 percent, lustration was extended indefinitely by parliament in 2000, only a handful of former dissidents were actually lustrated, judicial review was available in all cases after the ruling of the Constitutional Court in 1992, so no lustration was based exclusively on the files, and the initiative for lustration originated in parliament rather than in the government. *The New York Times* fact checkers must have been on vacation. Yet, this is quite representative of the broad baseless myths that continue to circulate among people who judge before ascertaining the facts.

1.5. *Aggregation*: The nomenklatura, the successful former dissident elite, and Western academics tend to object to transitional justice measures. The unsuccessful former dissidents and the new formerly "gray" political elite support transitional justice (cf. Elster 1998, pp. 44–45). Society remains mostly passively disinterested, until it becomes clear that the nomenklatura stole the economy. Decommunization is a struggle between elites (Holmes 1994): new non-Communist politicians and unsuccessful dissidents against the nomenklatura, the reformed Communist political parties, the government bureaucracy, the police, the military, the secret police, the judiciary, and the managers of the economy.

II. DEPENDENT VARIABLES

II.1. The decision whether to engage in transitional justice depended largely on the balance of political power between the post-Communist and non-Communist political elites. Parliamentary coalitions that had a non-Communist majority tended to support some kind of transitional justice, as in Višegrad (Czechoslovakia, Hungary, and Poland) and the Baltics. The economic hardships of transition caused, except in Czechoslovakia, a resurgence of reformed Communist Parties in the second post-Communist elections. This resulted in effective blocking of transitional justice measures. The corruption, cronyism, and incompetence of the reformed Communist Parties, as well as their acceleration rather than halting of the painful economic transition, led to their defeat in the third post-totalitarian elections, and in Poland and Lithuania to new attempts to enact transitional justice. As Letki (2002) claimed, transitional justice in Poland was not retroactive, but about the future. The theories that connect the degree of nastiness of the totalitarian regime and its level of resistance of transition with demands for transitional justice predict correctly the initial absence of transitional justice in Poland and Hungary in comparison with Czechoslovakia and East Germany. However, the popularity of lustration in Poland rose from 57 percent in 1994 to 76 percent in 1997 when lustration was enacted. By contrast, 73 percent of East Germans supported lustration in 1990, but only 48 percent supported it in 1994. The explanation is that people in a transitional situation care about their future, mostly their economic future. Once the economic woes of transition take over, they forget about the past.

However, when it becomes clear that at the very least the nomenklatura does not suffer from economic transition and at worst steals and makes it worse for everybody else, ordinary people seek to stop them somehow. In the absence of the rule of law, the past of the thieves is a useful criterion for separating them from control of liquid funds. By contrast, in the former East Germany, the new elites had been imported from West Germany; consequently the nomenklatura has not prospered and so has not given rise to resentment.

Among the post-Soviet and Southern European post-Communist states where 1989 resulted only in a reshuffling of the Communist elite, there was hardly any attempt to enact transitional justice. Instead, leaders of competing Communist factions, for example, in Albania, were prosecuted.

11.2. Four groups of perpetrators were identified as targets for transitional justice, two according to individual-criminal, and two according to collective noncriminal criteria.

11.2.1. The topmost rung on the totalitarian hierarchy was sometimes individually prosecuted, for example, the last dictators of Romania, Albania, and Bulgaria and their immediate circle of cronies. In Albania, this form of "transitional justice" resembled old-style Communist purges of members of rival elites and their families. Attempts to prosecute the leaders of the Czechoslovak Communist Party who invited the Soviets to invade their country and coordinated the invasion with them at the Soviet Embassy in Prague in 1968 were blocked by Czech judges.

11.2.2. Particularly heinous torturers and murderers were rarely sued before a criminal court. Even more rarely victims sued for civil damages.

11.2.3. A section of the nomenklatura may become the target of some kinds of purges. It is usually identified through membership in institutional entities that "shadowed" the facade or front public institutions. They may correspond with the higher echelons of the Communist Party proper, its paramilitary forces, its training personnel, and affiliated pseudocivil organizations. Within this definition the scope can vary from country to country. Radical proposals to criminalize the Communist Party were rejected everywhere because too many people would have been criminalized for nothing more than wanting to get a better job. In each country a slightly different definition of the relevant nomenklatura elite to be purged was put forward, based on bureaucratic definitions of managerial status.

11.2.4. When laws target the employees of the secret police and their agents, they use the bureaucratic criteria that were used by the secret police itself. In the typical Czechoslovak case there were four categories:

A. *Residents* were career officers of the secret police who handled networks or fulfilled other functions in state security. Establishing their identity is easy because since their security job was their principal employment, and there are plenty of records of their employment in government offices – they receive state benefits such as pensions according to their rank. Since

they handled many cases in their professional life, there would have been no shortage of witnesses, had the police had the resources and incentives to interview them.

B. *Collaborators* were secret informers of residents. Collaborators usually signed a Faustian contract formalizing their relations with the secret police, chose a cover name, and received financial or other remunerative benefits for their services such as the right to travel abroad, promotions, and coupons for buying imported products.

C. *Candidates* were considered by the secret police to become full collaborators. Some candidates were just collaborators on a trial period; others did not know the identity of the resident who was debriefing them; in still other cases, they knew the identity of the resident but refused to collaborate and were filed away.

D. *Confidants* or *contacts* were either part-time collaborators or people who at one-time provided information to a resident or a collaborator innocently, not realizing with whom they were dealing.

The evidence about the last three categories is open to dispute. This secret police classification does not correspond with the motivations of the informers: Some were wicked, wishing to cause harm to people they envied; a few were ideological fanatics; many others were ruthlessly opportunistic, willing to harm friends to advance themselves; others had a weak character, were unable to resist the temptations of collaboration despite knowing better; others were cowards who could be easily intimidated into submission by threats; and still others made only a formal compromise with the regime by agreeing to provide it with information they knew the regime already had, or was useless to it, while not betraying in practice any moral code. The categories of candidate and confidant did not distinguish between consent to inform and innocent indiscretion.

II.3. Four types of sanctions against the perpetrators described were suggested.

II.3.1. Individual *criminal* trials of Communist leaders or torturers may result in criminal sanctions such as imprisonment and fines. Since the worst Communist atrocities were committed during the early revolutionary phase, these crimes were in many cases beyond the statute of limitations, leading to attempts to extend it for certain types of crimes or to redefine the crimes as crimes against humanity that have no limitations. Criminal trials require the cooperation of judges, which is rare. Except in countries such as Albania in which the judiciary is still an arm of the government of the day, judges protect fellow members of the nomenklatura or are reluctant to become involved in struggles between political elites, so trials rarely result in convictions or punishments. A few were attempted with little success, facing judicial resistance in Hungary, Czechoslovakia, Lithuania, and Poland (Teitel 2000).

II.3.2. People who fall under the collective definitions (II.2.3 and II.2.4) can suffer three types of sanctions. First and most severe, they can be barred for a period of time from holding certain kinds of high office or working in certain

managerial positions in various sectors of public life, the economy, politics, government service, banking, education, or the mass media.

II.3.3. The government may publish or leak a list of secret police officers and informers. Once the list is in the public domain, individual citizens may decide to "excommunicate" those whose names are listed. This course was taken in Czechoslovakia (see www.cibulka.cz) especially, when it became clear that the courts would annul any lustration. In Hungary, the 1994 law stipulated exposure as the only sanction, expecting in vain that such politicians and officials would resign to avoid public shame (Williams et al. 2003). In other countries, partial lists were published, usually to smear political opponents. This measure is not very effective, considering that nonpolitical elites are usually of the former nomenklatura. This measure is effective only against center-Right politicians who may lose elections consequently. In view of decommunization, this measure is overinclusive because it may hurt most the few former dissidents who are mentioned in the files whether or not they were conscious collaborators and would indeed lose many of their friends (Škvorecký 2001).

II.3.4. The government may make available personal secret police files to their subjects, so they know who informed on them. In Poland, names of informers were blocked in the files copied for their subjects. In other countries, they appear under their secret cover name. Either way, the subjects of the files can guess with high reliability the identities of sources that appear more than once in their file.

II.4. The implementation of the last two sanctions (leaking names and granting access to files) is the easiest because it does not require the cooperation of the judicial and executive branches of government. Publishing the names requires only physical control of the files by the new political elite. Allowing access to the files requires in addition only a small budget and personnel to operate such archives.

II.4.1. In Czechoslovakia, it is possible to distinguish three stages in the process of lustration. The initial mood in the country in the first half year after the Velvet Revolution was euphoric. The government was composed of unelected former dissidents and Communists. During the euphoric months there was no interest in retribution: Havel appointed the secret policemen who were in charge of following him as his new bodyguards. After the first elections in June 1990, the economic problems associated with transition surfaced and the euphoria evaporated. The economic gap between the population and the nomenklatura became apparent, and the old fears of the nomenklatura reemerged with the Communists out of political power. The Czechoslovak federal parliament adopted in early 1991 a resolution to appoint a committee to investigate the files of the Communist secret service (StB) to find whether any of the members of parliament and the higher echelons of the executive branches collaborated. Fourteen members of the federal government and sixty other officials were declared former residents or informers of the secret police. They were given the choice between resignation and public exposure. The parliament acted

as investigator and judge, and the media acted as the enforcement branch of the executive branch. These untraditional roles of parliament and media were repeated in other post-Communist countries.

The Czechoslovak lustration law of October 4, 1991, was intended to purge all the social elites, in the legislative, executive, and judiciary branches of government; in the military, police, and security services; the state media, state industry, and banking; the Academy of Science; and higher education. The designated lustrated class comprised members of the elite of the Communist Party; StB residents (full-time career employees of the secret police) and all categories of informers; members of the "people's militia," the paramilitary force of the Communist Party; and students and teachers at secret police or terrorism schools. The original law contained waiver clauses. The ministers of defense and interior and the heads of the new (secret) Information Service and police were allowed to sign waivers for individuals lustrated in "the state interest" to fulfill the need of the state to use the rare professional specialties and technical skills of the lustrated. The enforcement of this law was assigned to an independent commission under the auspices of the Ministry of Interior, approved by the Federal Assembly. Two members were appointed by the minister of interior from among his staff, one by the director of the Federal Security Information Service, one by the minister of defense, and six by the Czech and Slovak National Assemblies.

Each employee or prospective employee who wished to hold a position in the higher echelons specified was required to ask for a certificate of negative lustration that would be presented to an employer or a responsible superior, or, in the case of elected officials, to an organ of parliament. In case of positive lustration, the persons concerned were to be informed of all the evidence against them. Evidence given to the commission was subjected to the normal rules of criminal evidence, the obligation to appear, the right to refuse to denounce, and so on. The commission was designated as a first court of appeal against positive lustration. Above the commission, there was a right to appeal to district courts. The lustration and the reasons and evidence for it were designated as confidential. Outside government, managers of media organizations and heads of political parties have been allowed to request the lustration of their employees/members (Kritz 1995, Vol. 3, pp. 312–21). This original lustration law replaced the judges with this commission. Enforcement was assigned to bureaucratic superiors who might or might not require the people who work under them to be lustrated. If the lustration was positive, they could demand their resignation or ignore the lustration verdict and allow the employment of the lustrated to continue.

Since the victory of national separatists in the June 1992 elections in Slovakia, lustration has never been implemented there. On November 26, 1992, the Federal Constitutional Court abolished the lustration of candidates and confidants because it was impossible to evaluate whether they were conscious of their relations with the secret police on the basis of the files, and the Interior Ministry Commission did not have the time or staff to review all the appeals by former

candidates and confidants. The court further abolished the option of issuing waivers to the lustration verdict "in the interest of the state" because it did not observe the separation of the executive from the judicial branches of government. As a result of the court ruling, previous lustrations of candidates and confidants were annulled. No new waivers were issued, but waivers that were issued during the preceding year were respected. The commission was abolished. Instead, a Bureau for the Investigation of the Crimes of Communism was established in Prague in the former headquarters of the Communist secret police, headed by Václav Benda, a former Charter 77 dissident and political prisoner.

Czech lustration was designed to bypass the noncooperative judiciary and police, at the price of adopting rough collective guilt. Still, the lustration law did not provide a mechanism for its enforcement and implementation. The enforcement of lustration depends on the actions of bureaucratic superiors of lustrated persons, who should first demand the lustration and then act on it. If they ignore the law, they suffer no sanctions against them. Since with the exception of the president and government ministers, most bureaucratic superiors have been members of the old nomenklatura, they have had a strong interest to do absolutely nothing about lustration and risk no sanction. Consequently, the Czech lustration law has been a declarative torso without normative legs.

Other factors diminished further the significance of the lustration law:

1. By 1992 most of Czech state industry was de jure privatized, that is, de jure beyond the scope of lustration.
2. By 1992, salaries in the growing private sector led state employees, including lustrated ones who had dense social networks, to resign voluntarily from the public sector to find a better job elsewhere.
3. Though the Supreme Court abolished the right of ministers to grant waivers to people who were lustrated, the waivers that were issued during the year when they were legal remained valid.
4. The law granted to people who were lustrated the right to appeal to ordinary courts. Usually, courts annulled positive lustrations.

Consequently the number of Czechs who actually lost their job because of lustration is estimated at a few hundred (Holmes 1994). The non-Communist political parties were indeed thoroughly lustrated, because they feared that their political opponents would make political capital of lustration scandals. The competing political parties acted mutually as agents of enforcement. Consequently about 5 percent of the members of parliament were forced to resign. Few of the highest bureaucrats who were working directly under the president, the prime minister, or the ministers were lustrated early on. This is the actual extent of the enforcement of the law of lustration in the Czech Republic. Over the years, this effect diminishes further as lustrated persons retire and leave the workforce, and no new lustrated persons enter it. Some former officers of the Communist secret police found their way back to politics through the back

door as informal or partly political advisers to major politicians such as Social Democratic former prime ministers Zeman and Gross.

The Bureau for Investigating the Crimes of Communism had the files of the secret police, but no power to arrest or interrogate. Its attempts to prosecute for violations of the lustration law were uniformly blocked by the courts. The only type of enforcement that was left was public exposure. Various long lists amounting to seventy-seven thousand names in all four categories, were leaked to the Czech press, Individual leaks were occasionally successful in mobilizing the media and politicians to pressure bureaucratic superiors to implement the law. Otherwise the Bureau for Investigating the Crimes of Communism has been quite impotent in facing the united nomenklatura.

The issues raised so far can be illustrated by the celebrated case of Jan Kavan. Kavan was lustrated when he was a member of parliament for the Social Democratic Party. From February 1969 to July 1970, while a student leader in the United Kingdom, Kavan provided information about his fellow Czechoslovak students to a Czechoslovak spy who worked at the Czechoslovak embassy in London. Kavan had the code name "Kato." Kavan has claimed that he did not know that the Czechoslovak diplomat he was talking with was a spy and that he did not provide him with any valuable or damaging information. According to Kavan's detractors, the file indicates clearly that Kavan was a conscious secret police informer. Still, nobody stepped forward to claim that Kavan had informed on such and such and therefore that person suffered so and so.

After being lustrated and dismissed from parliament in 1991, Kavan sued the Ministry of Interior. A ministry committee convicted him of being a confidant of the secret police. This category of collaboration was abolished in 1992 by court order and with it his lustration. In 1994 the court of the Seventh District of Prague concluded that Kavan was an unconscious informer. This conclusion was affirmed in 1996 by the Prague district court against the opinion of the head of the post-1989 secret police, the former dissident Stanislav Deváty, who claimed that Kavan would have had to be incredibly naive not to realize that his London conversations were being reported back in Prague. The court ruling in 1996 allowed Kavan to run successfully for elections to the Czech Senate. In 1998, when new Social Democrat prime minister, Miloš Zeman, announced his intention to appoint Kavan as his foreign minister, the largest private, right-wing-oriented TV network, TV Nova, and the pluralist daily newspaper *Mladá Fronta* published the materials on Kavan's alleged collaboration. In addition *Mladá Fronta* based its report on a TV Themes broadcast from the eighties that claimed that Kavan was acting against Czech dissidents and exiles. *Mladá Fronta* gilded the lily by claiming that Kavan is a persona non grata in the United Kingdom. Kavan sued again for libel and lost on all counts except on the persona non grata issue, when the British foreign minister, Robin Cook, made a deposition on his behalf (Drda 1998). When Kavan was first lustrated, President Havel publicly displayed friendship toward Kavan by having lunch with him in a popular restaurant. In 1998, President Havel asked Zeman not to

appoint Kavan as foreign minister because of his background. Zeman refused Havel's request.

I do not think that anybody cared about what Kavan did or did not do in 1969–70. At worst, Kavan committed then a victimless crime. The large majority of dissidents distrusted Kavan and were angry at him because of an incident he was involved with in 1981. Kavan, who remained in Britain after his graduation, founded an independent publishing house that published books and magazines that concerned East Central Europe. Kavan was also involved in various initiatives to publish in the West information and literature from East Central Europe and in attempts to create favorable public opinion toward East European dissidents. Kavan organized a massive smuggling operation of forbidden printed materials to Czechoslovakia. In 1981 Kavan was arrested by Czechoslovak border police while attempting to smuggle into Czechoslovakia forbidden printed materials in a van. In addition to the illicit books, Kavan's van contained preprinted mailing labels of the addressees of these illicit materials mixed with addresses chosen at random from the Prague phone book. The Czechoslovak secret police did not find it particularly challenging to separate the dissident networks from those names that were chosen at random from the phone book. As a British citizen, Kavan was released immediately. But the mailing list provided the secret police with information for a wave of oppression. Czechoslovak state television broadcasted the names as the first item on its nightly news. People on Kavan's list lost their job the next day. The choice of taking a mailing list with him from London is strange, to say the least. Former dissidents I talked with told me that they concluded that he was either a Communist agent or a fool, so either way they ceased to provide him with any potentially sensitive information, though some public dissidents (e.g., Havel) kept using him as a channel for distributing nonconfidential materials in the West. Kavan lost his friends not as a result of a victimless crime, but as a result of a victim-full folly.

While foreign minister, Kavan appointed Karel Srba, a Communist-era officer of Military Intelligence (not to be confused with the secret police), to lead anticorruption efforts in his ministry. Then, the daily *Mladá Fronta* published an article exposing corruption in the Czech foreign office: A building owned by the Czech Foreign Office in Moscow was spontaneously privatized by Kavan. In response, Srba hired a petty criminal nicknamed Citron (Lemon) to assassinate the journalist who exposed the affair. Citron, however, had his own code of professional ethics: He is a thief and not a murderer. He went to the police and the media, thereby becoming a minor celebrity. The Czechs were shocked. Czechs are quite tolerant of financial corruption, but they abhor violence. Unlike in Russia, there are no political assassinations in the Czech Republic, and journalists can criticize the government without being afraid of retaliation. Srba was arrested and sentenced to jail for attempted murder and Kavan became a serious embarrassment to the Social Democratic Party. Since he was not incriminated by his employee, who took the blame upon himself, there was no proof that Kavan was a criminal, and the police of course do not prosecute politicians

who merely steal. Still, it was widely believed that the contract for the journalist was ordered by Kavan, probably on instructions from Moscow, because corrupt Czech politicians do not need to kill journalists – they can safely ignore them – and Srba had no reason of his own to put a contract on the journalist. This was further embarrassing after it was divulged that the Serbians received the list of targets for American bombings during the Yugoslavia war from Czech North Atlantic Treaty Organization (NATO) officers who worked for the successor agency to the KGB. So, the Social Democrats got rid of Kavan, who also lost his Senate seat in the elections, by promoting him to work outside Europe at the Secretariat of the United Nations in New York. Kavan's successor as foreign minister claimed that confidential files "disappeared" under Kavan while he was in power and barred Kavan from access to any confidential materials in the future.

The extent of transitional justice in other post-Communist countries was more limited than in the Czech Republic. In Poland, no lustration took place initially, though various lists were circulating for political reasons, and informally, some of the employees of the prosecutor's office and judges had been dismissed already in 1990 (Szczerbiak 2002). In 1997, as elections loomed near and the corruption, patronage, and so on, of the ruling reformed Communists made it plausible that they would lose the elections, the right-wing opposition presented a bill of lustration according to which the officials who fill positions in the highest echelons of all three branches of government and the state media would be required to declare in a deposition that they have not been agents of the Polish Communist or any other foreign secret service (KGB). If they confess that they were agents, they may keep their job. If they lie, they are barred from them for ten years. A special court was supposed to enforce the law. Victims would have access to their files according to the law. The bill was initially threatened by a veto from the reformed Communist president, Kwashniewski. Instead of opposing the law, he suggested that the law would be enforced by ordinary courts (i.e., by the nomenklatura) and that the files would be open on demand to all: That is, any person would be able to read the intimate details that the secret police recorded on the lives of their victims. This last implausible proposal was designed to make the bill unacceptable. No judges could be found to serve on the special courts. In 1998, parliament revised the bill and appointed the Warsaw district court to enforce the law. It allowed itself to enact parliamentary denunciations and extended the scope of the law to include barristers in private practice as well.

Since Hungary was the most "cheerful barracks" in the Communist camp, as the regime in its last two decades was the most liberal in Eastern Europe, there was no revolution, but a smooth transition. Interest in transitional justice arose first in relation to the harsh oppression that accompanied the suppression of the 1956 uprising. These attempts ran into unsurpassable obstacles as a result of the statute of limitations. The Hungarian parliament got around to enacting an extensive Czech-style screening law only two months before the 1994 election that resulted in the return of the reformed Communists to

power (Kritz 1995, Vol. 3, pp. 418–25). Consequently the law was hardly effective.

In Lithuania there was an attempt to lustrate political representatives at the brief period of non-Communist rule before the return of the Communists to power after a year of independence. As elsewhere, the legislators attempted to bypass the courts by establishing a parliamentary committee to review members of parliament. Lithuanian lustration allowed for judiciary review. The unique element in the Lithuanian lustration was that "convicted" members of parliament would not be dismissed, but be subjected to an immediate by-election. A later lustration law broadened the category of lustration also to higher government positions and demanded the resignation of members of parliament (Kritz 1995, Vol. 2, pp. 766–69, Vol. 3, pp. 427–31). After the return of Communists to power, there had been no transitional justice in Lithuania. The return of a non-Communist majority in the third post-Communist elections led to attempts by the parliamentary majority to enact in 1998 Czech-style lustration, facing obstructions from the reformed Communist president, Adamkus.

In Bulgaria, lustration took place only in the academy. Attempts to introduce lustration into other spheres of the economy and public institutions were foiled by the Supreme Court. The government attempted to enforce this academic lustration law against the academic nomenklatura by connecting the financing of state universities and academic salaries to compliance with this law (Kritz 1995, Vol. 3, pp. 296–99, Vol. 2, pp. 703–5). Bulgarian academics told me that the law resulted in the demotion of a few rectors and deans of faculties. Otherwise, lustrated academics merely moved horizontally to other academic institutions.

III. THE RESULTS

Czech lustration was the most radical in the former Soviet bloc, with the exception of that in East Germany; 400,000 persons (4 percent of the population) were subjected to lustration vetting, of whom 3 percent were found to have been a resident or a collaborator (Williams et al. 2003). Some, like the former dissident and minister of justice Jiří Ruml, hold that the courts' actions rendered the law ineffective, by granting the large majority of appeal requests to annul positive verdicts of lustration. The constitutional court judge Prochazka said that lustration was effective in declaring strongly the social disapproval of collaboration. He excused the counterlustration actions of the courts by explaining that the destruction of incriminating materials by the secret police did not leave sufficient evidence in many cases. The former chairman of the Supreme Court, Otakar Motejl, said that lustration was "useful but unsuccessful." It was useful in creating public discussion of collaboration and in encouraging many people to leave public administration who might have remained there otherwise. Lustration was unsuccessful because many of those who left public administration received much better-paid jobs in the "private" sector and form the new/old rich. The court system tended to favor the lustrated. As the

vice-chairman of the Czech Supreme Court put it, "The lustrated were thrown out of the door, but some came back through the window" (Ivh and Dub 1998).

I doubt that transitional justice legislation had any considerable effect on the end result of the Czech, or for that matter any other, transition. In the Czech Republic (unlike elsewhere in Eastern Europe), political lustration was redundant. After the Velvet Revolution, the political elite was replaced. Whether or not 5 percent of the Czech parliament was composed of former collaborators would not have affected in any way the political results of the revolution.

The grave damage that has been inflicted on East Central European societies by the former secret police and the nomenklatura since 1989 is economic and moral. Again, the Czech Republic is representative in this respect, though the details of financial corruption varied somewhat from country to country: The lustration laws were not designed to control the private sector. Since most of Czech industry became de jure though not de facto privatized (the Czech government continued to control most of the market through the state-owned banks and subsidies in the form of bad loans), there were no legal limitations on the involvement of the nomenklatura and former secret police in the economy, as elsewhere in Eastern Europe. Consequently, the moral, social, and political devastation that these people inflicted on their fellow nationals was followed by economic devastation. The theft, "tunneling," and embezzlement of what was left of the national economies after 1989, the corruption of the new political elite, had much to do with the economic and consequently political power of the old nomenklatura elite (Tucker 2000a, pp. 209–41).

> Managers of the former state enterprises and members of the political nomenklatura became direct legal owners or co-owners (through ownership of a majority packet of shares) of existing or newly-created firms. To this end, they used – in active terms – huge "social capital" (good contacts and access to important information about people and firms, the ability to manipulate people) and abused – in passive terms – the fact that most people were inexperienced in economic and financial affairs and too dispersed to challenge them. (Veçerník 1996, p. 164)

Havel summed up the Czech transition in his December 9, 1997, address to parliament:

> Many believe that – democracy or no democracy – power is again in the hands of untrustworthy figures whose primary concern is their personal advancement instead of the interests of the people. Many are convinced that honest business people fare badly while fraudulent nouveaux riches get the green light. The prevalent opinion is that it pays off in this country to lie and to steal; that many politicians and civil servants are corruptible; that political parties – though they all declare honest intentions in lofty words – are covertly manipulated by suspicious financial groupings.
>
> Paradoxically, the cloak of liberalism without adjectives, which regarded many things as leftist aberrations, concealed the Marxist conception about a fundament and a superstructure: morality decency, humility . . . respect for law, a culture of human relations . . . were relegated to the realm of the superstructure, and slightly derided as a

mere "seasoning" of life – until we found there was nothing to season: the fundament had been tunnelled.

Letki (2002) noted the high correlation between lustration and successful transition to democracy. The country with the most lustration, the Czech Republic, is the most democratic; and Ukraine, where there was no lustration, was the least democratic. However, since the level of lustration reflects the balance between the post-Communist and non-Communist elites, the correlation may be the result of a common cause, the balance of powers among the elites. True, the absence of any kind of lustration or transitional justice in Russia eventually allowed the Putin counterrevolution, the return to power of the KGB and the rollback of democratic reforms, the freedom of the press, and the liberties won since the end of the Soviet Union. But the absence of lustration in Russia may well reflect as well as promote the power of the former KGB.

IV. CONCLUSION: PARANOIDS MAY BE PERSECUTED

Communism had a paranoid worldview. It constructed danger, enemies, and conspiracies out of thin air. Paranoia, unlike fear, is unfocused, a priori, and abstract, leading to compulsive behavior. Just imagine the amount of time and resources that the Communist regimes must have spent on spying on ordinary people! What for? They were not under danger as long as the Soviet Union backed them, and once it did not, all the residents, collaborators, candidates, and confidants in the world could not save them. The secret police was a reflection of compulsive paranoid behavior. But this behavior was projected on society and *constructed* it in that image. The people who were spied upon became paranoid themselves, seeing conspiracies, informers, and dangers everywhere in their environment. But unlike that of the Communists, the paranoia of ordinary denizens of the Communist world did not prevent them from being persecuted, before or after 1989.

Most supporters of lustration in the post-Communist universe were not very good in articulating their anxieties or grounding them in reality. But their paranoia aside, persecuted they were, and though they could not articulate their fears of the nomenklatura, they had good reason to fear a class of people who survive by stealing anything that can be moved and corrupting any being who has a soul. The publication of the lists of resident spies and informers and gaining of access to the files helped the victims exactly because it concretized their fears. Instead of living in an insecure world where anybody could have been an informer, they had clear knowledge who was against them *and who was not against them*. The Czech writer Pavel Kohout, a former Charter 77 dissident, a former Stalinist poet, and as he admitted a former informer during his Stalinist phase, read his file. He described his experience in an article in the weekend edition of the daily *Lidové noviny*. Kohout's greatest surprises did not result from discovering who informed on him, but from learning who *refused*

to inform on him. Some ordinary people he was sure had informed on him withstood interrogations, threats, and enticements, telling the secret police that they were his friends and they would not inform on him. These brave ordinary people never told Kohout what they did for him.

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10

Transitional Justice in Argentina and Chile

A Never-Ending Story?

Carlos H. Acuña

INTRODUCTION: TRANSITIONAL JUSTICE AND THE POLITICAL DILEMMAS OF DEMOCRATIC TRANSITIONS

For years we have inquired whether constitutional rulers can punish past human rights violators who still are the armed "guardians" of the country, or whether impunity is the price for democratic stability.[1] When do democracies risk their stability: when they punish or when they pardon human rights violators? In transitions from a repressive authoritarian regime to a democratic one, the dilemma about how to place the guardians under democratic rule becomes more acute: will the guardians accept being punished for the crimes they committed while in government without revolting against the newborn regime? On the other hand, can democracy survive without demonstrating that all citizens are equal before the law? The ethical foundations of democratic rule establish that all criminals should be brought to justice, particularly if they were part of an authoritarian strategy and the crimes were massive. Nevertheless, covering up crimes against humanity has been a generalized practice to achieve democratic stability, particularly in those cases in which past criminals have had relevant

[1] This chapter stems from the results of two original research projects we carried out with Catalina Smulovitz at CEDES, Buenos Aires, some years ago: "Human Rights and the Consolidation of Democracy: The Trial of the Argentine Military," with the support of the John D. and Catherine T. McArthur Foundation and the Ford Foundation, and "The Military as Political Actors in the Latin American Southern Cone," with the support of the North-South Center of the University of Miami. As such, it includes and expands arguments and part of the historical reconstruction already developed in other papers (notably "Adjusting the Armed Forces to Democracy: Successes, Failures and Ambiguities in the Southern Cone," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship and Society in Latin America* [Westview, Boulder, Colo., 1996]; and "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* [University of Notre Dame Press, Notre Dame, Ind., 1997]).

political functions in the transition to democracy.[2] Therefore, where do we stand? What do recent and present experiences teach us about the relationship between the treatment of past human rights violations and its effects on the legitimacy and stability of emerging democratic regimes?

The similarities and differences between the Argentine and Chilean cases make them particularly suited for a comparative approach to these questions. Both Argentina and Chile show dictatorial processes that started around the midseventies (1973 in Chile and 1976 in Argentina). Their authoritarian regimes were governed by military who shared the "National Security Doctrine" as their ideological framework, implemented neoliberal socioeconomic policies, and collaborated in exchanging intelligence information and carrying out common operations in their mutual crusade against the Left and popular organizations in general. Moreover, both military governments aimed their strategies at building future political regimes under their long-term tutelage.

Beyond these similarities, and in the Latin American context, the Argentine democratic transition has been exceptional: the trial and conviction of the main officers responsible for human rights violations are a first sign of this singularity. In spite of a political process that, in successive stages, limited the reach of the legal sanctions and ended in the pardon and liberation of those condemned, the distribution of political costs and benefits that resulted from the trials could not be totally reversed. Once the judicial intervention transformed historical facts into evidence, proven guilt, and sentences, neither a pardon nor an amnesty could revert to human rights situations similar to those cases in which a law of "oblivion" or an anticipated amnesty blocked investigation and judgment. The second sign of this singularity is that Argentina is the only Latin American case in which the military leadership has publicly recognized the illegitimate character of repression and systematic human rights violations it carried out during the military dictatorship: it was not until April 1995 that the Argentine armed forces formally recognized the illegitimacy of the repressive methods used during the dictatorship. In a public document of April 25, 1995, the chief of staff of the army finally recognized that the armed forces had tortured and murdered during the 1970s confrontation and stated that whoever "commits a crime against the National Constitution . . . gives immoral orders . . . follows immoral orders . . . to achieve ends believed to be just employs unjust, immoral means."[3] Moreover,

[2] Examples come to mind immediately when we recall just the last five decades of world history: the Western Allies' decision not to punish most of the Nazis responsible for human rights violations during World War II justified by the need to maintain a functioning state bureaucracy in West Germany; the U.S. government decision not to punish members of the Japanese royal family for their role in the genocide of Chinese civilians in order to take advantage of the symbolic force of the emperor and his family as a legitimating resource for the new democratic order; or the all too common support by Western democracies of authoritarian regimes that systematically violate human rights with the excuse of preventing the advance of "anti-Western" movements.

[3] This document had an important domino effect on the navy, air force, and Catholic Church that, although with different degrees of clarity, recognized in their own public documents the role of their members in carrying out or collaborating with state terrorism in the period.

the detention[4] of the former junta members ex-general Videla and ex-admiral Massera since 1998 has not resulted in military tensions. The bureaucratic character of the way the procedures of their indictment currently unfold goes hand in hand with the long-term subordination of the military to civilian rule.

The Chilean case falls at the opposite extreme of the spectrum. Free of defeat in an external military confrontation and economically successful, the military have been capable of resisting popular mobilizations and with the sympathy of more than 40 percent of the electorate were able to lead a transition imposing their own rules. The outcome not only showed for more than twenty years an effective domestic self-amnesty for their crimes and human rights violations, but also included institutional and economic prerogatives that assure, on the one hand, influence of the armed forces over the Supreme Court, the judicial system at lower levels, the Constitutional Tribunal, and the Senate as well as, on the other hand, veto power over some decisions of the executive and an electoral system that allows a minority with one-third plus one of the votes to control 50 percent of the congressional seats. The Chilean uncompleted transition to democracy was well described by the former president, from 1973 until 1997 commander in chief of the army, and currently senator General Augusto Pinochet Ugarte, when he stated "a esta democracia la tenemos atada, bien atada" (we have this democracy tied up, very well tied up). In this context it is understandable that, when Pinochet Ugarte was detained in Great Britain in 1998 at the request of a Spanish judge, the Chilean political system froze, massive mobilizations of opposition and support for the general spontaneously erupted, and to date the matter constitutes an important source of political cleavage in Chile. The issue of transitional justice reemerged in Chile at the heart of the political struggle.

The object of this chapter is to analyze and explain the particular dynamics assumed by the political process related to the treatment of military human rights violations during the transitions to democracy in Argentina and Chile. This work explains why the actors did what they did as a function of their objectives and the political and institutional constraints they encountered. It analyzes how and why the articulation of the different strategies shaped the political process and, finally, the significance of these processes for the type of democratic regime that emerged in each of these two Latin American cases.

1. THE ARGENTINE CASE: STATE TERRORISM, LIMITED TRANSITIONAL JUSTICE, AND MILITARY SUBORDINATION TO CONSTITUTIONAL RULE

Although the last Argentine dictatorship, which was inaugurated with the coup of March 24, 1976, shows all the features of other authoritarian regimes in Argentina, the nature and magnitude of illegal repression set this case apart from

[4] Both detained for the kidnapping of children, a crime considered by the judges beyond the scope of the presidential pardon of 1991.

previous dictatorial regimes. The Comisión Nacional sobre la Desaparición de Personas (National commission for disappeared Persons [CONADEP]) in 1984 documented the disappearance of 8,963 people, even as it made clear that it estimated that the number of victims exceeded 9,000 cases. Amnesty International estimated that the number of victims surpassed fifteen thousand, and other human rights organizations have maintained that the victims reached thirty thousand. From 1984 to 1999, the Undersecretariat for Human Rights confirmed the existence of around three thousand new cases, resulting in nearly twelve thousand confirmed disappeared.

After six years of repression, unsuccessful socioeconomic policies, and intramilitary conflict, the government tried to resolve the increasing political and social tensions by invading the Malvinas/Falklands Islands, a long-standing Argentine claim of sovereignty that showed consensus among military and civilians, Left and Right, and others. The military defeat in June 1982 brutally redefined the government's situation: it lost authority vis-a-vis society, and the intramilitary conflicts sharpened. Democratic elections were the only way the military found to retreat to barracks.

1.1. Judicial Autonomy and the Trial of the Members of the Military Juntas as a Frustration of President Alfonsín's Objectives

In October 1983, Raúl Alfonsín, to the surprise of many and with the support not only of the middle classes but also of part of the popular vote that had been historically Peronist, won the presidential elections. To meet the demand for justice that had set the tone of its electoral campaign, the Radical government designed a strategy that simultaneously intended to sanction members of the armed forces who had committed violations of human rights and tried to incorporate the military in the democratic arena. This strategy was based on the pursuit of a limited self-judgment by the military. The self-purge of the military would allow the Radical government to sanction judicially some of those responsible for violations of human rights. In this way, the government would fulfill electoral promises without creating a generalized threat to the armed forces. To assure this, a secret exchange took place between the government and the military leadership: the military would hand in a list of thirty or so names of officers they were willing to judge and convict in exchange for the suppression of what they perceived as a campaign to destroy the armed forces. Another important feature of the exchange was the presidency's determination to pardon those to be condemned for human rights violations before the end of the first term, namely, 1989.[5] The equilibrium attempted by Alfonsín was a

[5] Former chief of staff during the Alfonsín administration, General Ríos Ereñú stated in an interview, "President Alfonsín had promised that before leaving office those that had been condemned would be pardoned. . . . This means that I, the Chief of Staff, knew that the maximum that they would have to endure was six years. That during those six years, if things worked out fine, only the military Junta and some Commanders of Army Corps would be sanctioned and that the

limited judgment to fulfill his electoral promises, a low cost for those few who would be condemned (because whatever the sentence they were supposed to remain in jail no more than six years), and a neutralization of the threat to the rest of the armed forces.

The result of this negotiation immediately fell short for both parties. The military handed in only nine names, those of former members of the military juntas that had ruled the country since 1976. While the government delivered on its commitment and intention to close the judicial chapter as soon as possible, the process would soon show that even in a presidential democracy the president faces constraints, checks, and balances. The government's plan included the immediate detention of the former members of the military juntas as well as of some military and police authorities who had become public symbols of human rights abuses, the repeal of the "Law of National Pacification" ("self-amnesty" law), and the enactment of a new law that was to reduce dramatically the scope of penal liability for human rights abuses and the jurisdiction in which the trials were to be held.

Aside from these measures, the initial strategy of the government included the formation of the National Commission on the Disappearance of Persons (CONADEP). This commission was to receive denunciations and evidence of disappearances, send them to the justice system, check on the whereabouts of such persons, and, finally, determine the location of lost children. The constitution of CONADEP allowed the government to block the formation of a bicameral investigation commission, which was sought by most of the human rights organizations. From the government's point of view, such a commission, by granting Congress both a larger say in the formation of a human rights policy and the power to investigate those presumed responsible, endangered the government's goal of limiting the trial and condemnation to a few military chiefs. If indeed these reasons explain why the presidency decided on the formation of CONADEP, it should be emphasized that the effects of the commission's work far surpassed those that the government had hoped at the moment of its creation.

In December 1983 Congress repealed the "Law of Self-Amnesty." Nevertheless, the government's strategy encountered its first problems when it sanctioned the Reform of the Military Code (Law 23,049). This law conferred upon the Supreme Council of the armed forces the initial jurisdiction to prosecute military personnel, something that constituted a governmental success. On the other hand, the opposition managed to include the establishment of a mechanism of automatic appeal in civilian courts for the military court's decisions, and a legal

majority would have no problems" (Norden, Deborah, "Between Coups and Consolidation: Military Rebellion in Post-Authoritarian Argentina," Ph.D. Dissertation, University of California-Berkeley, 1992, p. 256). Joaquín Morales Solá confirms this version when he states, "Ríos Ereñú had become enthusiastic with a promise made to him by Borrás [minister of defense at the time]. The Minister assured him that the President would decide an amnesty before the conclusion of his government and meanwhile only the military Juntas and a small group of commanders . . . would be judged" (Morales Solá, Joaquín, *Asalto a la Ilusión*, Planeta, Buenos Aires, 1990, p. 148).

formula that precluded the indiscriminate use of the concept of "due obedience" in cases of infamous and aberrant crimes (*delitos atroces y aberrantes*). This last modification prevented the government from limiting ab initio the scope of the trials. When it became evident that the Supreme Council of the armed forces would not carry out the self-purge of the military, the Federal Appeals Court of Buenos Aires took the case of the members of the military juntas in its hands (September 1984). In June 1985 the trial of the members of the military juntas was initiated, and soon the daily media were flooded by the horrors of state terrorism.[6] From that moment on, and for a few months, juridical logic took primacy over the political logic that had governed the conflict until then.

As a consequence of this trial, former military president Jorge Rafael Videla and former commander in chief of the navy Admiral Emilio Massera were given life sentences, former president Eduardo Viola was given seventeen years in prison, and the junta members for the navy and air force Admiral Lambruschini and Brigadier Agosti were given eight years and three years and nine months, respectively.[7] Juridical logic, openly presented and publicized, gave credibility to the narratives of the past and put beyond suspicion the accounts of the witnesses. The trial turned into an effective mechanism for the historical and political judgment of the dictatorial regime. Furthermore, and contrary to what was expected by the government, instead of closing the "human rights question," it ended up reopening the issue: the court recommended follow-up of all the leads and information gathered about officers and noncommissioned officers (NCOs) accused of any involvement in human rights violations. This was a blow to the government's credibility among the military. The army's chief of staff had been told by members of the presidency that the sentence would foreclose future prosecutions by applying the principle of "due obedience" to all those members of the armed forces and police who had acted under the authority of the juntas.

1.2. The Presidency's Attempt to Curtail Judicial Autonomy

When the trial came to an end, and in a context characterized by increasing discontent and pressure from the armed forces, the presidency started to take action that tended to restrict the scope of the verdict and to ensure military acquiescence. These moves included three measures: the Instrucciones a los Fiscales Militares (Instructions to Military Prosecutors), the Ley de Punto Final (Law of Fullstop), and the Ley de Obediencia Debida (Law of Due Obedience).

[6] The impact on public opinion was such that the government, in an attempt to reduce it, established that all the TV newscasts were to show the images but not the audio portion of the trial, something that was possible because at the time the major networks were state owned. It was assumed that the "cold" description by anchorpersons of what was being revealed in the trial would create less anger than the narration by the victims themselves.

[7] The members of the junta that governed the country between 1979 and 1982 were acquitted because the court considered that the evidence against them was insufficient and inconclusive.

A few months after the end of the trial, in 1986, *instructions to military prosecutors* were issued by the minister of defense with the intention of radically reducing the number of prosecutions by exempting from accountability the cases in which those accused of torture, kidnapping, and/or murder could prove or the context would lead to the assumption that they had acted according to orders. This first initiative to close the question politically did not succeed, given the mobilized opposition it awoke among the ranks of the Peronist Party, sectors of the governing Radical Party, human rights organizations, and the Federal Court of the Federal Capital.

The Ley de Punto Final, also in 1986, approached the issue from another angle. Instead of considering whether those who violated human rights were or were not liable, it established a deadline for summoning the presumed violators of human rights. This law was approved in December; the deadline was set for February and January, traditionally a month of vacations when most judicial activities are suspended in Argentina. The issue seemed closed by a well-timed unexpected move by the presidency and the majority it finally managed to obtain in Congress. Nevertheless, when the law was approved, seven federal courts suspended their January holidays to work on the pending cases. By February, when the time limit to prosecute determined by the law ended, more than three hundred high-ranking officers had been indicted. Thus, even though the president had managed to pass the Ley de Punto Final, the practical consequences of that law and an autonomous judiciary made this second attempt fail.

The Ley de Obediencia Debida was approved shortly after the April 1987 military uprising, headed by the *carapintadas*[8] in opposition to the prosecutions for human rights violations that they presented as the government's shrewd strategy to destroy the armed forces. During that uprising two major facts came to light. On the one hand, the uprising showed the strength of the military demand and the lack of capacity for command both of civilian authorities and of the army chief of staff. On the other hand, the wide and generalized mobilization of civil society[9] demonstrated the strength of societal repudiation of military impositions and, in the worst case, a military government. The crisis was curtailed, creating the image that the president personally had imposed the democratic will on the rebels. However, shortly after the end of the crisis the presidency submitted to Congress a project for a "due obedience" law, demonstrating that, one way or another, a new exchange had been carried out. The approved Ley de Obediencia Debida established that those individuals who at the time of the events were chief, junior, and noncommissioned officers; soldiers of the armed forces or members of security forces; police and penitentiary personnel, were not punishable for crimes that violated human rights, provided

[8] The rebellious forces were called *carapintadas*, or "painted faces," for the dark camouflage paint these commandos used.

[9] It should be noted that this reaction for the first time in Argentine history included representatives of the major business associations.

they could be assumed to have acted within the scope of due obedience. The government had finally achieved in 1987 an objective it had sought since 1983, although at the wrong time: the political meaning of this law entailed different costs and benefits form the ones it had intended at the outset of the process. For most of the population, this law was clear evidence that the government was giving up one of the banners that in 1983 had allowed it to become the main guarantee of democracy and of the rule of law, and that the president's word was untrustworthy. Moreover, this law's sanction continued to leave an open flank in the dispute with the armed forces: the political vindication of the military repression from 1976 to 1982.

After the "Easter Rebellion," a new front of conflict opened in the relationship between the government and the armed forces. The human rights dispute overlapped with the conflict over what should be done with the participants in military rebellions, a conflict that in reality hid the struggle over the capacity of the emerging rebel sectors to influence the army's decisions. The preeminence of this new dispute modified the relative weight of the issues being debated. The discussion over how to punish those responsible for violations of human rights was overshadowed by the debate over how to reinstall the chain of command in the army. Even though the government was committed to end the trials of those responsible for human rights violations, neither the government nor important sectors of the army high command were willing to reinforce the political power of the *carapintadas* within the military.

The insurrections of "Monte Caseros" and "Villa Martelli" (both in 1988) and the last uprising of December 1990 were the result of the incorporation of the intramilitary cleavage in the human rights conflict. The three rebellions started as a consequence of the discontent of the *carapintada* sectors with the penalties the military leadership established for them. Nevertheless, after the law of due obedience was passed, the *carapintadas* faced difficulties in finding followers among the officer ranks. With the recurrence of incidents in which the chain of command was being broken to advance interests that were not perceived as related to the "whole" of the armed forces anymore, the sympathy that the *carapintadas* enjoyed among the officer's corps and NCOs started to vanish.

1.3. Menem: A New President Following an Old Strategy

The treatment of past human rights violations and the tensions with the military were not the only problems that the Alfonsín administration had to face. The economic problems proved much more complex than expected and, after the government's third economic plan failed, the Argentine economy collapsed in 1989. The crisis forced Alfonsín to turn over the government to the elected president, Carlos S. Menem, several months before schedule. The speed and uncontrolled nature of the events did not allow the outgoing president to fulfill his commitment to pardon those who had been convicted of human rights violations.

The 1989 presidential elections created new expectations among the *carapintadas*. They expected that an electoral victory of the Peronist candidate would bring about the dismissal of the sanctions imposed by the Army General Staff, as well as a governmental position for their imprisoned leader, Colonel Mohammed Seineldín. On October 8, 1989, Carlos S. Menem, in power since July, announced a first presidential pardon. Among its 277 beneficiaries were military personnel who were involved in human rights violations, some convicted for their intervention in the Malvinas/Falklands war, others convicted for their participation in the military uprisings during the previous Radical government, as well as civilians who had been condemned for guerrilla activities. The ex-commanders in chief and former junta members Videla, Viola, Massera, and Lambruschini were not included in this pardon; nor were Generals Camps, Richieri, and Suárez Mason nor the former head of the guerrilla organization Montoneros, Mario Firmenich, although a future pardon was announced.

What were the consequences of the pardon for the intramilitary conflict? On a first reading one might believe that the *carapintada* leaders had obtained the results they were after: the imposition of an amnesty for human rights violations during the dictatorship and the political advance of their leadership within the military. Nevertheless, some days later it became evident that the pardon would not reverse the sentences imposed on them by the Army General Staff. The pardon allowed them to avoid being condemned by civilian courts, but it did not allow the *carapintadas* to obtain impunity in the military scene. From then on, they could not legitimate their activity in terms of "institutional" demands. Furthermore, their growing politicization resulted in their increasing political isolation among their military comrades.

Disenchanted with Menem, with some of their own members shifting toward participating in institutional politics, with a dwindling military influence, and with decreasing control over active units, the *carapintadas* made a last effort to gain control of the Army General Staff. The last uprising, on December 3, 1990, was the bloodiest and most violent. This time, there was a forceful repression of the uprising. When the rebellion ended, the *carapintadas* had been defeated in the military field and neutralized in the political arena.

What had changed to produce such a wide and clear defeat? In the first place, with the recent pardon and the imminence of a second one, as well as with the growing politicization of the movement, the support for the *carapintadas* among army officers could only be sustained on the basis of political loyalty. On the other hand, those officers in charge of the army realized that the repeated challenges to the chain of command and the fact that its support was mostly from low-ranking and noncommissioned officers implied a major risk for the survival of the institution.

In January 1991, only a few days after the rebellion and its defeat, a second presidential pardon was announced. This pardon included the first two military juntas as well as ex-generals Camps, Suárez Mason, and Richieri, together with the former guerrilla leader Mario Firmenich and a few other civilians. What reasons did the presidency have to issue a second pardon after the December

1990 uprising? Its sanction reaffirmed the Menemist strategy to forgive past crimes while punishing present and future disobedience. At the same time, it strengthened the Army General Staff, preventing the *carapintada* minority from becoming once again the spokespersons for the demands of the military corporation as a whole.

1.4. Reparation of Damages for the Victims, the Search for the Missing Children, and a Return to Prison of Human Rights Violators: 1991–2002

After the presidential pardon of 1991, the process of justice related to human rights violations showed four main areas of action: reparation for damages to the victims of state terrorism, information about the disappeared, the search for and punishment for the kidnapping of children, and, finally, the intervention of foreign courts.

Once the pardons were in place, the executive aimed at reducing political costs by moving forward in a series of human rights aspects that, apparently, would not imply new confrontations, namely, reparation for the victims and the search for kidnapped children. In both these issues the Undersecretariat of Human Rights, at the time part of the Ministry of Interior, played a major role.

With respect to *reparations for the victims*, the government followed the decisions of the Inter-American Court of Human Rights[10] in the sense that it was the state's responsibility to compensate the victims economically for its actions under the authoritarian regime. This was done through a presidential decree, three laws, and the appointment of the Undersecretariat of Human Rights as the institutional body responsible for the implementation of the scheme.

Presidential decree number 70 of 1991 was aimed at those who had suffered illegitimate detention and whose right to claim reparation in the court had expired. By Law 24,043 of the same year, the benefit was extended to all those who had been detained "at disposition of the Executive Power" and all civilians detained by decision of war tribunals; those who had been detained in military facilities without being sentenced by a war tribunal; conscripts who had been sentenced by war tribunals (equating their situation to that of civilians who had been sentenced by war tribunals); children born in captivity of mothers included in this law; and all those detained in clandestine centers. These benefits amount to US$74.60 per day of detention. Illegal military violence and abuses in the detention centers had started before the coup d'etat of 1976. So the problem was to establish a parameter to define the period covered by this right. The decision was to fix it from November 6, 1974, the date the state of siege was declared during the democratic regime, through December 10, 1983, when the new democratic government took office.

[10] Recommendations based on the International Pact of Political and Civil Rights of December 19, 1966, which states in its Article 9.5, "Toda persona que haya sido ilegalmente detenida o presa, tendrá derecho efectivo a obtener reparación."

Finally, Law 24,411 of 1994 determined the compensation to be received by parents, children, or the lawful heirs of those disappeared or dead as a consequence of the repression carried out before December 10, 1983. The compensation per person was defined as equivalent to one hundred times the monthly salary of Category A of the National System of Public Administrators, resulting in a total amount of US$220,000 per person. Law 24,499 of 1995 extended the deadline for presenting claims though June 2000. From 1994 through 1997 the families of nearly six thousand disappeared and of twelve hundred individuals violently killed by state agents had filed applications for reparations.

This program implies a significant fiscal burden. The way in which an equilibrium was established between the rights of the victims and the fiscal capacity of the state, something particularly relevant at a time of profound economic reform, was to pay with government bonds that the beneficiaries could choose to obtain in pesos or in U.S. dollars.[11] The figure on the total amount paid as of February 1998 was US$655,574,539, of which US$9,980,000 was paid according to Decree 70/91; US$551,005,428 corresponded to Law 24,043/91, and US$94,589,111 to Law 24,411/94.[12] The estimate is that the total amount for these reparations reached approximately US$750 million by the end of 2000.

In none of the laws mentioned were reparations contemplated for the exiled. Nevertheless, an administrative interpretation of Law 24,043 made by the Undersecretariat for Human Rights included those who were held in administrative detention under the state of siege and allowed to leave the country under Article 23 of the Constitution ("right of option"); in other words, those detained and forced out of the country until a decree allowed them to return or the state of siege was lifted were compensated with the same amount for each day of detention and for each day in exile US$74.60 per day.[13] Those who were released in Argentina and later went into exile or those that went into exile, preempting detention or kidnapping, were not included as beneficiaries because they were nominally free to return. In spite of the fact that without a legal basis it is extremely difficult to establish who did and who did not have good political reasons to leave the country or not to return after some time, during 1999 Congress began a debate over the rights of all those exiled who cannot formally show a legal reason for having left the country. One of the drafts that were discussed establishes half of the original daily amount for these exiles (US$37) and an applicable period from November 1974 to December 10, 1983.[14] If a new law covering this larger group of exiles, who went into exile without making

[11] The beneficiaries also have the option to sell the bonds at market price, at this point covering around 75 percent of their face value, or wait until the bonds mature, when they will be worth the full face value.

[12] *Queselea*, Publicación Bimestral de la Subsecretaría de Derechos Humanos y Sociales, March 1998, pp. 12, 13.

[13] I have to thank both Priscilla Hayner and Juan Méndez for this information. Around 1,000 exiles were beneficiaries of this decision.

[14] See *Clarín*, January 26, 1999, p. 16.

use of their "right of option," is approved, the final total amount paid for reparations could easily double (some argue that could triple) the projection of a total of US$750 million.

With regard to the *missing children*, the government supported their search after 1991. Some of the disappeared were kidnapped with small children and babies, and others were pregnant at the time of detention. In over 280 cases these children or those born in captivity were not returned to their original family and were either appropriated by the military or members of the police or given for adoption to families, who in some cases were unaware of the children's origin. The search for the missing children and the quest for punishment for their abductors became the central issue for the work of the Grandmothers of Plaza de Mayo. As a response to the request of the Grandmothers, the executive in 1992 created the National Commission for the Right to Identity, an organism that works jointly with the National Bank of Genetic Data. By November 1998, sixty-one youngsters had learned the truth about their parents' fate and reestablished a relationship with their biological family.[15]

The unexpected consequence of this work was that long-standing legal demands related to the issue surfaced during 1998. Two judges decided that the sentences of the members of the juntas and other high-ranking personnel pardoned by the presidency had not included the illegal appropriation of children.[16] Their grounds for this decision were (a) that no sanction was established for the kidnapping of children in their 1985 sentences and (b) that in 1985 they had been tried as members of the governing body of the country, that is, the military junta, and not as commanders in chief of each of the branches. In this sense, and given that the appropriation of children was not the result of a political decision at the national level but of operational strategies of the branches as autonomous actors, their personal responsibility still holds and can be judged. Moreover, for the unsolved cases of missing children the crime is considered ongoing given that the "official documents forgery" embedded in the change of identity that followed the appropriation of the child has not been corrected. The responsibility of the former junta members and other officers is being established by the judges either by proving their knowledge of or direct relationship to specific cases of child appropriation or by assuming that because of their

[15] In cases in which the children had been appropriated in an unlawful way by military or police personnel, their original identity is restituted to the youngster by a judge. On the other hand, in those cases in which the children had been adopted in good faith, and given that the identity is considered to be constituted by name, nationality, and family and social ties, instead of by a mere biological link, the dramatic issue is resolved by consulting the preferences of the victim (even in cases in which the victim has not reached an age of legal independence).

[16] It is interesting to note that the former prosecuting attorneys during the trial of the junta members disagree among themselves in this respect. While the head of that team, Carlos Strassera, considers the position of the judges correct, the lawyer who acted at that time as his adjunct, Luis Moreno Ocampo, holds the position that a systematic plan to kidnap children was considered during the trial, that it was never proved and that, in spite of the lack of conviction in 1985, these crimes have already been judged and, therefore, covered by the 1991 presidential pardon.

operational responsibilities they were aware of the illegal events and did not take action to prevent them.

In this context on June 6, November 24, December 7, December 9, and December 23, 1998, ex-general, former president and commander in chief of the army Jorge R. Videla; ex-admiral and commander in chief of the navy Emilio E. Massera; retired vice admiral and former chief of naval operations Antonio Vañek; retired rear admiral and former chief of the naval School of Mechanics (the most important illegal detention center under control of the navy) José Suppicich and former president and retired general Reynaldo Bignone were, respectively, detained[17] and indicted for the kidnapping of children and participation in official document destruction and forgery. Former commanders in chief of the army and navy, retired general Cristino Nicolaides and retired admiral Rubén Franco, were also detained and indicted on these charges during 1999. Although this is still an ongoing process, only a few mobilizations of human rights activists have taken place, and the events are followed by the society with interest although without much drama. The general mood tends to consider that what is happening is what is supposed to happen, and except on June 6, 1998, when the public impact of this process erupted, no one worries much about the opinion of the armed forces, nor are they expressing one. On September 9, 1999, the Federal Appeals Court of Buenos Aires ruled that the kidnapping of children is a crime that cannot be prescribed and, therefore, the proceedings by the lower courts were legitimate and should continue.[18]

At different stages the executive, the judiciary, and Congress have all moved in the direction of the *right to truth and information*, sometimes in overlapping ways. The executive, through the work of the Undersecretariat of Human Rights, started the Program of Truth and Memory, aimed at digitalizing the available information in different national and provincial archives of the judiciary and human rights organizations. This is not a minor issue in Argentina given that most of these archives are not computerized and information has seldom been systematically cross-referenced. This work is ongoing, and its result is to be a data bank containing information about victims, perpetrators, and the circumstances of the crimes.

With respect to the judiciary, some Federal Appeal Courts, such as the one in La Plata, Province of Buenos Aires, have ruled in accordance with the Inter-American Court of Human Rights that the right to truth and information of the victims implies that the pardons of those sentenced should not foreclose continued investigation to allow the families of the victims of state terrorism to know the circumstances related to the disappearance of the victims and the location of their remains (Resolution 18 of April 21, 1998). In this sense, this court has requested from the Federal Appeals Courts of Buenos Aires and

[17] Videla was still under house arrest in June 2005, as was Massera when he died that month, as Argentine law establishes this provision for those over seventy years of age.

[18] *La Nación*, September 10, 1999, p. 5. The Appeals Court also established the need to correct some procedural errors that the lower courts had committed.

San Martín the remission of all the proceedings of habeas corpus and criminal cases initiated in the Province of Buenos Aires's lower courts and used for the trials of the junta members and high-ranking officers who headed operational regions. The La Plata Court has also started to take public testimony of victims and families of victims in order to reconstruct the fate of those killed and disappeared for whom information is still unavailable.

Menem's presidency indeed maintained an aggressive attitude toward those who pursued the objective of reopening cases or confronted the legitimacy of the Law of Due Obedience or the presidential pardons. This strategy was consistent throughout the first (1989–95) and second (1995–99) tenures of his administrations and met with varying degrees of success. The year 1995 started with the shocking public confession of retired navy captain Adolfo Scilingo about the methods employed by the navy to kidnap, torture, murder, and disappear political militants during the seventies and his participation in these activities. The ensuing public uproar was met by the chief of staff of the army's denouncing the illegitimacy of the repressive methods used by the military dictatorship (see the Introduction of this chapter). When matters seemed to have quieted and the scheme of economic reparations was well under way, the issue of human rights violations reemerged for the public eye: in March 1998 congressional representatives of the center-Left opposition Frente para un Pais Solidario (FREPASO) presented a project to repeal the old Full Stop and Due Obedience laws. Although of no major judicial consequence, given that the due obedience criteria legally in effect from 1987 to 1998 allowed the original beneficiaries to avoid bar prosecution under the principle of nonapplication of ex post facto legislation, the proposal had the support of over 80 percent of public opinion and forced all relevant politicians to take a stand on the issue. With the whole matter again in the open and a presidency isolated from its own party's congressional representatives, the law was passed swiftly by both chambers in Congress. After this defeat, those who sought finally to "turn the page" on the human rights violations found themselves, first, with the April 1998 resolution by some federal appeal courts to respond to the right to truth and information by reopening the investigation related to the disappeared and, second, with the process related to the missing children which started with the detention of former president Videla on June 1998 and continues to the present.

Menem's aggressive strategy against those who defied the presidential pardons included confrontations with the actions of foreign courts and Decree 111/98 forbidding all state organs to collaborate with the judicial proceedings by the Spanish courts on these matters. The *intervention of foreign courts* in the Argentine transition is not limited to the recommendations and rulings of the Inter-American Human Rights Court. Major conflicts have occurred when French and Spanish courts decided to judge those responsible for human rights violations of their nationals on Argentine soil, and Italian and German courts have also initiated proceedings for the violation of rights of their nationals in Argentina. In the case of France, ex-navy captain Alfredo Astiz was condemned years ago in absentia for the abduction and murder of two French nuns, Alice

Domon and Leonie Duquet. Astiz was a naval intelligence operative who infiltrated the Mothers of Plaza de Mayo and collaborated in the kidnapping and murder of part of its original leadership, with whom the nuns were collaborating. An Italian court is judging ex-general Suárez Mason in absentia and a German court in September 1998 started proceedings related to the disappearance of eighty of its nationals in Argentina. Spain's Judge Baltasar Garzón (who demanded Pinochet's extradition from Great Britain) is in charge of procedures indicting 152 members of the Argentine armed forces for human rights violations and requiring INTERPOL detention anywhere in the world (except Argentina) of eleven of those.[19] In a further move, Judge Garzón required the extradition of ninety-eight military officers from the Argentine government on November 1999, arguing that their crimes fell within the notion of genocide and, therefore, had not been prescribed and could be judged by a Spanish court. This time, not only Menem's government reacted against the requirement; former president Alfonsín and elected (on October 24, 1999) president Fernando De la Rúa (like Alfonsín, a member of the opposition Radical party) considered the requirement of extradition inappropriate and defended the principle of judicial territoriality.[20]

The stand of the Menem government in this respect was consistent in asserting the principle of territoriality for the judicial proceedings, denying collaboration to foreign judges, and pledging support for the constitution of an International Tribunal of Criminal Justice that it hoped would not apply its rulings retroactively. As we saw, this stand was maintained by the incoming government: on December 10, 1999, an alliance between the centrist Radical Party and the center-Left FREPASO replaced Carlos Menem with Fernando De la Rúa in the presidency. The new president made clear that he would try to improve the relationship with foreign courts and strengthen the role of the judiciary vis-à-vis the executive. In this context, the Under-Secretariat of Human Rights was removed from the Ministry of Interior, to be placed under the scope of the Ministry of Justice and the new government derogated Decree 111/98, which forbade all state organs to collaborate with the judicial proceedings by the Spanish courts on local human rights violations. Cosmetics apart, with respect to the role of foreign courts the De la Rúa government maintained the principle of judicial territoriality as well as the support for the creation of an International Tribunal of Criminal Justice. Beyond the internal tensions that this stand created within the governing alliance between the Radical Party and FREPASO, Argentina once again demonstrated a new government that followed an old strategy. This old strategy was maintained beyond the downfall of the De la Rúa government in December 2001 and continued with Eduardo Duhalde's government.

The De la Rúa government was more tolerant toward domestic judicial decisions: on March 7, 2001, the federal judge Gabriel Cavallo abrogated the

[19] *La Nación*, October 18, 1998, p. 9.
[20] *La Nación*, November 4, 1999, pp. 1, 5.

amnesty laws, declaring the full stop and due obedience laws "unconstitutional, null and void," a decision that allowed the reopening of several cases of human rights violations against the already detained junta members, as well as against former senior officers, such as the former president and commander in chief Leopoldo F. Galtieri, who had managed to avoid detention until mid-2001 and who found themselves indicted and under house arrest at the time of writing.

Conflict and international intervention were present throughout most of the 1990s decade in the Argentine process related to human rights violations, and despite the coming and going of local courts and legislation, domestic criminals learned early on that beyond the national frontiers they faced a more hostile environment than the uneasy, and sometimes even risky, local one.

1.5. Lessons from the Argentine Experience: Other Intervening Variables in the Subordination of the Military to Constitutional Rule (Besides Transitional Justice)

The present position of the armed forces is not only the product of the dynamics that characterized transitional justice in Argentina. On the one hand, the armed forces confronted one of the worst possible scenarios: the trials and the conviction of their leaders for their responsibility in the repression during the military dictatorship. The political costs for the army increased as a consequence of the conflict between the general staff and the *carapintadas*. Even though the general staff succeeded in gaining the benefit of the pardon and was victorious over the *carapintadas*, it could not neutralize the profound redefinition of its relative position before civil society that the trials generated, nor has it been able to eliminate the costs and risks resulting from the politicization of military institutions.

On the other hand, the 1976–83 military regime resulted in a extensive erosion of the military's public image and political legitimacy. In the first place, the systematic violations of human rights gave way to the emergence of strong resentments among the majority of the population against the military. The trial only accentuated a tendency already in place in the Argentine society. In the second place, the deep socioeconomic crisis that resulted from the economic policies implemented by the military produced resentment among the popular sectors, and distanced important groups of the bourgeoisie that traditionally constituted the core of the political and economic alliance that lent social support to military governments. The armed forces stopped being predictable and became a source of uncertainty in relation to the interests of capitalists.[21] Another example of the risks that the military behavior entailed for the bourgeoisie and for traditional international allies such as the United States was the

[21] Acuña, Carlos H., "Politics and Economics in the Argentina of the Nineties (Or, Why the future is no longer what it used to be)," in W. Smith, C. Acuña, and E. Gamarra (comps.), *Democracy, Markets and Structural Reforms in Latin America: Argentina, Bolivia, Brazil, Chile and Mexico*, Transaction, New Brunswick, N.J., 1994.

ill-fated Malvinas/Falklands adventure. The defeat generated in turn two deep intramilitary cleavages: the breakdown of the relationships among the different forces, on the one hand, and a tension between the generals who had the politicomilitary responsibility and the junior officers and NCOs who were in charge of operational functions.

The internal confrontation that exploded during Easter Week of 1987 unveiled a new scenario for intramilitary conflicts. In contrast with confrontations in the past, in which the institution appeared divided in factions that cut across ranks, this time the conflict emerged as a struggle of low-ranking officers supported by NCOs against "the generals." If the *carapintadas* were not isolated and defeated, the "class struggle" could only end with the destruction of the institution as such, since a potential victory of the *carapintadas* implied the discharge of most high-ranking personnel, and the victory of "the generals" meant the dismissal of the lower-rank officers.

Even though the most conflict-laden aspects of the internal tensions were resolved and the *carapintadas* defeated, the role played by the armed forces during their control of the government caused their social and political isolation and the acute internal crisis that took place in recent years. Consequently, those who defeated the *carapintadas* have a clear choice: if the priority is the survival of the institution, the armed forces cannot run the risks involved in political intervention. Hence as a consequence of the crisis that the armed forces started to suffer during and as a result of their dictatorship, and of the political and judicial results of the struggle over the question of human rights, in the long run the military have lost the incentive to challenge constitutional governments.

The current situation of the Argentine armed forces has been affected also by the transformation of the international scenario and by the fiscal crisis of the state. The end of the cold war resulted in the disappearance of the "Communist threat," eroding one of the traditional arguments used to justify military interventions in politics. The economic integration with Brazil and the frontier agreements with Chile have resulted in the transformation of old hypotheses of conflict and in the conversion of old potential enemies into allies or commercial partners. The political and economic realignment with the United States that took place during the nineties resulted in a dismantling of important military projects, such as the Condor missile and nuclear devices, the last related to the acceptance of the Argentine government of the Tlatelolco Treaty. All these factors have activated the search for new military duties (such as participation in United Nations [UN] peace missions) and have resulted in a profound redefinition of the role of the military in internal politics.

These changes in the national and international context have been reinforced by a series of legal modifications that establish a new political and institutional position for the armed forces. Since 1983 the president has strengthened his formal leadership over the military as commander in chief of the armed forces, by eliminating some prerogatives that historically had endowed the military leadership with large quotas of power and autonomy. The approval of the Ley

de Defensa (Law of Defense) in 1988 restricted the duties of the armed forces to defense in cases of external aggression.

The fiscal crisis of the state and economic restructuring have resulted in a significant decrease of military participation in economic activities. During Menem's administration many army quarters were dismantled, nearly all military enterprises were privatized, personnel were substantially reduced, the draft was ended, and military budgets were curtailed dramatically. All these events meant a radical transformation of the power and nature of the armed forces as a political actor[22] and are impossible to dissociate from the process of transitional justice.

2. CHILE: FROM AUTHORITARIANISM TO A DEMOCRACY STILL IN TRANSITION

After long-standing stability of the political regime, Chile suffered on September 11, 1973, the breakdown of its democracy. General Augusto Pinochet, leading a junta consisting of the commanders of each military branch and of the carabineros, took over the political decision-making process. The persecution and killing of those people the regime defined as its opponents were pursued systematically. In some cases, this process took place publicly and on a large scale, with the intention of paralyzing possible reactions. In other cases, it occurred in a clandestine and selective way. The figures of the National Commission of Truth and Reconciliation report (Rettig Report, February 1991) show that during the period covered by the dictatorship (1973–90) 2,095 individuals were killed for political reasons and 1,102 persons disappeared (although some projections of human rights organizations double this number).[23]

The institutionalization that would seriously limit the scope of action of democratic representatives during the transition started in 1978, when a plebiscite was called to support the military government and to condemn the denunciations of human rights violations that had been voiced at the UN. Once the results of the plebiscite strengthened the government's position, an amnesty law was passed in order to prevent eventual trials for those who had participated in the repression. This stage ended in 1980 with the consolidation of Pinochet's

[22] For a comparative analysis of the evolution and significance of the military industry and resources, see Acuña, Carlos H., and Smith, William C., "The Politics of *Military Economics* in the Southern Cone: Comparative Perspectives on Arms Production in Argentina, Brazil and Chile," in *Political Power and Social Theory*, 9, 1995. The data in this article allow us to infer that whereas the average military expenditure as percentage of GDP in the democratic period previous to the military regime was 1.3 (1973–76), during the military regime it increased to 2.8 (1976–83), during the Alfonsín administration was reduced to 1.1 (1983–89), and during Menem's first government fell to approximately 0.9 (1989–95). It should be noted that these percentages do not include the cost of military pensions, which in Argentina represent around a third of total military expenditures.

[23] Although most human rights violations in Chile took place between 1973 and 1978, repression grew significantly at different points in later periods.

leadership through a plebiscite that ratified the constitution proposed by the military government. Although the Constitution of 1980 contemplated a return to open elections in 1989, it also established a mechanism for succession that ensured the continuity in power of the military leaders, of the judiciary, and of the commander in chief of the army until 1997. In addition, it limited the power of future civilian governments through the creation of nonrepresentative institutions and of a National Security Council that ensured a continued military role in surveillance and repressive functions. This constitution shaped the subsequent dynamics of the Chilean process in fundamental ways. The inclusion of transitional provisions created a time limit for the dictatorship, provided legal mechanisms for its retreat, allowed the military government to constrain the opposition during the transition, and conditioned both the resources and the actions of the postdictatorial government.[24] Thus, the internal consolidation of the regime helped to define the characteristics of the future democracy and of the armed forces' role in the future civilian government, while also strengthening the personal leadership of Pinochet.

The opposition was able to displace Pinochet from the presidency in 1989 at the cost of reducing its future scope of action. In contrast with other transitions, in which military governments had tried to preserve some of their prerogatives through negotiations with the opposition, the Pinochet government avoided discussion of many of these issues in the informal conversations that took place in 1988 and 1989. From the point of view of the military government, the restrictions imposed by the legal framework that the opposition had accepted and endorsed were such that new agreements became unnecessary. Consider, however, the reaction of the Concertación de Partidos por la Democracia, the alliance of Christian Democrats and Socialists that served as a base for President Patricio Aylwin's government.

Confident of its chances to achieve a parliamentary majority sufficiently large to offset the restrictions imposed by the Constitution of 1980, the Concertación chose not to debate these restrictions. The opposition's belief was that by avoiding such discussion, it could avoid compromises that might restrict its future autonomy. In the last months before the transfer of power, the forces of the Concertación agreed to one key point involving the future of the armed forces. When the Organic Law of the Armed Forces was negotiated, the parties agreed to maintain the budgetary autonomy of the military: specifically, the military budget could not fall below its level of 1989, and the military would in addition receive 10 percent of income earned through copper exports. In contrast to the situations in Brazil and Argentina, where crises of the state significantly affected

[24] In this respect, see Barros, Robert J., *By Reason or by Force: Military Constitutionalism in Chile (1973–1989)*, Ph.D. Dissertation, University of Chicago, 1996, and "Dictatorship and Constitutionalism in Pinochet's Chile," Working Paper 14, Universidad de San Andrés, Buenos Aires, September 1998; and Garretón, Manuel Antonio, "Human Rights in Democratization Processes," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America* (Westview, Boulder, Colo., 1996).

the military budget, the Chilean armed forces were able to isolate themselves from fluctuations of the national economy and to guarantee a budget ensuring operational autonomy and high salaries for their officers.

2.1. Transition and Democracy in Chile: The Aylwin Administration

From the very start of the Patricio Aylwin administration in 1990, the Concertación experienced the limitations imposed by the legal framework it had accepted. What became evident, inasmuch as it failed to obtain a substantial legislative majority, was "that from then on, it would obtain only what was possible."[25] Yet until the constitution and the Organic Laws passed by the military could be changed, the president would not be able to appoint the commander of the armed forces or remove any military commander without the permission of the Security Council; the military budget would not be set by elected civilians; the 1978 Amnesty Law would not be annulled or overruled; and the government would continue to confront nine senators of the forty-five, who are appointed by the military and the Supreme Courts, among others, a number that assures a right-wing veto in the Senate. The balance of forces in Congress has also affected the government's capacity to pass and amend legislation. Even today, now that limited legal reforms have been achieved, the death penalty remains in place for crimes related to state security, military courts have jurisdiction over some crimes committed by civilians, and verdicts issued by the military regime are still in force.

Since those responsible for human rights violations could not be prosecuted, the government in 1990 formed a commission – the Commission on Truth and Reconciliation – to investigate and establish the truth about human rights abuses that resulted in death. But even before the results of the commission were made public, the Unión Democrática Independiente, the Renovación Nacional, and members of the armed forces denounced it. At the same time, the commission report stimulated new demands to modify the Amnesty Law and to bring to trial those liable for crimes, even though they could not be sentenced. Yet General Pinochet and other military leaders repeatedly warned that they would not allow military personnel to be brought to trial, because in such a case the rule of law would cease. For its part, the Supreme Court, made up mostly of judges named by the military government,[26] rejected in August 1990 a motion

[25] Namuncurá Serrano, Domingo, "Derechos humanos en Chile: Tensiones cívico-militares en el camino por establecer la verdad," Mimeo, CEDES, Buenos Aires, 1991.

[26] As Jorge Correa points out, since 1990 the Aylwin and Frei administrations have replaced seven of the seventeen judges of the court, six through retirement and one through dismissal by an impeachment proceeding. Nevertheless, the new judges do not necessarily share the democratic government's stand on human rights. The presidency finds its options restricted by appointing new judges from a list of five that is submitted by the Supreme Court itself ("'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 138, 153).

requesting the inapplicability of the Amnesty Law. In this way, the court ratified the will of the military leadership. Toward the end of 1990, moreover, the army successfully opposed the implementation of measures that could have reduced its prerogatives.

The painstaking detail of the Rettig Commission Report, which was released to the public in February 1991, provided hard evidence in support of widely held suspicions about the extent and brutality of human rights violations during the dictatorship. Eager to make the most of an apparent opportunity to press the need for justice, the government responded to the report by attempting to accelerate the reform of the judiciary. This initiative met strong opposition, however, and was partially aborted when within days (on April 1) of the Rettig report terrorists assassinated the right-wing leader and former constitutional adviser to Pinochet, Jaime Guzmán. The criminal attack allowed the right wing to regain the offensive and started to shift the debate toward the discussion of measures to guarantee internal security and order.

The government also moved forward, following the commission's recommendations, to establish financial reparations. Law 19.123 of January 31, 1992, established the National Corporation for Reparation and Reconciliation as a temporary decentralized state organ, under the supervision of the Ministry of Interior. Articles 17 and 18 consider as victims entitled to reparation all those identified in the Rettig report (disappeared or murdered by state agents) as well as all those declared as such by the corporation itself, and established health and educational benefits, as well as a fixed monthly amount of approximately US$370 per family to be distributed 40 percent to the surviving spouse, 30 percent to the mother of the victim, 15 percent to the father or any natural children of the victim, and 15 percent to each child of the victim up to twenty-five years of age (defining a distributive mechanism in case there were more than one child or any of the beneficiaries dies or voluntarily forgoes the compensation). In addition, the designated beneficiaries collect one (lump sum) compensatory allowance equivalent to twelve months of their rightful annuity. The fiscal outlay for this cause for the year 1992 amounted to US$22 million.[27]

Parallel to the move toward reparation, lower courts increased their investigative activity, even though the judges realized that any accusation would place the case under the jurisdiction of a military court, implying its immediate dismissal under the provisions of the 1978 amnesty. This strategy of information gathering resulted in military unrest, basically because the armed forces believed that, beyond the final outcome of these processes, to require members of the armed forces to testify about human rights violations was to put them on trial before the media. During 1993 two other events strengthened military uneasiness: first, and as a result of pressures from the United States, the 1978 amnesty had excluded the murder of Orlando Letelier, foreign minister

[27] Medina Quiroga, Cecilia, "The Reparations Program," "Chile," in Neil J. Kritz, ed., *Transitional Justice: Country Studies*, vol. II, United States Institute of Peace Press, Washington, D.C., 1995, pp. 502–507.

of Salvador Allende, and his secretary, Ronnie Moffit, in Washington, D.C., in 1976. In charge of the investigation of these killings was one of the newly appointed judges to the Supreme Court, Adolfo Bañados. Bañados could establish a direct link between the murders and the leadership of the Dirección Nacional de Inteligencia (National Intelligence Directorate [DINA]); the result was the indictment of General Manuel Contreras, former head of DINA, and of Brigadier Manuel Espinoza, his second in command. Second, an arrest warrant was issued for Fernando Laureani, an active-duty colonel, for his participation in human rights violations. In this general context on May 28 the military mobilized fully equipped combat troops, including armored vehicles, surrounding army headquarters. No one in the government had been informed about this display of strength, and it was taken for what it was: an open threat to remind the government that military power was still there and its patience was coming to an end.

The reaction of the presidency was to try to put an end to judicial action (similar to the Ley de Punto Final – Law of Full Stop – in Argentina). This strategy attempted to obtain information in exchange for the assurance to the military that the investigations and potential prosecutions would soon end. The government's strategy did not survive the end of the year. Disagreements within the governmental alliance frustrated Aylwin's course of action in September 1993, and in November Supreme Court judge Adolfo Bañados declared General Contreras and Brigadier Espinoza guilty and sentenced them to seven- and six-year imprisonment, respectively. Although their appeal made fulfillment of the sentence conditional upon the approval of the Supreme Court as a whole, the situation created shaky conditions for the victorious new candidate of the Concertación, Eduardo Frei.

2.2. When the Transition Refuses to End: The Frei Administration

When Eduardo Frei took office on March 1994, he had to come to terms with the fact that the transition had not been completed during Aylwin's administration. The judicial proceedings kept complicating the government's objectives in several ways. On the one hand, crimes perpetrated by military or police personnel after the amnesty's deadline of 1978 were being sanctioned: in March 1994 fifteen members of the police were convicted for the murder of three communist militants in 1985, during 1995 and 1996 other convictions related to crimes also committed in 1985 and in 1986 occurred. Some of these cases resulted in a renewed illustration of the military's defiant autonomy. In his narrative of what happened when the presiding judge suggested to the military court that high police officials were guilty of obstructing justice, Jorge Correa writes:

> Among the officers that he named were former director of the police, César Mendoza Durán, and the individual currently holding the same position, Rodolfo Stange. The judge's report was [the] immediate source of controversy, and on April 5, 1994, the Frei government demanded that the chief of police turn in his resignation. Yet not only

Stange refused to bow to this order and rejected the accusations made against him, but the government itself came under severe criticism for asking the director's resignation when he had yet to be charged with a crime. In the end, the Minister of Interior, Germán Correa, was forced to step down as a result of the administration's gaffe, Stange remained in office, and a military court eventually dismissed all remaining charges in the case.[28]

On the other hand, a major political conflict resulted when the Supreme Court finally ruled on the appeal of the former heads of DINA, General Contreras and Brigadier Espinoza. On May 1995 the court upheld the conviction and gave the order to incarcerate them. While Espinoza fulfilled the order, Contreras, from his farm and guarded by military comrades, stated that he was not going to be jailed. It took a tense process, which included his admission to the naval hospital to undergo surgery, before he was finally imprisoned in October 1995. For five months the government was incapable of treating General Contreras as subject to the law on an equal footing with other citizens. As a response to a situation that the government considered highly volatile and out of hand, President Frei reattempted to achieve Aylwin's old failed objective, namely, to pass legislation that allowed the courts to exchange information about the crimes and whereabouts of the missing for secrecy about the informants and the assurance to the military that judicial proceedings would stop. This exchange of truth for justice failed again because of internal opposition in the Concertación as well as from both the human rights organizations and the far Right.

In a stalemate, the institutional process put in place by the military continued to meet its own deadlines: in 1997 General Pinochet was replaced as the head of the army by a loyal successor and in 1998 he became a nonelected senator, presumably for life.

2.3. Taking to Court a Victorious Army: The Unexpected (and Overwhelming) International Variable

The latest events are a matter of yesterday's, today's, and tomorrow's newspapers. The story since October 1998 is roughly as follows: Senator Augusto Pinochet Ugarte decided to visit Great Britain for minor surgery. Holding a diplomatic passport as a member of the Senate, Pinochet was surprised on October 16, 1998, when he was detained by Scotland Yard at the request of Spanish judge Baltasar Garzón. This was the consequence of a demand presented in 1996 to the Spanish courts against Pinochet, Gustavo Leigh, and others by Chilean human rights organizations and victims. Since that date the Spanish judges decided there were grounds to accuse Pinochet of crimes against humanity that affected Spanish nationals in Chile and that have been unpunished in the country where they were committed. Based on international treaties

[28] Correa, Jorge, "'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 146–147.

and conventions, the judge's request to Great Britain for extradition presented the human rights violations committed by Pinochet as crimes against humanity and, as such, without prescription or the possibility of an amnesty, and subject to extradition as objects of global jurisdiction.[29]

The Chilean government was aware of the proceedings and, as in the Argentine case, hostile to them: an official statement of the Chilean government of May 28, 1997, described the activity of the Spanish judges as "a political trial of the Chilean transition to democracy."[30] Once the general was in jail, the strategies that followed fell one by one. The argument that he enjoyed diplomatic immunity fell through when it became clear that only those who represent the country vis-à-vis other states enjoy the privilege. The argument that the crimes were committed while he was a head of state and, therefore, he again deserved immunity, found a positive response in the British Supreme Court (October 28) but was dismissed by the Chamber of Lords (on November 25 in a split 3–2 vote of the "Law Lords"). The secretary of the interior, Jack Straw, ratified the decision of the lords on December 9, concluding that there were indeed grounds for extradition to Spain, although in his decision the crimes considered were murder, torture, and kidnapping and did not include aggravated murder and genocide. On December 17, 1998, the Appeals Committee of the Chamber of Lords dismissed the decision of the Law Lords because of the participation of Lord Leonard Hoffman, whose ties with Amnesty International created doubts about his impartiality. On March 24, 1999, a new panel of lords concluded that there were grounds for the extradition, and the secretary of interior ratified this new decision on April 15, opening formally the process of extradition. The British court in charge of the extradition trial approved on October 8, 1999, the Spanish court's request for extradition. Beyond the delays promoted by the senator's defense arguing his bad health and age (his eighty-fourth birthday was on November 25, 1999) to stop the proceedings, the next major step was to be the decision of the Supreme Court in regard to the new appeal, at this stage, presented by the defense against the lower court ruling of October 1999. With mounting pressure from other European requests for the extradition of Pinochet (from Belgium, Switzerland, and France), the secretary of the interior decided in the first days of 2000 that a medical examination was needed to assess the general's condition and ability to face a trial. The result of the examination was the British government's decision that Pinochet was not fit to stand trial. After first attempting to avoid making public the content of the medical report and then, forced by the Courts of Appeals to disclose it to the French, Swiss, Spanish, and Belgium courts, the British secretary of interior released

[29] The UN General Assembly, Resolution 3 of February 13, 1946, adopting the principles of Nuremberg as part of the principles of international law; the four Geneva Conventions; the International Pact for Political and Civil Rights of December 19, 1966; the Convention against Torture of December 10, 1984 (ratified by Spain and signed by Chile in 1987); the Extradition and Judicial Assistance Treaty between Spain and Chile of April 14, 1992; and the Convention of Double Nationality between Chile and Spain of May 24, 1958.

[30] *La Nación*, October 18, 1998, p. 9.

Pinochet to return to Chile on March 2, 2000, after nearly seventeen months of detention. Pinochet Ugarte landed in Chile to be welcomed by a military parade on March 3.

During the process, the Chilean government sided actively with the senator's intention to return home, although with shifting arguments, some of them not acceptable to Pinochet. The original demand for the recognition of immunity by the British was followed by a request to Pinochet for an apology for his crimes and resignation of his post as senator "for the good of the country."[31] The objective was to create political conditions that would influence a favorable vote by the lords. Facing Pinochet's disagreement with this proposal, the government attempted to obtain a decision by the Chilean Supreme Court to judge the senator, replicating the proceedings that took place for the Letelier murder. The objective this time was for the domestic tribunal to demand priority treatment of the case, given that the crimes were committed within its territorial jurisdiction. The Supreme Court did not agree to appoint one of its members to preside over this action, citing previous rulings that considered the crimes in question as covered by the 1978 amnesty.[32]

At the beginning of the process tensions in Chile mounted: the Chilean ambassador to Great Britain was summoned several times to Santiago, the armed forces issued repeated statements about the critical importance of the matter and threatened Spanish shipyards with the suspension of the purchase of submarines that were already being built, demonstrators for and against Pinochet clashed in the streets of Santiago, and the governing Concertación faced important internal tensions. While the Christian Democrats united behind the government's demand for the return home of the senator, the Socialists faced a more complex situation. The members of the government, such as the foreign minister José Miguel Insulza, as well as the party's presidential candidate, Ricardo Lagos, sided with the position that the intervention of the Spanish courts, as well as the decisions of the lords and the British secretary of the interior, were irresponsible and illegitimate. Socialist deputies and party institutions such as the party's Political Commission, on the other hand, issued public statements in support of Pinochet's judgment "wherever." The matter was considered to be related to national security both by the armed forces and by the government, and the National Security Council had several meetings to analyze the situation and design common strategies for the executive, the armed forces, and the courts. The majority of public opinion considered the general guilty of violations of human rights (63 percent), although a majority

[31] *La Nación*, November 5, 1998, p. 6.

[32] *La Nación*, November 15, 1998, p. 7. This argument is debatable even from the point of view of the Supreme Court, taking into account that if Pinochet recognized, as his defense did in Great Britain, that he was the head of the DINA and that Contreras reported to him about the activities of this organization, which the Chilean Supreme Court ruling in 1995 characterized as "criminal" (Ruling of the Supreme Court of Chile, Letelier's Case, May 30, 1995), then at least one of his crimes falls beyond the scope of the 1978 amnesty and can in effect be tried by the Supreme Court.

also estimated that he should be judged in Chile (57 percent). Two-thirds did not consider democracy in danger.[33]

During the second half of 1999, and in the context of a growing and tight political competition for the presidency, the major presidential candidates, as well as most of the electorate, shifted their attention to more pressing issues: unemployment, recession, fiscal expenditures, and deficit. Even the right-wing candidate, Joaquín Lavín, actively seeking centrist votes, downplayed and portrayed the issue as a matter of the past.[34] The electoral result of the December 12, 1999, presidential elections was a surprising draw between the Concertación candidate, the Socialist Ricardo Lagos, who obtained 47.96 percent of the vote, and the right-wing candidate, Lavín, who managed to obtain 47.52 percent of the votes. Although this was the best election result for the Right in decades, the runoff election of January 16, 2000, was won by the Concertación, which obtained 51.31 percent of the vote against 48.68 percent for the Right. Lagos took office on March 11, only a week after the triumphant return of Senator Pinochet to Chile, in a context filled with tension. In this context the new dynamics of the Chilean courts are creating an – admittedly risky – strategic window of opportunity for a major institutional reform that could result in the completion of the transition to a full-fledged democracy in Chile. Let us take a closer look at this process.

The context of the second half of 1999 and first months of 2000 showed the ambiguities and contradictions that emerge when a tight authoritarian grip loses strength: the old ways coexist with new ones in a puzzling manner. On June 15, 1999, the directors of Planeta publishing house, Bartolo Ortiz and Carlos Orellana, were jailed for the publication of the book *El libro Negro de la Justicia Chilena* (The Black Book of Chilean Justice), in which the author, Alejandra Matus – at the time out of the country fearing repression – analyzes corrupt practices of the Chilean judicial system, paying particular attention to the behavior of the former president of the Supreme Court, Servando Jordán. On the basis of the law of Internal Security of the State, Judge Rafael Huerta first censored the book because it affected "the good image of the Judicial System" and later imposed detention for the author and the directors of the publishing house. At the beginning of 2000 the accusation was still pending for the author (residing in Miami), the directors were free, and the book was still censored.

Also in June, Judge Juan Guzmán Tapia ordered the arrest of retired general Sergio Arellano Stark and of four of his former military aides, for their responsibility in the detention and murder of seventy-two members of the opposition after the coup in 1973, most of whom ended up disappeared (the "Death Caravan"). The judge's argument was that the crimes could be considered against humanity and, therefore, not covered by the 1978 amnesty. On the other hand, the Supreme Court, partly as a consequence of reforms carried out in 1997

[33] *La Nación*, December 3, 1998, p. 4.

[34] Lavín stated that "Pinochet is part of the past" and that it was neither true that Lagos represented Allende nor he the military government (*La Nación*, December 6, 1999, p. 2).

and in 1999,[35] modified its previous stand and ruled at different moments that, first, the amnesty of 1978 could not be applied to homicides until they had been tried and sentenced and, second, the amnesty did not include disappearances because, given that no body had been found, these crimes should be considered ongoing, therefore, present and beyond the 1978 scope. This new development opened a threatening door for the military: in addition to the senior officers already sentenced or indicted,[36] Pinochet himself now faced the possibility of losing his parliamentary immunity and of being indicted for gross human rights violations, as requested also by Judge Guzmán Tapia to the Appeals Court on March 7, 2000, in relation to Pinochet's responsibility for the seventy-two murders and disappearances of the Death Caravan. Pinochet's flamboyant return and Judge Guzmán Tapia's request triggered a landslide of accusations: by May 2000 over one hundred cases against Pinochet had been brought by victims or their families before different Chilean courts.

Pressured from abroad and by local judges, military representatives accepted an invitation of the minister of defense, Edmundo Pérez Yoma, to start a series of discussions with lawyers of the human rights organizations. These meetings, which started on August 7, 1999, had no specific objectives or timetable, beyond a common search for truth and reconciliation. The issue of justice is characterized by controversy as is the goal of the military to achieve an end to what they perceive as systematic political harassment. The organizations of the families of the victims did not agree to participate, arguing that the sole objective of the proposal is to assure impunity to the military. Beyond the clear shortcomings of these meetings, it was the first time that representatives of human rights organizations and of the military sat together with the government in an open dialogue and negotiation. This dialogue lost impulse after the armed forces staged their welcoming parade for General Pinochet in March 2000.

In the international scene, not only Belgium, Spanish, French, and Swiss courts filed requests for Pinochet's extradition; the U.S. Department of Justice also decided to reopen the Letelier murder case to review Pinochet's role in it.[37] Moreover, an Italian court in June 1996 had already sentenced in absentia Generals Raúl Iturriaga Neumann and Manuel Contreras to eighteen and twenty years in prison for the failed murder attempt on (former vice president and one of the founders of Chilean Christian Democracy) Bernardo Leighton and his

[35] Reforms included rules for the appointment of Supreme Court judges, the number of its members, and compulsory retirement at seventy-five years of age.

[36] Senior officers sentenced or indicted include not only the already mentioned Generals Contreras and Arellano Stark but also General Salas Wenzel (indicted for covering up homicides committed by security forces), Ramsés Alvarez Sgolia (former chief of army intelligence, sentenced for the murder of a union leader), Humberto Gordon (former director of the National Information Central, indicted for being an accomplice of Sgolia), and Brigadier Pedro Espinoza (indicted for his participation in the Death Caravan).

[37] The case refers to the 1976 murder of Orlando Letelier and Ronnie Moffit in Washington, D.C. On the U.S. Department of Justice's decision, see *The Washington Post*, March 23, 2000.

wife, Ana Fresno, on October 6, 1975, in Rome. The impact of this was felt in Chile on March 14, 2000, when a Chilean judge detained General Iturriaga Neumann as a result of a request for extradition by the Italian court. On the other hand, the principle of territorial jurisdiction of the courts that is upheld by the Chilean government in its confrontation with intervention by foreign courts is supported by the neighboring – and also threatened – governments of Mercado Común del Sur (MERCOSUR) (Argentina, Bolivia, Brazil, Paraguay, and Uruguay) who issued a joint statement with Chile on December 10, 1998, in this regard. This position is also supported by Cuba and former heads of state such as the Socialist Felipe González.

As if in response to the judicial threat to remove Pinochet's parliamentary immunity, on March 25, 2000, Congress strengthened his personal immunity as former president. In other words, the potential removal of his immunity as a senator would not affect his immunity as former president.[38] It did not take long for President Lagos to propose a constitutional reform aimed at the possibility of presidential removal of the military chiefs and the modification of a series of functions of the National Security Council and of the Constitutional Tribunal, as well as the derogation of the system of appointed senators. It is not yet clear whether the proposal, made public on April 4, 2000, was part of a tacit exchange or negotiation between the government and the Right, in which the bargaining chips were, on the one hand, Pinochet's freedom and, on the other, the support of the Right for curtailing the political influence of the military on governmental matters.

The major problem that the Chilean transition started to face in this new scenario was not so much Pinochet's future: on July 1, 2002, the Second Chamber of the Chilean Supreme Court ruled to dismiss tha case against Pinochet for his role in the Caravan of Death because he was mentally unfit to stand trial.[39] Only a few days after that decision, on July 10, 2002, the general resigned as a senator, hoping that his immunity as former president would allow him to fade out of public life.[40]

The problem for the Chilean institutional arrangement is that the Spanish, British, Italian, French, Swiss, and Belgium courts' decisions are setting an international precedent that threatens many members of the Chilean armed forces once they step out of the country. And the problem is also that the Chilean court's decisions are, simultaneously and beyond Pinochet's fate, establishing

[38] The project was presented as an act of justice toward former President Aylwin, because his four years in office (instead of the normal six) did not allow him to become a senator, receive a pension for life, or enjoy advantages such as immunity from judicial persecution. The problem arose when the text that was finally approved established these rights for all former presidents (thus including Pinochet) and did not define any cause for the loss of immunity (as it is established for the immunity of members of Congress). The decision was made by a majority of 113 right-wing and Christian Democratic representatives against the opposition of 27 votes from the Socialist deputies.

[39] Amnesty International News Release, July 3, 2002.

[40] BBCMUNDO.com, July 29, 2002.

a domestic environment that, no matter how well *atada* (tied) the Chilean democracy has been, is becoming increasingly threatening for human rights violators. In that sense, and contrary to what was stated by a former second in command of the Chilean army, General Jorge Ballerino Stanford,[41] we are witnessing a situation in which a locally victorious army is indeed indicted in criminal courts that act accordingly, both in a domestic and in a global setting.

The Chilean government faced during 2001–2 two options: accept the temptation to exchange freedom for the guilty (curtailing judicial autonomy à la Due Obedience Law in Argentina) for a constitutional reform that would prevent authoritarian enclaves in governing bodies or, the alternative, try to achieve this constitutional reform and complete the transition to a full-fledged democracy upholding the rule of law. Whether judicial autonomy shall be curtailed in exchange for a constitutional reform was an open issue for the 2003 agenda, because rulers, even democratic ones, have not shown themselves to be very trustworthy on this matter: their pragmatism distrusts international law as much as it distrusts an independent domestic judiciary.

3. THE MILITARY AS POLITICAL ACTORS IN ARGENTINA AND CHILE: A COMPARATIVE ANALYSIS OF THEIR POLITICAL AND INSTITUTIONAL SOURCES OF POWER IN THE NEW DEMOCRACIES

The institutional role of the armed forces in the new democratic regimes was in both countries a matter of conflict between political and military elites. The principal demands of the military regimes and the armed forces during the transition processes concerned, first, the granting of legal privileges that would protect them from being taken to court for their past actions and, second, the institutionalization of legal prerogatives to guarantee their right to intervene in internal conflicts if a "subversive" threat reemerged. The armed forces' success in obtaining these prerogatives varied. They invariably tried to preserve a tutelary role over the civilian government; but the process of political struggle that took place before, during, and after the dictatorship determined the different ways in which the armed forces were eventually integrated in the democratic system. These different patterns of integration, in turn, had diverse consequences for the resulting types of democracy. Although democracy developed under military tutelage in Chile, struggles over the form and scope of that tutelage are still being waged there. Argentina, meanwhile, has been surprisingly better able to subordinate its armed forces to civilian rule.

In Argentina Congress discusses and approves the military budget, whereas in Chile the armed forces keep 10 percent of the income from copper exports, in addition to their regular budget (which, by law, cannot be less than the 1989

[41] Quoted by Jorge Correa in "'No Victorious Army Has Ever Been Prosecuted': The Unsettled Story of Transitional Justice in Chile," in J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Ind., 1997, pp. 147–148.

military budget). In Chile, the president cannot appoint or remove military commanders without permission from the National Security Council, whereas in Argentina the Senate approves the promotion lists of high-ranking officers. The Senate acts on the basis of a proposal made by the executive, which in turn considers the proposal made by each of the armed forces. In Argentina, there is a Ministry of Defense led by a civilian. This ministry manages the country's war industry. In the Chilean case, the military presence in the civilian power structure is guaranteed through senators designated by the military, as well as through a National Security Council with the responsibility for guarding and controlling the political process. The Chilean state-owned arms industries are under military administration and enjoy a high level of autonomy from the national authorities.

In Chile, the armed forces have constitutional rights to guarantee law and order. Thus, the possibility of intervention in internal security matters and of a military tutelary role over the constitutional powers is legitimized. In Argentina, the Law of National Defense explicitly states that the mission of the armed forces is to defend the nation in the event of foreign aggression. This rule was maintained in the Internal Security Law, which nevertheless allows for the armed forces to lend logistic support in matters of internal security. Several decrees passed in the last stage of Alfonsín's government and during the Menem administration have, once again, introduced some ambiguity into the scope of the intervention of the military in internal conflicts.

Several distinct features set the Chilean case apart from that of Argentina. In particular, the legal and institutional framework of Chile's transition constrained the democratic governments by legalizing, legitimating, and facilitating continuity of the armed forces' influence over the new regime.

The economic success of Pinochet's administration, combined with the support that the fear of a return to the pre-1973 period generated in significant sectors of the civilian population, restricted the effectiveness of the democratic forces. With the failure of strategies that went beyond the limits imposed by the military legality, the opposition opted for solutions that were based on accepting the boundaries defined by the military model. The Concertación failed to obtain the parliamentary majority needed to overrule the restrictions imposed by the military government. Nevertheless, as Garretón points out,[42] the Concertación government enjoyed sufficient political credibility to allow it to disregard some of these restrictions. Furthermore, given the international context, could the Chilean armed forces plausibly embark on a new reactive coup? The government's choice of a gradualist strategy cannot be attributed to cultural factors alone (i.e., to the Chilean legalist tradition). It is likely that a confrontational strategy would have broken the alliance of forces included in the Concertación. If this is so, the gradualist strategy reflected not only the threat of the armed

[42] Garretón, Mauel Antonio, "Human Rights in Democratization Processes," in E. Jelin and E. Herschberg, eds., *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America*, Westview, Boulder, Colo., 1996.

forces and their party allies but also the constraints imposed by the composition of the governing alliance.

Compared to their counterparts in Argentina, the Chilean armed forces fared better politically: they left government after a successful economic administration, part of the citizenry endorsed and legitimated a legal framework that placed them at the center of the institutional order, economic autonomy prevailed, internal conflicts were limited, and they did not have to relinquish their right to conduct domestic intelligence activities.

Alfred Stepan has suggested a way to analyze civilian military relations as a function of two variables: the degree and scope (maintenance and variation) of military prerogatives, on the one hand, and the degree and level of military contestation of civilian decisions, on the other.[43] If we adopt a maximalist position regarding the notion of democracy, only those societies with low prerogatives and a low level of military contestation can be considered democracies.[44] However, since many regimes in Latin America have been and still are considered democracies despite medium levels of military prerogatives, we will adopt that intermediate level as our dividing line between democracy and authoritarianism or not fully democratic regimes. That is, in general terms, a regime reaches the democratic condition when it has low or middle levels of military prerogatives. Comparing our two cases in these terms, we can draw the following conclusions:

First, Argentina shifted from low prerogatives and high contestation during the Alfonsín years to low prerogatives and low contestation in the Menem and De la Rúa administrations, implying that the existing de jure control over the military has shifted, resulting in both de jure and de facto civilian control. Argentina has ended up in a nonoptimal equilibrium. There is no doubt that the trial, conviction, the first seven-year detention and the current renewed imprisonment of former military presidents and commanders in chief constitute an exceptional and key element in its process of democratic consolidation. Without an autonomous judiciary willing to defy the political strategies of the presidency, as well as without political parties and human rights organizations willing to push the politically risky rule of law, military subordination to constitutional rule would probably not have come about. In contrast, the presidential pardons have obstructed the completion of the punishment and the "due obedience" law constituted a de facto amnesty that violates the right to justice of the victims and their relatives.[45] The dilemma, therefore, is not only about past

[43] Stepan, Alfred, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton University Press, Princeton, N.J., 1988, chapter 7.

[44] The level of contestation is not essential to the definition of the democratic character of a regime. However, once a democratic regime has been established, the level and nature of military contestation of civilian decisions and policies become relevant to establishment of the prospects for democratic consolidation.

[45] It also violates Article 2.3 of the UN Convention against Torture of December 10, 1984, and Article 6 of the Declaration of the UN General Assembly about the protection of persons against forced disappearance of December 18, 1992.

human rights violations but also about present ones; in a nutshell, it concerns not only how a democracy deals with the past, retroactive justice, but how it is able to defend and realize the rights of its citizens in the present. The dilemma concerns the kind of democracy that is being built.

Second, Chile has a high level of prerogatives and a medium level of military contestation of constitutional authorities. Thus, it is a case in which the armed forces have been most successful in maintaining their prerogatives and tutelary role over political matters. Indeed, the magnitude of these prerogatives and the degree of military influence over certain areas of public policymaking put into question the fully democratic character of the present Chilean regime. Chilean democracy can be considered "partial" or "incomplete," or as a representative civilian regime that, despite having a democratically elected government, has yet to complete the process of transition to a fully democratic political order. And at present, the progress toward the culmination of the Chilean political process in a full democracy is tightly intertwined with the kind of transitional justice it will finally adopt.

4. Transitional Justice and Democratic Governments: Common Traits of Argentina and Chile (and of Brazil, Paraguay, Uruguay, and So On)

Finally, what does the analysis of the Argentine and Chilean cases tell us about the role of the judiciary and its relationship to the dilemmas faced by newly emerged democracies?

When democratic politicians face the challenge of human rights violators who still legally bear arms, they tend to perceive in the autonomy of the judiciary a source of potential danger. Courts that serve the law before the political needs of the presidency can, no doubt, become sources of tension in processes characterized by unstable equilibria. In this sense, politicians are right to be careful about the risks entailed by an autonomous judiciary. Their error lies not in being cautious about these risks but in assuming that the problem lies in the judiciary when, in fact, it is inherent in democracy as a regime of governance and conflict resolution. As Przeworski has pointed out, the stability of rules creates uncertainty about the outcomes, a feature inherent in the democratic struggle. To prioritize the achievement of an outcome over the stability of the rules and over the freedom of action of the judiciary opposes the democratic nature of the regime. If democracy is a regime in which all citizens are equal before the law, as a rule of thumb all those responsible for human rights violations should be taken to trial and punished, and all those democratically entrusted with the collective welfare of the society should be willing to face the risks entailed by the rule of law. It is difficult to imagine a process of democratic consolidation and deepening in which politicians and citizens are not willing to face the risk of an autonomous judiciary.

This reconstruction not only showed Argentine and Chilean politicians' sharing uneasiness about the domestic autonomous judiciary. It also showed a

governmental logic that reacts with even more uneasiness if the autonomous judiciary is operating beyond its frontiers. And this is also understandable: for centuries public order has tended to be the result of processes that occur within national limits controlled by the state. External judicial rulings that contradict domestic political arrangements destabilize local equilibria and political order, at least, in the short run. Moreover, external judicial rulings question the limits not only of national sovereignty but also of popular sovereignty. Indeed, the assumption behind international law is that it supersedes the majoritarian preferences of a given polity at a given time. If we believe in international law we must not only accept the uncertainties of outcomes within given rules; we must also accept that certain rules are beyond popular consultation or preference. And this principle necessarily implies a reduction of power for local political representatives as well as the reduction both of national and of popular sovereignty when the dilemma is about applying the law.

11

Transitional Justice in the German Democratic Republic and in Unified Germany

Claus Offe and Ulrike Poppe

New political regimes are never created on a tabula rasa. Hence any new regime must establish some relationship to the actors and subjects of its predecessor regime. Also, it must establish reasons supporting the nature of this retrospective relationship. The retrospective relationship must be justifiable in terms of the new regime. Whereas new authoritarian regimes may be able to repress and destroy the traces and memories of the predecessor regime, this option is precluded in new democracies. The latter must deal, in order to secure their viability and credibility of their principles in the future, with past injustices through means and procedures that are consistent with presently valid standards of justice, such as the rule of law and equality before the law. This threefold temporal reference to the past, the present, and the future is constitutive of the problems of transition justice in new democracies. This chapter is about the way this backward-looking practices evolved in unified Germany with regard to the past of the now defunct state of the German Democratic Republic (GDR) and the dominant actors of this state, as well as its victims.

We deal here with "policies," that is, initiatives taken and strategies chosen or sponsored by state actors (governments, the judiciary, and special agencies constituted by law), not the numerous exclusively civic actions in which conflicts are carried out among family members, by social and political movements, within occupational groups, or by the media. Policies of transition justice can focus on perpetrators and on victims. They can also consist in formal legal procedures or the conditioning of discretionary moves taken by political actors. A matrix that is made up of these two dimensions can help to group the numerous policy options available in this field (see Figure 11.1).

Box 1 of the figure represents all those cases in which criminal law procedures are applied to perpetrators. The rules and decisions governing this field of activities include those governing the resources spent on investigation; decisions concerning the statutes of limitation and the time frame of prosecution, kinds of actors and acts that are to be prosecuted, and rules concerning amnesty and dismissal from prison.

	perpetrators	victims
legal sanctions	criminal punishment 1	restitution/ compensation 2
political sanctions	3 disqualification from public sector employment	4 "recognition"

FIGURE 11.1. Types of responses to past injustices

Box 2 concerns victims and the legal entitlements they are endowed with regarding restitution of property and compensation of suffering and incarceration. Note that the satisfaction of seeing former oppressors formally punished can be an externality of box 1 activities that belongs here.

Box 3 contains all practices by which state policies shape and condition the fate of alleged perpetrators within civil society without directly ordering specific outcomes. For instance, perpetrators are banned from public sector employment or must pass special screening before being eligible for public office. Such information can be issued publicly or conveyed to specific target recipients, with some probability implied (and intended) that the persons in question will become targets of civic and political disqualification. The sanctions following upon such exposition remain largely (except, within limits, for the sector of state employment itself, as in the case of lustration) a matter of how friends, customers, employers, relatives, local communities, the media, and others respond to what has been made public or specifically conveyed to them about particular acts and actors. This type of sanctioning can be termed *civil disqualification*. Other policies in this category include the state-sponsored establishment of documentation centers, exhibitions, research activities, investigative commissions, and the like.

Finally, box 4 contains the role assigned by policymakers to victims' associations, state-sponsored confrontations, encounters and exchanges between former perpetrators and their victims, and claims against perpetrators granted victims by the state. The typical goal (and not just the side effect, as in box 1) of policies here is to offer recognition to victims of the old regime and to help them to develop a sense of trust and of belonging to the newly constituted political community.

We concentrate here on state-sponsored activities focusing on agents of the old regime, that is, on phenomena belonging to boxes 1 and 3. The practices thus categorized are intended to deal with the morally, legally, economically,

and politically relevant residues of the old regime and the persons who made up that regime. These practices of coping or coming to terms with recent history have a history of their own. We proceed as follows. First, we follow the main nodes, or branching points, in the history of dealing with the past of the GDR and its relevant residues. The question is, What choice of policies was adopted in these fields? These policies include those initiated by the preunification regime in the GDR that began to form after the manifest breakdown of the old regime with the fall of the wall (November 9, 1989) and ended with unification on October 3, 1990. They also include those policies and legislation initiated after unification by German authorities.

Second, we intend to look at the causal mechanisms that can be held responsible for choices being made in one particular way, rather than other ways that were known to be available and often have actually been pursued in other places or at other times. For instance, we need to explain the fact that at a very early stage of the process a decision was made that the Socialist Unity Party (SED), the former monopolistic Communist Party of the GDR, was allowed to transform itself (while keeping most of its vast assets) into the post-Communist Party of Democratic Socialism (PDS). For identifiable reasons, it was not treated after 1989 as the Nazi Party was after 1945, namely, prohibited. We thus try to give a synthetic account of both the course of major events and outcomes and the premises, actors, principles, constraints, interests, power positions, and coalitions that made the sequence of decisions and events happen the way it actually did.

Third, we offer some thoughts, speculations, and generalizations concerning the retrospective evaluation of the policies that were actually adopted. Have they lived up to expectations and hopes originally associated with them? And if so, to what extent and with what kind of side effects?

Any course of action that is being taken is a selection made from a space that contains myriad other possibilities that have been rejected, explicitly or implicitly. What explains why the options actually chosen were chosen, and its alternatives rejected? And what reasons do actors give for opting for one possibility rather than its alternative(s)? Concerning box 1 of the matrix alone, the space of available possibilities can be visualized by a decision tree as (partially) represented in Figure 11.2. The number of nodes and the specification of alternatives represented in the figure serve only the purpose of illustration. Note, however, that the hierarchical presentation can be somewhat deceptive. For example, the suggestion is that node 5 could only be dealt with subsequent to node 2. To the contrary, the decision taken at node 2 may well be taken in anticipation of the choice that actors intend to make, or perceive to be easily available and preferable, at point 5. So the causal determination can be upward as well as downward. Also, causal determination may significantly deviate from the reasons and justifications given by actors or perceived and accepted by mass audiences.

The first question that must be posed and answered after the breakdown of any old regime is that of activism versus inaction concerning transition justice (node 1). To anticipate some of what we are going to elaborate, the post-1989

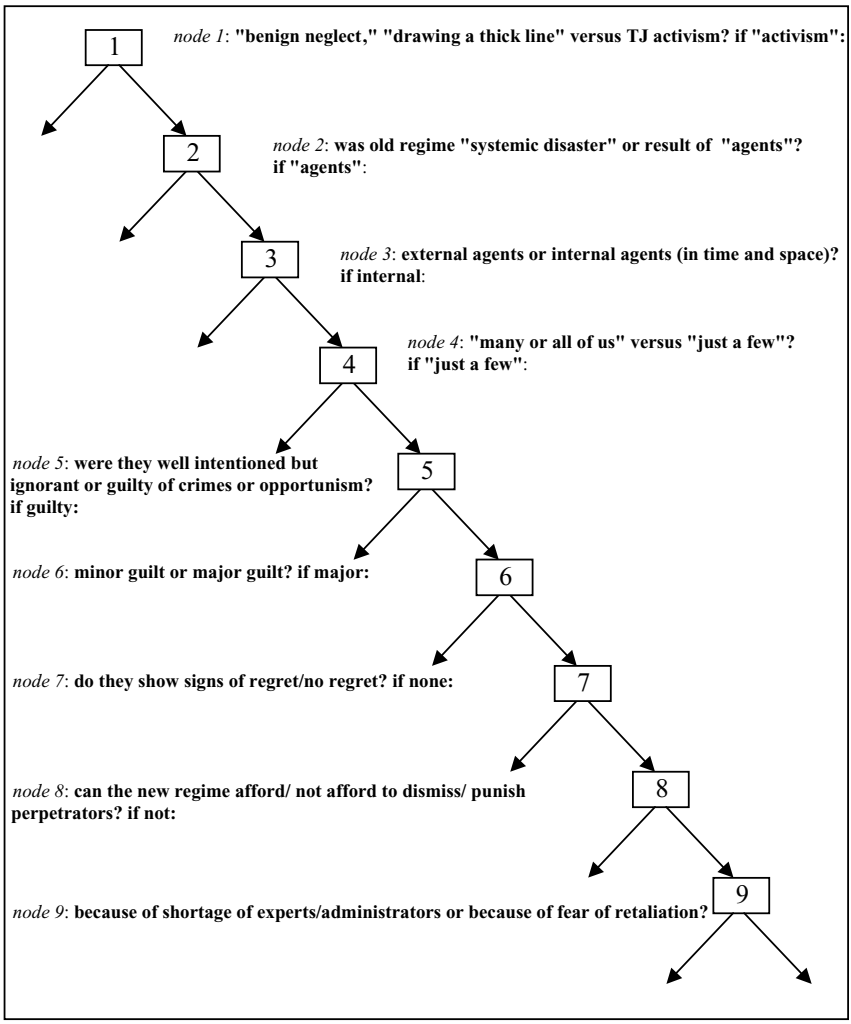

FIGURE 11.2. A partial decision tree concerning wrongdoing under the old regime

German situation was strongly and singularly (if compared to the other simultaneous transitions from state socialism) shaped by an activist orientation. Not only were German elites and mass publics convinced that "something must be done," particularly as there are an acute memory and ongoing debate on what has been done, and arguably done wrongly, since the breakdown of Nazi Germany in 1945. In the context of unification, there was also a virtually unique scarcity of reasonable concerns and arguments why one should better refrain from doing what might be done (node 8). To wit, old elites at whom that activism was directed enjoyed less bargaining power to protect themselves than they did anywhere else. Neither credible threats of revenge nor the threat of

withholding of needed cooperation with the successor regime was available to them, as the control over the entire process was firmly in the hands of the West German political elite and its constituency, which made up roughly 80 percent of the population of unified Germany. On the other hand, West German elites saw the need to reach out for the former opposition movements in the East whose spokespersons were calling for an activist approach to transition justice. Nor did the Soviet Union see any reason to deploy its (considerable) bargaining power in the "two-plus-four-negotiations" of spring and summer 1990 on behalf of the interest of its former comrades in the leadership and state apparatus of the GDR. Also, transitional justice activism was suggested not only by the lofty consideration that it was needed in order to overcome the old regime and to build a solid foundation for the future of the new democracy. It was also motivated by present interests in the politics of history. In a nutshell, conservative political forces saw a splendid opportunity to whitewash some of the dubious features of the post-1945 transition. In a nutshell, whoever had criticized the practices and outcomes of that episode should be assured that "this time we are ready to do it right," and do it, at that, on the basis of a uniquely rich source of data, a unique wealth of which had been accumulated by the old regime and made easily and widely accessible by the new one. Finally, what allowed an activist approach to be adopted was the fact that, in contrast to 1945, the crimes of the old regime were clearly not of the abysmal scope and quality that had called for almost one entire generation's interlude of "communicative silence," as one philosopher has put it. With all these reasons and motivations for an activist approach, who should be selected as its legitimate targets?

STATE SOCIALISM AS DISASTER OR AS CRIME?

Let us start with a thought experiment. Suppose we could assess the total volume of welfare or well-being (in the most inclusive sense) of an entire society for the period of its existence. Leaving aside all the problems of interpersonal and intertemporal utility aggregation, we would come up with an estimate of the overall welfare performance and happiness of a society during the period in question. Such information on actual well-being would make sense if it were meaningfully contrasted to a notion of potential welfare, the benchmark being either the standards a society, through its representative agencies, has set for itself or the standard actually achieved by "comparable" societies. Now, societies never live in the "best of all possible worlds." Hence, whatever the standard applied, the actual level of welfare achieved would most likely turn out to be inferior to the standard of overall potential welfare that would have resulted under the counterfactual condition that everything went as well, or had been done as wisely and with the desired measure of fairness as we reasonably could hope for.

This speculation leaves us with a differential, the difference between actual and potential overall welfare experienced over a period. The notion that is relevant here is that of the volume of "unnecessary suffering." An argument

that was popular in Poland in the early nineties and that was referred to, for instance, in a talk by the former Polish prime minister Suchocka claimed that the Communist regime had prevented Polish society from becoming a "normal" society, with the benchmark French or other West European societies and their material as well as nonmaterial indicators of well-being and collective happiness.

After having established the notion of the difference of actual and potential well-being achieved in a society within a historical period (and supposing this differential is deemed nontrivial), we can then ask how to account for this differential of suboptimal welfare performance. Several possible answers come to mind. First, the gap can be due to bad luck, amounting to a disaster of historical proportions (such as a major economic crisis) for which no specific actor can be held responsible. Next, it can actually be attributed to some significant category of agents. These agents may be part of the society's space and time slice in question, or they may be external and previous to it. For instance, a serious underperformance in the welfare yield of period *N* may be due to what identifiable actors did in that society in the preceding period *M*; examples include a war of aggression committed in *M* from the consequences of which results the underperformance during *N*. Also, external actors such as occupation forces may be responsible for the gap, for instance, because of the extracted massive reparations from the economy under consideration.

But the gap may also be construed to have been caused by *internal* actors who may have made irrational, misguided, irresponsible, or otherwise morally objectionable decisions as the result of which the total welfare may have been depressed. As one limiting case, virtually all adult members of the society in question (except, perhaps, a tiny minority of opposition activists, as well as the very young) may be said to have caused (or failed to prevent or correct) the pathologies from which they have been suffering. According to this reading, the gap of well-being is the result of giant collectively self-inflicted damage. Alternatively, there may be a subgroup, such as bad rulers and their administrative staff, who caused the gap.

Furthermore, the actors who have caused the relative loss of welfare and happiness may be perfectly innocent, because they cannot be reasonably expected to have known better and to have avoided the "mistakes" they actually turn out in retrospect to have committed. For instance, it may have been a case of bad luck in elite selection. Also, the knowledge needed to distinguish disastrous courses of action from benign ones may not have been available at the point of action.

But in contrast to these actors to whom such excuses apply, some acts and their authors can be criticized as positively unjustified. This is the core of actors to whom questions of moral and legal responsibility, or of guilt and punishment, can be meaningfully addressed. This is the case if (a) the act in question, lacking a valid welfare-related or other normative justification, added to the overall level of "unnecessary" suffering, waste, and unhappiness; and if (b) this effect was known or could have been known to the agents in question; and if (c) they were

in no way coerced to commit this action so that noncompliance would have resulted in the suffering of personal damage that the person in question could not have been expected to accept.

In other words, if autonomous actors do actually inflict damage on others and can be assumed to know what they are doing, we consider them guilty of wrongdoings. These objectionable acts of accountable past actors can be considered to be relatively minor in nature and/or so widespread in scope that the new regime covers them with an attitude of silence or forgiveness. If such an attitude is not adopted, the situation calls for sanctions.

LIVING IN UNTRUTH

Unfortunately, meaningful and uncontroversial measures for something like "overall systemic failure," "unnecessary suffering," or the "gap between actual and potential welfare" are impossible to come by. In order to create such measures, one would have to make crude aggregate utility calculations and heroic counterfactual assumptions. Although it is common to assess the alleged deficiencies of the political and economic system of the GDR by using the West German realities of the postwar period as a benchmark, such a measure of the systemic performance of the GDR cannot be taken seriously. Its use would mean ignoring the fact that neither the potential of economic and political development of the two states nor the intended patterns of their development had much in common that would justify such benchmarking. In the absence of an objective accounting frame, the only way out is to measure and evaluate societies by the standards they have explicitly set *for themselves*. Should they be found to fail in terms of these standards – as well as to fail to admit such failures, to learn from them, and to allow for initiatives to correct them – the evidence of the presence of a welfare gap is rather compelling. For instance, if rights are nominally guaranteed but not redeemed in practice, without this gap's becoming known or being acknowledged by rulers and without the means (such as independent courts) being available to the ruled to correct the situation, we can speak of a severe systemic failure. Similarly, one might look at the gap between intended and actual economic output. Although there is nothing wrong with the failure to implement economic plans successfully, a "second-order" failure begins when this failure is covered up and attempts to learn from failures so as to overcome inefficiencies are being obstructed.

State socialist societies, in the name of "scientific socialism," have destroyed and prohibited the use of valid means of self-observation and self-evaluation, such as independent courts, clean and contested elections, professional bookkeeping, free media, and politically uncontrolled social theory. It is not only that they failed to accomplish what they could have accomplished. They failed to allow for the admission of this failure. Thus the easiest and most encompassing way to answer the question of what was wrong with state socialism is to point to this feature of endemic and pervasive dishonesty. For the system's

dependency the practices of profoundly dishonest self-portrayal breeds the violent repression of those trying to tell the truth and to share it with others.

State socialist regimes depend on apparatuses specializing in the repression of truth. At best, narrowly circumscribed parts of the ruling elite are allowed access to the truth. The problem would be understated by far if we were to conclude that it was a regime of liars. Much worse, the regime generated a huge demand not so much for liars but for specialists devoted to the task of silencing truth. State socialist systems conceive of themselves, and probably rightly so, as highly vulnerable to noncooperative or openly independent modes of behavior. They are paranoiac about dissent, treason, manifest acts of disloyalty, and internal enemies, particularly so in a Cold War international environment in which every "wrong move" or unlicensed contact can be scandalized as "helping the enemy." Hence state socialist regimes spend enormous resources and efforts on surveillance, control, indoctrination, and the sanctioning of any challenges to the canonized self-portrayal and its allergy to nonpartisan observation.

If we are right in arguing that the stability of the entire political, economic, and cultural system of state socialist societies such as the GDR was contingent upon the effective neutralization of potential "truth tellers" through intimidation and other means of repression, it follows that what is wrong with state socialism cannot be accounted for in terms of acts and actors alone. Moral wrongs were a systemic, not primarily a personal quality. Institutional arrangements of this system were such that any political and economic elite would suffer from a virtual addiction to practices of epistemic policing. The systemic need for controlling and repressing presumably ubiquitous and dangerous"truth tellers" creates rewarding opportunities for actors who are willing, able, and sufficiently unscrupulous to perform a delicate double task: they must be able to find out the truth about potentially dangerous truth tellers and simultaneously minimize the risk that the truth of their performing this task is found out by those whom they are supposed to survey. In other words, state socialism creates favorable opportunity structures for an army of formally employed as well as "informal" collaborators of the Ministry of State Security (Stasi) (as their ranks, numbering more than 250,000 in a population of 17 million, were called in the GDR). This is so according to much the same logic as corporate capitalism creates the need for an army of investment brokers. In either case, the role people play is mandated by systemic requirements and cannot fully be reduced to their personal intentions and moral qualities. State socialism is an opportunity structure that imposes constraints, allocates incentives and premiums, and inculcates preferences that are all not of anyone's deliberate making and free choice. How is it possible to come to terms with these "faceless" arrangements in terms of personal guilt and culpability?

On the other hand, such a "systemic" view of the past is deeply unsatisfactory for actors that are external to the system in time and space. For the past regime lives on, not just in the memories and continued suffering of victims, but also in the visible and suspected position of privilege and influence that members of the old elite and their functionaries continue to enjoy. Many of them have been

able, or are suspected to have been able, to "convert" the resources acquired under the old regime into present status and advantage. The old regime has its traces and residues within the new. What present actors can act on is no longer the institutional order of the old regime, or its "structure." That order has gone anyway. The only thing to deal with that remains are persons who are known to have done certain things or suffered certain things. The failure to deal with these residues, or so it is believed at least by the victims themselves and those who feel solidarity with them or indignation over their victimization, would stand in the way of an effective integration of both actors and sufferers into the new political order unless these events are properly dealt with by the new regime. In order to cope with either of the two continuities – the continuity of memory and indignation and the continuity of impunity and influence – the present reading of the history of the now defunct system of state socialism is bound to shift to an "activist" mode. In an epistemic gestalt switch, personal responsibility is now being emphasized and systemic causation played down, and actors are now being looked upon in terms of personality traits such as heroism, moral weakness, guilt, awareness, deliberate action, and opportunism, rather than in structural terms such as social roles, built-in constraints, and preferences shaped through indoctrination and manipulation. Those who used to be (and used to think of themselves) as "functionaries" of the regime are now, after that regime's end, being reconstituted as responsible and potentially culpable agents.

Many people both inside and outside the defunct empire of European state socialism believe that this type of political and economic order was a profoundly unfortunate period in the history of the societies affected by it, as state socialism deprived huge populations of the measure of well-being and happiness, as well as of the benefits of a civilized and liberal political order, that they could have attained in the absence of state socialism. Let us assume, for the matter of argument, that this proposition is both meaningful and true. In retrospect and after the old regime went under, it is unlikely for the reasons just mentioned that the gap will any longer be attributed to impersonal forces and structures that caused a historical disaster. Such a "structuralist" view of the past may well be the preferred reading of history of those whose acts are now being explored and perhaps punished. On the other hand, the preferred reading of victims (as well as of the proponents of the new regime) tends to be that the entire malaise of the past system can be accounted for in terms of crimes committed by identifiable and responsible persons, among whom many survived the breakdown of the old regime.[1] As this question remains contested, and as the discourse concerning

[1] This emphasis on concrete individual actors who can be held responsible for systemic properties is also illustrated by the reversal of the role of party and party members in the 1945 and 1989 cases. In 1945, the Nazi Party was outlawed by the occupying powers, but many of the ranking party members were allowed to pursue their juridical, political, or administrative careers. After 1989, the party was allowed to continue to exist, but members were screened before they were (re)admitted to professional or administrative positions.

the question cannot be concluded by authoritative fiat in a liberal society, the first problem is to reach a workable agreement among all sides involved on the range of acts and actors within the old regime to which the notion of moral or criminal guilt and punishment should be held to be applicable.

THE POLITICS OF BUILDING INTERPRETIVE FRAMES

Unoriginally, the notion of "responsible agency," and hence the answer to the question just raised, is a social construct. Let us distinguish two polar types of such constructs. One is the "weak" frame, which denies, and the authors and proponents of which may be actually quite strongly interested in denying, the possibility of linking outcomes to causal acts of internal actors ("internal" in terms of both space and time) who have been sufficiently autonomous and knowledgeable to be culpable. Adherents of this frame tend to look upon the negative experience of state socialism in terms of a fateful and anonymous historical disaster, perhaps even mitigated by some favorable accomplishments. This disaster emerges, according to this reading, from the synergism of innumerable actors, past and present, internal and external, well-intentioned, unknowing, and only marginally criminal by intention and effect. In other words, the "disaster" component, according to the proponents of this type of interpretive frame, is held to approach 99 percent.

The polar opposite is a "strong" frame, which claims, and the proponents of which may be equally interested in claiming, that most of the negative outcomes can actually be traced back to personal actors who are demonstrably legally and, at least, morally responsible for the damage they have inflicted upon others (as well as themselves). Adherents of this frame tend to favor criminal prosecution, as well as other retroactive methods of dealing with unjust acts committed in the past with which the new regime must cope. To be sure, most empirical cases of interpreters dealing with the past must be located "in between" these polar opposites. But the distribution of frames across observers is far from random. The individually preferred interpretive frames may differ across countries, across generations, across types of disasters/crimes under scrutiny, across time, and across political orientation, biographical experience, institutional location, and professional identity. As a result of this plurality of orientations, frames are essentially contested, and the contest is unlikely to be resolved by compelling arguments from philosophical analysis, historical research, legal scholarship, or political expediency.

To what extent were actors and acts actually "internal" ones? And if they are to be held external, are they external in space or in time? Answers are far from obvious. Why was it that the exculpation was rarely used (or, at any rate, rarely accepted), in the case of the GDR, that much of the disaster must be attributed to external rather than internal actors? This excuse has been widely used in the Polish case. It might have been used regarding the GDR regime as well, given the fact that the sovereignty of the East German state was a limited one (contrary to what the GDR leadership itself postulated at the time) to the end within

the framework of the Warsaw Pact and the Council for Mutual Economic Aid, (CMEA), with the Soviet leadership playing a dominant and generally decisive role. The excuse of external agency was actually invoked by defendants in the trial conducted against the Politburo members accused of being responsible for the border regime and the lives lost under this regime. These defendants claimed that they were just following Warsaw Pact orders, without any possibility of escape. This attempted exoneration was rejected by the court on account of its dubious factual premise and the moral inconclusiveness of the claim that the defendants were actually "coerced" to comply. However, the argument of ascribing the wrongdoings of the past regime to the coercion of an external actor was, and still is, much more widely in use in the GDR's neighboring countries, most obviously in Poland, than in Germany itself. This difference can be explained by the fact that any externalization strategy would be blunted, in the German case, by the obvious consideration that the control of the Soviet empire over East German politics was itself caused by the war of aggression originating from Germany, and Germany's subsequent defeat. In other words, it is only to Germany that the condition applies that the agents of external coercion were originally caused, enabled, and seemingly justified by previous internal actors. This consideration deflates the value of any depiction of the past as a history of collective victimization. One might speculate that the latter intellectual scheme is more likely to emerge in a Roman Catholic as opposed to a Protestant culture with its basically individualist background assumptions.

Concerning the question of the causal attribution of outcomes to internal and external actors, and more precisely, actors being internal or external in either space or time, a complex matrix that links categories of interpreters to their respective most favored interpretations could be drawn. For example, opposition activists who fought the old regime, together with many courts involved in prosecuting members of the old regime, would typically reject the old elite's claim of having been coerced by forces external in space. In the eyes of these interpreters, rulers and other agents making up the old regime are held to have been sufficiently unconstrained by external actors and hence autonomous and responsible for their acts. At the same time, these interpreters would certainly be prepared to recognize the role of causal forces that were external in time, namely, the Nazi regime and its war of aggression. In contrast, the interpretive frame prevailing in Poland is significantly different in that the attribution of deplorable outcomes to responsible actors was unequivocally based on the notion of some unjustified foreign rule of the Soviet Union, without much focus on criminal forms of cooperation of which significant numbers of internal actors could now be justly accused, for attempts to scrutinize the elite of the former regime and its supporters are widely seen in Poland as dangerously divisive moves that could undermine the sense of national unity and pride.

These two examples may serve as an illustration of the link that exists between the location of actors in a field of interests and meanings, on the one hand, and their preferred frame of interpretation, on the other. The framing of agency and the causal attribution of outcomes to agents are not conditioned by

factual evidence and disinterested analysis alone. There is a discursive "politics" of framing. Pragmatic considerations of acts that would have to follow from the adoption of a particular "reading" of the old regime, and strategic responses to these acts that must be anticipated from affected groups, will all play a role in the formation of interpretive frames. For instance, pragmatic considerations such as the following ones may play a role in the motivation of those favoring a "weak" frame:

- The anticipation that attempted legal activism in prosecuting crimes committed under the old regime is likely to be obstructed (or even actively and violently fought)[2] by alienated agents within the state administration and the judiciary
- The anticipated need that the expertise of those liable to criminal prosecution will be indispensable to the reconstruction of the political and economic order, with the implication that tactical lenience should be allowed to prevail
- The anticipation that the quality of the available evidence will not be sufficient (perhaps because of the control members of the old apparatus have gained or even maintained over these documents) to enter into effective criminal prosecution
- The possibility that proponents of the new regime may also wish to protect themselves by protecting key actors of the old regime from criminal prosecution, with the underlying reasoning that if such prosecution were to result in significant penalties, representative actors of the new regime could be blamed in retrospect for having cooperated with (or at least not duly resisted suggestions aiming at cooperation from) those whose eventual demise from power had caught them by surprise

These and similar considerations may all play a role in discouraging the building of a "strong," actor-centered frame built on the presumption of evident links between outcomes, on the one hand, and autonomous and knowledgeable (and hence potentially culpable) actors, on the other.

Conversely, the adoption of a "strong," or agency-centered frame that would allow for the attribution of most of the negative outcomes to internal actors who are held fully responsible is also driven by values, anticipations, and interests. Relevant considerations of this kind include the following:

- Proponents of the "strong" frame may be motivated by the desire to respond to the emotional needs of victims and to win over those who have suffered under the old regime to accepting the rules and principles of the new regime.
- There are also invariably less lofty motivations for the adoption of a strong frame and its punitive practical implications. One of them results from the

[2] The most dramatic case that corroborated reasons for fear were the attempted carapintada revolts in Argentinian barracks. Compared to them, the Spanish case of a military officer who invaded the parliament with a gun in 1981 remained a minor and isolated incident.

fact that the coping with acts committed in the past is always embedded in present-day political conflict. For instance, if a governing political party A manages to demonstrate and publicize the fact that actor X has been involved in objectionable activities under the old regime and, furthermore, that this very same actor is now associated with or enjoys the support of opposition party B, this is likely to yield a competitive advantage for party A in future electoral campaigns. The obvious retaliatory move that party B is likely to resort to is scrutinizing the elite personnel associated with party A for similarly reprehensible actors or acts. Political competition may also be conducted in terms of a moralizing conflict over metanorms, with the typical accusation that political parties on the Left are disposed toward treating with inappropriate leniency crimes committed under the old regime.

- Other political goals served by the adoption of a "strong" frame include the attempt to restore some international reputation of a country (such as Germany) that has been widely accused in the past, from the outside as well as from within, for having failed to punish the perpetrators of the Nazi regime as vigorously and consistently as was called for moral reasons. This type of motivation follows the rule of "This time we are determined to do it right."
- Also, the somewhat triumphalist goal can be served of engraving the fact into the memory of the present and future generations that "we," the liberal democracies of the West, have won the Cold War and that the merciless prosecution of the old regime's elites is mandated by the need to consolidate the new state.
- More respectably perhaps, the goals to be served by adopting a version of the "strong" frame are to immunize future actors against the dangers and temptations of relying on or complying with authoritarian rule and to make irreversible the transition to a liberal and democratic form of political regime.
- Finally, a strong frame, together with its practical punitive implications, can be advocated because it serves the political, juridical, and scholarly interests of those who are committed to shedding as much light as possible on the internal dynamics of the old regime, for criminal trials afford the unique opportunity to gather data because courts can (a) force strategic actors to testify before a court and to submit to the scrutiny of criminal investigation and (b), in most cases, to testify under oath.

THE ADOPTION OF A "STRONG" FRAME IN GERMANY AFTER 1989

The two lists of motivations, both of them incomplete, highlight the complexity that is involved in adopting either the weak or the strong frame, or any mixed position in between. Yet the actual trajectory that can be observed in the case of the GDR and its later treatment within unified Germany is easy to summarize. A dominant coalition emerged in which actors and motives converged on adopting a modified version of the strong frame. The German case of retroactive justice resulted in a more activist strategy concerning the pre-1989 regime

of the GDR and its actors than in any of the other post-Communist countries. Why was this so? Let us review how the various pros and cons that we have identified figured in the German formation of a policy concerning transition justice.

The presence of a substantial welfare gap, both material and immaterial, that had accumulated throughout the forty years of history of the GDR was taken for granted at the end of the year 1989 not only (trivially) by West German political elites and the former GDR's opposition forces, but also by the political and economic leadership of the GDR itself. There was literally nobody who would claim publicly that the old regime deserved any credit for its economic sustainability or political legitimacy. Similarly pervasive was the consensus that this grim reality of moral and economic bankruptcy must be largely accounted for in terms of internal agency, as no external scapegoats were available. These internal actors were seen to be accountable (in the sense specified). This accountability was recognized by all sides involved, including the SED state party and most of its leadership. The latter, however, was somewhat selective in its recognition of accountability and guilt, taking exception, for instance, about the border regime and the loss of lives under this regime, which were attributed to external coercion originating in Warsaw Pact structures. Otherwise, the recognition of failures and mistakes, though not universally of a criminal nature, was unequivocal.

The state party's preparedness to engage in self-blame is less curious than it might appear at first sight, for the leadership of SED, soon after the breakdown of its regime renamed the Party of Democratic Socialism (PDS), was bound to appreciate that its political future was contingent upon some credible measure of distancing itself from aspects of its political past and that of selected elements of its former leadership.[3] At the same time, the insistence of the leadership on the logic of "mistakes" committed by identifiable individuals rather than structural patterns of state socialism that caused an inescapable disaster allowed leaders and masses alike to preserve their belief in the viability of some future form of state socialism, one in which such mistakes were to be prevented.

There was thus no relevant voice in the GDR between November 1989 and the end of its statehood on October 3, 1990, that would have raised principled objections to the prosecution of at least some of the violations of rights that were instigated, sponsored, tolerated, and condoned by and under the old regime. More than that: there was a broad if highly diverse and diversely motivated advocacy of legal sanctions of these violations. Nor were there, at least during the initial phase of the process in 1989–90, significant objections to embarking on a course of criminal sanctioning. Virtually all the reasons suggesting the adoption of a "weak" frame, as summarized, were absent, and all

[3] This is in marked contrast to military authoritarian regimes who can resist – as well as have every reason to resist – even gestures in the direction of criminal proceedings' being adopted. After their demise, they are interested in wholesale amnesty. After all, they are not based on a political party whose electoral fate is at stake in case no such prosecution would be forthcoming.

the reasons supporting the adoption of a strong frame present. The focus of the criminal prosecutions initiated in 1990 (i.e, before unification) was not on the old regime's acts of repression, but on illegitimate appropriation of economic resources (through corruption) and of political resources through the falsification of local elections that had demonstrably occurred on a large scale in May 1989 (Marxen and Werle 1999, p. 235).

To elaborate, no substantial fears arose (contrary to the actual subsequent experience of a substantial nostalgic backlash spearheaded by the PDS) that juridical activism in dealing with violations of the defunct regime would alienate relevant parts of the East German population and thus exacerbate divisions within the post-Communist society of the GDR. With the exception of the core of the state party and the most loyal parts of its constituency, virtually all political forces, and particularly so both the former opposition within the GDR and the political elites of the Federal Republic, expected a rapid process in which, for both political and economic reasons, the vast majority of the people of the GDR would be persuaded to adopt loyalty to the principles the West German state is based on, and eventually to unification. At the very least, and with the prospect of unification becoming rapidly more concrete, committed supporters of the old regime were expected to be incapable of playing any significant role in the future of unified Germany. There was no perceived need to extend any leniency to them out of political prudence. To the contrary, it was widely perceived that juridical *inaction* would have grossly frustrated the internal opposition forces in the GDR and their allies within the emerging party system.

Similarly, the concern that the personnel of the state apparatus, including the judiciary, would feel alienated by a strategy of judicial activism and would try to obstruct the process appeared unfounded. To be sure, there were various attempts and initiatives launched by Stasi officers and other agents of the old regime to intimidate, threaten, and "punish" the new authorities, as well as to join forces with West German and other gangs involved in organized crime (Richter 1996: pp. 254ff.). But no case is documented in which these networks (often referred to as Seilschaften, or mountain climbers connected by a rope) actually succeeded in effectively interfering with the orderly conduct of politics, administration, or justice. For the functionaries of the old regime incentives to adapt to the new conditions were significantly more powerful than incentives, as well as opportunities, to fight the new regime. This can be explained by the fact that it must have been evident to officials of all ranks and branches of the state apparatus (in sharp contrast to both the post-1945 situation in Germany and the situation prevailing in all other post-Communist countries) that acts betraying faithfulness to the politics and principles of the old regime would be responded to by the new regime through disciplinary measures and ultimately the removal of opponents from their position. Such removal would involve the consequence for those affected of losing their career prospects, particularly as a virtually unlimited supply of substitute personnel could be mobilized and moved in from West Germany. This configuration of power relations has actually led

to highly opportunistic behavioral responses that are proverbially referred to by comparisons to the chameleon, a reptile able to adjust quickly to the color of its environment, or to the Wendehals, a bird capable of turning its head 180 degrees without breaking its neck. The term also alludes to the transition (Wende). Scores of those who were involved in Stasi activities were dismissed and replaced by either substitutes who could be recruited locally or, particularly in cases in which the newly adopted West German institutions required new kinds of expertise and professional knowledge, by temporary substitutes called in from the West.

Finally, there was also no reason to believe that the databases for criminal prosecution would turn out to be insufficient for criminal prosecution in either quantity or quality. To the contrary, and after the Citizens' Committees had largely succeeded during the winter of 1989–90 in obviating local Stasi officials' attempts to destroy or hide files, a vast official data archive was organized through an act (Stasi-Unterlagengesetz, StUG) passed by the Bundestag in December 1991. No other post-Communist country has at the disposal of its authorities a comparable wealth of data that would be, on top of it, equally well protected from the interference of interested parties.

All of these considerations do not yield a single point of view that could serve as an objection to the strategy to juridical activism in dealing with the violations of rights committed under and with the approval of the old regime. The adoption of a strong frame was made more likely in the case of the GDR by the circumstances just discussed than in the other post-Communist regimes where these favorable conditions did not apply, certainly not to the same extent.

Yet in the early nineties arguments against adopting the strong frame, at least in its radical version, did play some role in the case of the GDR, too. These arguments are based on doubts that a justification for vigorous retroactive transition justice that is consistent with both legal principle and historical precedent can be found. Concerning the latter, the comparison with the transition justice that was practiced in Germany after 1945 works both ways. On the one hand, one can argue that what went wrong then must be corrected now. But on the other hand, the argument cannot be dismissed that after scores of leading politicians, state functionaries, and intellectuals who were deeply involved in the Nazi regime were unpunished after 1945, why should it be right to adopt tough strategies of criminal prosecution against those whose crimes were on the whole of an indisputably smaller scale? If anything, these and other doubts have increased in their weight and significance since the beginning of criminal prosecution in late 1989. In a nutshell, or so we wish to argue, the arguments supporting the adoption of a strong frame lost much of their force in the process, giving way to doubts, disappointments, and even regrets as the process unfolded. The questions that must be addressed in the process are momentous indeed. Who is to be sanctioned for what acts, by what methods, and on the basis of what kind of justification?

ACTS AND ACTORS

The welfare-diminishing acts by which the GDR regime deprived its citizens of rights as well as of material resources are numerous (cf. Marxen and Werle 1999, pp. 3–140, for the most detailed account). Beginning with violations of the right to life inflicted on people killed at the border and as political enemies of the regime, actors within the state apparatus of the GDR systematically violated, on the basis of the official instruction, justification, and toleration of the regime's representative elites, virtually every human and civil right recognized in civilized nations.[4] Cases in point are the systematic repression of free communication and information, the denial of the right to communicate and to move across borders, coercive internal relocations, abductions and (in some cases) subsequent killings of persons from foreign countries,[5] denial of property rights and the program of forced agricultural collectivization, ideological indoctrination of the entire population, violation of the physical integrity of athletes through routinely administered doping programs, far-reaching denial of the right to associational life within civil society, large-scale spying on people suspected of oppositional activities, and unjust sanctioning of such activities through criminal punishment and the practice of *Zersetzung*.

These violations of rights were undisputedly of "internal" origin. The excuse that political repression, including criminal punishment for acts of political opposition and dissent, was ordered by representatives of the Soviet government (such as the Soviet Military Tribunal) active within the territory of the GDR had entirely lost its foundation by about 1955. All repression after that early date was largely homemade. There were between 250,000 and 300,000 political prisoners sentenced during the entire history of the GDR. As late as the period 1979 to 1989, the average number of people sentenced for political acts (including alleged economic "crimes" and requests to obtain a permit to leave the country) was five thousand per year. The number of those whom the actors within the repressive state apparatus considered "hostile elements" and prosecuted was much larger than the number of those who actually adopted a "hostile" position by engaging in organized, religious, network, or movement forms of opposition and resistance. The latter figure was estimated, as late as the mideighties, as "a few thousand" people. The difference between the two figures – say, 250,000 and perhaps 5,000 – is partly explained by the fact that

[4] Though, interestingly, not every violation of civil rights was actually tolerated by the regime's officials. When two Stasi officers decided that it would be a helpful idea actually to kill two opposition activists by making them victims of what was designed to appear a fatal traffic accident, they were accused and sanctioned by superiors for going much too far and for planning to commit criminal acts. Details of the case, as well as of the failure of the German court system to prosecute even this extreme case, are reported in *Der Spiegel*, No. 47, November 22, 1999, 72–76.

[5] The number of abductions from West to East, both executed and attempted, is estimated to be 600 to 700 cases. Just one of these cases resulted in a single person's being sentenced to prison.

very often people who were sentenced to prison terms were "bought free," at a rate of about DM 100,000 per capita, by West German authorities – an act that implied their "dismissal" from GDR citizenship and transfer to West Germany. This act also provided the GDR government not only with the opportunity to "earn" substantial amounts of revenues, but also with the unique chance to get rid of and permanently externalize much of the opposition. Whereas authoritarian regimes often run the risk of increasing the ranks of their opponents by employing repressive means against them, the GDR had exempted itself from this dialectics of repression.

The apparatus of repression that was designed to deter oppositional activities and to investigate political "crimes" was sizable indeed. Recent estimates of the number of people active in the state security apparatus cite 91,000 full-time (*hauptamtliche*) and another 174,000 "unofficial" employees and collaborators.

But there is no obvious reason to restrict criminal prosecution to those actors who demonstrably were involved in the repression of activities of citizens that were perfectly legal according to the letter of the GDR's laws. In addition to such repressive acts, there were other damages inflicted and losses implemented by the leadership of the GDR. As far as the collectively detrimental destruction (or inefficient allocation) of resources (as opposed to the violation of rights) is concerned, massive environmental poisoning must be mentioned, as well as the decay and rotting of buildings and entire historical cities that were allowed to occur through lack of repair and maintenance, the waste of items of the so-called *Volksvermögen* (people's wealth) through the deficiencies of the system of management and planning, and the illegal appropriation of economic resources by members of the elite and privileged strata.

How can these acts be accounted for in terms of the preceding conceptual analysis? The answer is far from certain. On the one extreme, few commentators would probably describe the system of state socialism as it was established in the German Democratic Republic after 1949 as anything close to a criminal conspiracy of self-serving power holders who intentionally and knowingly caused the economic malaise and civilizational decline from which the GDR irremediably suffered. Between the extremes of unequivocal criminal guilt and equally unequivocal innocence, there is a huge gray zone in which both questions of fact ("Who did what or ordered it to be done?") and those of legal principle ("Which norms and procedures should apply and what kinds of excuses of defendants must be recognized?") are often exceedingly hard to settle. That is to say (using the criteria of guilt mentioned, namely, violations of rights and interests, absence of justification, absence of excusable ignorance, and absence of coercion), most actors who were positioned at some point within the vast apparatuses of political, military, economic, and cultural control thought of their own action most of the time as justified by either valid norms or desirable outcomes.

But even if not, they may have felt caught in a dilemma such that one and the same act appeared mandated in view of one norm or utility while lacking

justification in terms of another principle or rule of a roughly equal salience. Perpetrators may also have been unaware (and perhaps inexcusably so) of the consequences of their action. Furthermore, they may have felt "forced" to do what they were doing, with the alternative possibilities implied that the "force" was real, that it was just imagined in order to calm the actor's conscience, and that it was real but had relatively mild sanctions attached to noncompliance so that actual compliance appears more a matter of opportunism than of coercion. Other possibilities include the fatalistic type of compliance based on the agent's full awareness that there is no valid justification for doing what he is supposed to do but that noncompliance is, at the same time, perfectly inconsequential, as "If I don't do it, someone else will."

But not only are terms such as *justified*, *aware*, and *forced* highly ambiguous and contested. To be sure, the gray zone does not cover the entire range of objectionable acts committed by officials and servants of the old regime. Large numbers of cases can be cited in which power holders intentionally, arbitrarily, and freely violated the rights, destroyed the life plans, and inflicted damage on fellow citizens in ways and to an extent that must be described as deeply cynical and often positively sadistic. Also, opportunism was widespread and practiced with good conscience under a regime that put a premium on conformism and obedience rather than the exercise of autonomous moral judgment. At the other extreme, the honest belief among "perpetrators with good conscience" that compliance was justified by the ideals of social justice and international peace was also part of the picture. Even within the limited segment of the overall malaise of state socialism in which negative outcomes can be traced to personal actors it appears exceedingly difficult to disentangle the varieties and mixes of all of these motives, cognitive states, and interested interpretations, narratives, rationalizations, and excuses by which those under accusation may defend themselves. Even more difficult is the attempt to assign criminal guilt to actors in conformity with procedures that live up to the requirements of rule-of-law principles, such as nonretroactivity.

The overall malaise of state socialism is much larger than the total of damages and suffering that identifiable actors inflicted on concrete victims. The ways in which potential well-being and happiness were obstructed by the state socialist regime of the GDR falls roughly in three categories. One is the violation of civil rights, as just specified. A second is the erection and maintenance of a system of economic management that while implementing in its distributional effects a pattern of authoritarian and paternalistic egalitarianism covering all *Werktätige* (working people) and their families implied a relative waste of economic resources (including the waste inflicted through economic corruption and privileges of the ruling elite) and a lag in productivity that was partly caused by the mode of integration of the GDR economy into the Council of Mutual Economic Aid (CMEA) system. Third, the ruling ideology, together with the monopolistic control it exercised over the school system, the media, the arts, the sciences, and virtually all other institutional sectors of society, imposed a regressive cognitive culture. The doctrines of the ruling ideology, as promulgated by

the monopolistic party, can be held responsible not just for providing justifications for the practices in the two other realms of civil rights and economic efficiency, but also for blocking and paralyzing much of the intellectual, moral, and perhaps even aesthetic potential, sensibility, and creativity of the citizenry of GDR (notwithstanding the major artistic accomplishments of the GDR's often oppositional writers, painters, and musicians).

Now, the disastrous effects of the two latter categories of deprivation, the economic and the cultural, are not easily accounted for in terms of individual acts and actors as in the case with the first. Conversely, if the past of the state socialist regime is primarily looked at through the prism of criminal law and its logic of processing illicit acts and their consequences through attributing them to individual actors according to legal rules, this practice would seem to involve a somewhat selective attention to damaging acts that are potentially punishable according to standards of criminal law, for this perspective implies the framing of the deprivations caused by the old regime as something that is primarily committed by agents within the repressive state apparatus (the *Staatsicherheit,* the courts, and the police); conversely, it deemphasizes those deprivations that largely cannot thus be attributed, namely, the "systemic" ills of the apparatuses of ideological control and economic (mis)management. The question can be asked (but cannot possibly be fully discussed in the present context) whether the worst deficiency of the past regime was actually its systematic violation of human and civil rights and not, to an equal or even greater extent, its equally systematic mismanagement of economic resources or its imposition of a rigidly ideological cognitive culture.

Is it right to conclude that if only the GDR had practiced greater respect for civil rights, the realities of the GDR society would have become more tolerable as its economic and ideological deficiencies alone would have been less objectionable? At any rate, this is a point of view that implicitly seems to be endorsed if we approach the problem primarily in terms of acts for which identifiable actors are legally responsible and punishable for violation of the human and civil rights of citizens. This is a question on which the authors of this chapter remain somewhat divided. The more strictly and scrupulously legal procedures are applied, the more legitimate complaints about the damages the old regime inflicted are likely to remain outside the realm of retrospective sanctioning, as the full range of damages inflicted cannot possibly be processed through the narrow channels of orderly criminal prosecution. Given the constitutional provision that prohibits retroactive punishment according to *nulla poena sine lege*, not the wrongs of the regime, but only the violations of the regime's own (at least nominally valid) norms can be the object of criminal prosecution. What can be sanctioned is thus not the "normal" operation of the system, but its excesses. The question arises whether this implicit demonstration of the impotency of criminal law will actually contribute to the intended purpose of its administration, namely, the cultivation of trust in the rule of law. By implication, many harmful acts that were typical of the practices of the old regime cannot be prosecuted because of the lack of one or more prerequisites

of formally correct trials (about which more in a moment). Conversely, some categories of crimes are relatively easy to bring to trial, although they may in no way constitute a distinctive characteristic of the state socialist regime. Examples are ordinary white-collar crimes (for the commission of which the economics of currency reform and unification provided plentiful opportunities) and the doping of athletes.

These complications have led to the formation of a multitiered system of state-sponsored Aufarbeitung der Vergangenheit, or working on the coming to terms with the past (as the somewhat ambiguous term that was adopted from the retrospective debates of the 1950s can be translated). The highest level of this multitiered system, which comprises legal, historical, and political strategies, consists in regular criminal proceedings, initiated by a special prosecutor's office and investigative authority. The next level is the complex set of activities that unfolded on the basis of the act of 1991 (Stasi-Unterlagengesetz) and were conducted by the agency set up by this law, commonly referred to as the Gauck agency after the name of its first president. Although the initiation of criminal procedures is only part of this agency's mandate, it does focus on individual actors on either side of the repressive transaction and sanctions the perpetrators of repressive acts through exposure and (indirectly) civic disqualification. A further step away from formal sanctioning and criminal procedure is the Enquête Kommission (inquiry commission set up by the German Federal Parliament, Bundestag, on May 20, 1992). This commission was assigned the truly formidable task of "working on the coming to terms with the history and consequences of the SED dictatorship in Germany." The commission focuses in its work not so much on individuals and their responsibilities, as on institutions and power relations. Finally, there are a number of proposals for state-sponsored activities, such as the setting up of research and documentation centers and educational activities, that are intended to serve the deeper understanding as well as wider awareness of the nature of the state socialist regime. We now proceed to discuss the activities on these four tiers in turn.

CRIMINAL TRIALS

Whether or not to employ criminal law was a question that was settled from the beginning in political terms and under the impact of political contingencies. There was nothing "natural" or automatic in the reliance on criminal proceedings initiated against the former state's elites. To wit, there are a series of "ifs" that would have excluded criminal prosecution as a viable option. Had the old regime in its desperate struggle for survival taken recourse to massive violence (following the Chinese example of June 4, 1989) or had the opposition turned violent during or after the breakdown of the old regime, nothing would have remained in terms of an agenda of criminal prosecution. In the first case, the system's breakdown might at least have been postponed, thus making the prosecution of its crimes impossible for the time being. In the second case, a kind of revolutionary "justice" that arguably might have made formal criminal

prosecution unnecessary at a later point would have taken its course. Furthermore, such prosecution would have been renounced as an option under the conceivable circumstances of a *transición pactada*, in which the forces of the old regime (or its sponsors in Moscow) would have remained strong enough to negotiate a general amnesty for themselves as a precondition of conceding their removal from office and power.

Thus the question of applying criminal justice has been treated as a political question in the GDR since November 1989 and (beyond the end of the GDR's life span) in unified Germany. The overall preference was, from the beginning of the breakdown of the old regime onward, in favor of prosecution, with initially at best marginal support for the alternative of drawing a "thick line" or amnesty. As early as November 18, 1989, the SED-controlled legislature installed a committee of investigation that was mandated to inquire into cases of abuse of official powers and corruption as well as the falsification of election results. On November 22, a police officer was sentenced to a fourteen-month prison term for severely beating a GDR citizen. In December, several members of the SED Politburo and party officials of regional headquarters were arrested, and subsequently more than half of the members of the Politburo were arrested for some period. After the parliamentary elections of March 18, 1990, the second plenary session of the Volkskammer debated, on April 12, the need for prosecuting regime crimes; this need was endorsed by members of all parliamentary groups. This determination to prosecute regime crimes was also emphasized by the GDR delegation negotiating the terms of the Unity Treaty with its West German counterpart. As a consequence, the mandate for prosecution was enshrined in the Unity Treaty that became effective on October 3, 1990.

This very broad consensus has generated a path dependency of judicial activism, as the new all-German legislature and political elites could not possibly pursue a more lenient line than the one adopted by the stated policy goal of the Volkskammer, the democratically legitimate parliament of the GDR elected on March 18, 1990, as well as obviously also of the majority of the population. Courts in unified Germany considered themselves in possession of a mandate to embark on criminal prosecution of "regime criminality" not because of their own authority to do so (which would have smacked of victors' justice), but because of Verfolgungskontinuität, or continuity of a prosecution that was originally initiated by the (democratic) GDR and now became a legacy to be honored by the court system of unified Germany.

Why was criminal prosecution considered to be worth the effort, in spite of the difficulties that arguably might have been foreseen even at the beginning? Three lines of argument have been offered to show why criminal punishment must be attempted. One is the familiar argument that perpetrators must be punished in order to deter them or others from committing similar crimes in the future. This argument has been dismissed as a nonstarter in the case of GDR Regierungskriminalität as, thanks to unification and the evident moral as well as economic breakdown of the old regime, there will be no conceivable

opportunity for incriminated actors or others to commit comparable crimes within a newly erected state socialist regime at any point in the future (Jakobs 1992). At best, there can be a preceptorial effect of attaching moral and juridical disapproval to the old regime as a whole and the principles on which it was based.

A second argument in support of criminal prosecution takes the point of view not of perpetrators (or potential future perpetrators) who must be deterred, but of victims who must be integrated and (at least) symbolically compensated. Apart from the potential conflict between the objectives of administering justice in strict conformity with standards of procedural fairness, on the one hand, and the provision of emotional comfort and satisfaction to victims, on the other, the argument presupposes that this reconciliation can actually be achieved within the constraints of the rule of law principle and ordinary criminal proceedings. Much of the later evidence that was perhaps not foreseeable at the point of unification suggests that this is not the case and that, to the contrary, victims are often deeply irritated and offended by the fact that very few and relatively mild sanctions have actually been implemented. This applies all the more as the reverse side of the medal of criminal prosecution is acquittal of those against whom no sufficient case can be established – with the implication, which greatly angers victims, that perpetrators have often received a virtual stamp of innocence when being acquitted from criminal prosecution because of lack of sufficient evidence against them. Even worse, German courts of appeal have decided that even though a particular crime was defined by the criminal code of the GDR but only nominally so (because it had never actually been applied to relevant cases, e.g., of homicides committed at the border), it is inadmissible to prosecute a case on the basis of that (pseudo) norm because doing so would violate the principle of nonretroactivity.

A third set of considerations in support of criminal prosecution takes the point of view neither of the perpetrators nor of their victims, but, as it were, of the corporate interest of the German criminal law system itself. The argument is that after the German court system has failed to prosecute most of the government crimes of the Nazi regime, and after it has been rightly and severely criticized for this failure, this is the opportunity to do things right and to restore the (self-) respect of the court system. At any rate, it must be assured that the same mistakes are not committed again at all costs.

None of the major political actors making up the postunification German party system, not even the PDS, could afford to oppose criminal prosecution as an instrument of dealing with the personnel of the old regime. Any such opposition would have been scandalized by political competitors as a proof of inappropriate permissiveness and leniency. The awareness of this potential charge applies with particular force to the (Social Democratic) German Left, as it is the Social Democrats who are now being remembered for initiatives they had launched in the mid-1980s that aimed at closer cooperation with the SED and resulted in a paper coauthored by representatives of the two parties. Also, the political Right (as well as some media supporting it) were not always able to

resist the temptation of the following argument: As the Left has stigmatized the early history of West Germany as being under the shadow of Nazi continuities, conservative forces must now strike back by exposing the Left for its continuing intellectual affinities with state socialism. At any rate, during the first half of the nineties, the denunciation of (aspiring) political elite members in East Germany for alleged Stasi collaboration was a tactic applied by either of the two major political parties of the West. As the Christian Democrats (in their infamous "red socks" electoral campaign of 1994) accused the Social Democrats of being irresponsibly open to collaboration with SED/PDS elements, so the Social Democrats exposed their major electoral competitor of harboring in their ranks important elements of the Eastern Christian Democratic Union (CDU), an institutional ally (within the GDR National Front) of the SED. These tactical moves, however, were clearly not appreciated and rewarded by either Western or Eastern voters. To be sure, these initiatives were not aimed at bringing state criminals to criminal justice, but at disqualifying individuals from political elite positions.

However, and returning to criminal prosecution proper, a demanding set of conditions must be met in order to conduct criminal justice under rule of law principles. Six of these conditions that are required for the prosecution and eventual sentencing of a defendant can be distinguished. Each of them is associated with some thorny questions. Let us briefly review these conditions and related problems, without, however, going into any detail of the vast technical legal literature that has emerged in recent years on these issues (cf. Isensee 1992, Jakobs 1992, Lüdersen 1992, Schaal and Woell 1997, Stark et al. 1992, Marxen and Werle 1999).

First, a valid and specific norm that identifies some act in question as a crime must be found. The problem here is the question of retroactivity, as the legal norm must have been valid *already* at the point when the act was committed *and* must have actually been operative as a norm applying to all acts and all actors. That is to say, a rule is actually a rule only if it is not a rule that arbitrary exemptions from the rule are being made and can be expected as a rule. Also, the norm must *still* be applicable at the point of the opening of criminal prosecution, as opposed to being inapplicable as a result of some statute of limitation. The solution found in the case of the GDR is that only those norms that were enshrined in the criminal codes of both of the states concerned, the German Democratic Republic and the Federal Republic of Germany, were relied on for criminal prosecution. If either of the legal norms provided for a milder punishment than the other, that was the one to be adopted for the trial. The statute of limitations was suspended, as some crimes actually punishable under GDR law were arbitrarily not prosecuted by the authorities. The clock was restarted so that all crimes committed between 1949 and 1990 could be prosecuted for a period of ten years, ending on the tenth anniversary of unification on October 2, 2000. As an exception, the prosecution of homicides remains open until October 2030. Some acts, such as practices of *Zersetzung*, were actually, in spite of the often significant damage inflicted upon victims,

technically no more than minor misdemeanors. For instance, breaking into the apartment of a citizen was punishable under GDR law only if the act had been committed repeatedly.

Second, the act violating a criminal norm must be proved to have actually taken place. The availability of evidence differs according to categories of crimes. Given the vast quantity of violations of rights committed by members and collaborators of the Ministry of State Security (MfS) of the GDR, as well as the opaque organizational context in which these violations were committed, the problems of producing viable evidence were massive (Marxen and Werle 1999, p. 228). Furthermore, and in order to preclude the politically divisive appearance of victor's justice, the courts have tended to impose very stringent requirements on admissible proof (ibid.). Some acts that could be proved to have taken place on the basis of documents, such as the tapping of the telephones of citizens, could not be prosecuted as they were not punishable under GDR law.

Third, the author of some particular act, the perpetrator, must be identifiable. Similar difficulties apply as in the previous point. If acts could be identified, they could not be linked to the authors of such acts, or vice versa, with potential actors, such as prison guards. Also, the courts tried to avoid another potential objection, namely, that of focusing on the hierarchically inferior actors (e.g., in cases of border homicides) while letting their superiors off the hook.

Fourth, in most cases some concrete damage must demonstrably have been caused by the actor's act. Fifth, the actor must have been aware of the illicit nature of his act. And sixth, the actor's excuse of having been coerced must be invalidated.

The kinds of criminal activities, however, that were to be investigated and, wherever possible, subsequently brought to trial were sharply limited. They included six major categories of crimes.

- Homicides committed by border guards
- Violation of court procedures and defendants' rights, as well as arbitrary sentences according to GDR law
- Economic crimes, mostly committed in the context of unification
- Killings and abductions committed by agents of the Ministry of State Security
- Extortion of property of persons who were allowed to leave the GDR
- Miscellaneous crimes such as falsification of election results and administering of anabolics and other drugs to athletes

What are conspicuously missing from this list are huge numbers of cases in which individual citizens became the objects of "disorganizing" measures (*Zersetzungsmassnahmen*) initiated by Stasi agents who would not only spy and report on their victims, but also interfere with their (work, family, social, sex, educational, etc.) life with exquisite viciousness. An internal book of instructions issued by the Ministry for State Security (MfS) in 1985 recommended to the collaborators as methods of operative intervention practices such as "finding out about personal weaknesses of persons and fabricating compromising

materials," "promoting distrust and mutual suspicions among members of groups," engaging in the "deliberate splintering, paralyzing, disorganization, and isolation of hostile-negative forces," or "undermining the self-esteem of persons by organizing failures in their professional and social life."

Considerable resources were made available for the formidable task of implementing criminal justice under these constraints and with the foreseeable order of magnitude of cases. These resources included a specialized criminal investigative agency for the inquiry into government crimes of the GDR as well as white-collar crimes committed in the process of unification, the Zentrale polizeiliche Ermittlungsstelle für Regierungs- und Vereinigungskriminalität (ZERV), set up in Berlin in 1994. ZERV was designed to employ a staff of as many as three hundred police investigators and to perform its task until the end of 1999. Its director, who retired at the end of 1998, was a senior West Berlin police officer, Manfred Kittlaus, who started his career as a prominent and controversial figure in the political police of West Berlin. The specialized resources for criminal prosecution also included a special prosecutor's office, the Staatsanwaltschaft II (StA II), founded on October 1, 1994, which was to open criminal proceedings based on the investigative results of ZERV. It was headed by the eloquent and strongly committed state attorney Christoph Schaefgen and designed to employ as many as sixty-five attorneys as special prosecutors. To complicate matters further, it must be mentioned that apart from the two centralized agencies operating out of Berlin, there were also specialized departments of the state attorney's offices of the five new states, which pursued the investigation of local and regional government crimes.

The vast resources, however, that were to be made available to the two Berlin-based agencies never became fully operational. Given the centralist structure of the GDR, many of the crimes in question were to be investigated in (East) Berlin, the capital of the defunct state. But given the federal structure of the old (and now, subsequent to unification, enlarged) FRG, the costs of investigation and subsequent trials were to be jointly borne by the (old) federal states. Although the prime ministers of the states had agreed, as early as in May 1991, to contribute substantial resources to the national task of criminal prosecution, this agreement was honored, according to the heads of both ZERV and Sta II, with symptomatic reluctance.

Both Schaefgen and Kittlaus have complained vividly that their hands were partially tied by the unwillingness of the West German states to honor their contractual commitments. There were also complaints voiced by the two that the possibilities the Unity Treaty and German courts allowed for in terms of criminal prosecution of GDR government crime were severely limited. The account that Kittlaus gave in several interviews prior to his retirement at the end of 1998 was this. As resources were limited and rule of law guarantees made prosecution difficult, very few perpetrators were actually sentenced. But also inversely, as the "success in court" that any police agency depends upon as a measure of its performance was so disappointing, the Länder governments, the media, and the (West German) public soon lost much of their interest in

the entire enterprise of criminal prosecution and failed to provide the necessary support and material resources. Kittlaus complains about a "certain lack of interest in our work" (*Die Welt*, November 30, 1998).

The quantitative yield of the efforts of ZERV and StA II has been unimpressive indeed. As of March 31, 1999, 22,765 investigations were opened, leading to the opening of just 565 criminal court cases. Verdicts were reached in 211 cases, of which just 20 resulted in actual prison sentences. As a rule of thumb, less than 0.1 percent of all investigations resulted in prison sentences. Border guards who were sentenced in court for having committed intentional homicides were, almost without exception, punished with suspended prison terms. Serious crimes such as more than twenty presumed commissioned murders perpetrated by the GDR Ministry of State Security could not be tried because the actual perpetrators could not be identified. Legal experts (Marxen and Werle 1999, p. 253) have offered the highly plausible counterfactual speculation that had the democratic GDR existed longer than it actually had, the criminal prosecution its government and court system had initiated during its short span of life would have resulted in considerably more numerous and more severe sentences than were actually accomplished by the unified German system.

Not only has the juridical outcome of criminal proceedings remained very limited. The interest of the national public (more than three-quarters of whom are former West German citizens) in the data that became available and in the unmasking of acts and actors in the GDR has remained remarkably moderate. But media interest in the juridical (ZERV and StA II) as well as broader historical databases (Gauck and Enquête Kommission) was at best short lived. The issue of transition justice has played a somewhat marginal role in Germany, at least a much smaller one than it would have played in a separate and permanent democratic successor state of the GDR. A widely shared feeling in the West is that, as it cannot be done right, and as so much effort has led to so little outcome, it should not be done at all – "it" being the attempt to come to terms with the old regime by the means of criminal justice. This lack of a vigorous interest of Western elites in criminal prosecution is attributed by former activists of the citizen movement to a measure of latent complicity of segments of the old FRG with elites of the old GDR. Had government crimes been prosecuted more energetically and successfully, these Western elite segments (which extend not only to Social Democrats) would have been exposed and embarrassed for having sought collaboration with positively criminal counterparts in the East.

Concerning ordinary citizens, the vast majority of Germans has never come close to being threatened by (to say nothing of being co-opted or hired by) Stasi or other criminal institutions of the former GDR. Also, given the highly precarious economic and labor market situation that prevails in most of the new Länder, there are more urgent matters perceived as worthy of worry than the ugly realities of the defunct SED regime and its acts of repression. Here the unique German constellation plays a role that consists in the fact that the transition from state socialism took place in the form of national unification. Whereas the future of the ongoing integration of the former two German states

is widely understood to be a problem of the entire German society, economy, and polity, the past of the former GDR is perceived as a matter of mainly regional interest.

The somewhat complacent and disinterested attitude of much of the (West) German public may also have to do with the perception that, in contrast to at least the Latin American and South African cases of transition justice, but arguably also those of some other Central East European (CEE) countries, the state crimes in the GDR were of a relatively(!) mild nature. Apart from the killings on the border since August 1961 (estimated at up to one thousand cases), homicide cases were not numerous and mostly a matter of the distant past of the 1950s, often attributed to the Soviet occupation forces rather than internal actors. At any rate, passionate feelings of hatred and painful memories of past suffering and losses are certainly intense among the direct victims, but much less widespread in the new Länder than they are in the successor regimes of terrorist military dictatorships such as Chile or Argentina. Also, the crimes of the SED dictatorships are clearly less horrendous, by orders of magnitude, than the crimes of the Nazi regime, which remain the central focus of any reading of German history of the twentieth century. It is almost as if so much attention is absorbed by the Nazi regime that little remains to be spent on the East German SED dictatorship. The arguably lopsided distribution of attention and interest is further conditioned by the widely shared perception that it is neo-Nazi ideology and mobilization that constitute a persistent threat to liberal democracies, whereas dictatorial state socialism, particularly after the end of the Soviet Union, enjoys much less of a prospect for renaissance.

Three players of very different size and significance are active within this discursive field of German transition justice. First, the forces of the old GDR regime (now being led by the well-organized successor party PDS, which contends rather successfully for the position of the second largest party in several of the new Länder as well as the former East Berlin). These forces have understandably very limited interest in having any light thrown on the dark side of the state socialist state; they are rather busy in "renormalizing" that state retrospectively. Second, the forces of the former GDR opposition who were the main target of state repression pursue an interest in criminal sanctions as well as in engraving the malaise of the old regime and the suffering it caused on the nation's collective memory mainly for preventive and reconciliatory purposes. This category is by far the least numerous and resourceful of the three. To be sure, it is supported by (relatively small) numbers of West German politicians, academics, and intellectuals, who, for a variety of motivations, consider the in-depth exploration of the state socialist regime's crimes a national priority. But it is also the case that former opposition activists and their insistence on vigorous practices of transition justice cannot claim representativeness as the GDR population in general, as the vast majority of this population had been "neither for nor against" the old regime or willing to take risks by offering opposition or even resistance. This majority of the GDR's population was understandably reluctant to support a process as a result of which it would have been exposed

as having engaged in practices of opportunistic adjustment. On the other hand, some limited support for tough measures of criminal justice can be motivated by the wish to unload one's own feelings of guilt on individuals within the leadership. Third, and by far most important, are the forces of the West German political party system who managed to organize a grandiose political takeover in the period between the first (and last) free elections on March 19, 1990, and the final dissolution of the GDR on October 3 of that year.

Within this triangular configuration of forces, the citizen movements of the GDR, which credit themselves with having brought down the regime through their peaceful "revolution" in November 1989, have been deprived of any distinctive and visible political role. Many of the activists have been absorbed into the Eastern wing, itself highly precarious concerning its political fate in the new Länder, of the Green Party (*Bündnis 90*). Others have turned to the Social Democrats (SPD). In contrast to those of some other post-authoritarian cases of transition, the opponents and targets of the old regime do not, as a coherent political formation, play any significant role in the new regime, although dozens of former opposition activists are now holding important political and other positions across the entire political spectrum and within a variety of institutional sectors. But there is hardly any charismatic figure (such as Bishop Tutu or Václav Havel) or movement (such as the Madres de la Plaza de Mayo in Buenos Aires) in Germany who would represent a credible and authentic account of the suffering that was caused by the old regime and the moral demand for sanctions and rehabilitation.

To summarize the experience from criminal prosecution, the dilemma is this: the more scrupulously the tools of criminal justice are being employed for the sake of legitimacy, the less effective the sanctioning mechanism becomes. In spite of the extension of the statute of limitation to 1999 adopted by the German legislature, it is now clear that the yield of the efforts of prosecution in terms of criminal sanctions will remain extremely limited. It has also become evident that the interest of political and juridical elites, the media, and the public in general in issues of both punishment and rehabilitation has been declining. At the same time, the successor party PDS and its constituency have perversely profited from what could be read as an implicit demonstration that virtually nothing can be shown to be wrong with the old regime in terms of criminal law. Also, the following dilemma is evident: the maximum that can possibly be done within the constraints of rule of law and nonretroactivity is still far below the minimum that would have to be done in order to satisfy the small but vocal groups of those who suffered most under the old regime.

As a result of the sobering experience of criminal justice, two overall developments took place in the course of the 1990s. First, disappointment and frustration spread among those who were interested in criminal prosecution because of the difficulties of conducting "successful" trials. Second, procedures other than criminal prosecution were increasingly relied upon and proposed as a method of sanctioning actors of the old regime and a means to come to terms with its residues.

ADMINISTERING ARCHIVES: THE "GAUCK AGENCY"

Whereas the due process of criminal prosecution often runs into the problem that acts are known to have taken place although the authors of those acts cannot be identified with the degree of accuracy that is called for by rule of law principles, the problem the Gauck agency is mandated to solve is the reverse: here, particular actors (as defined by their organizational affiliation, the duration of this affiliation, and hierarchical position within the GDR state apparatus) are to be sanctioned without the need to prove that they have committed particular acts or inflicted specific damage on specific fellow citizens. Sometimes, and that is doubtless one of the legislative intentions behind the StUG, the information made available by the agency will lead to third-party sanctioning of the persons to whom this information pertains. The nature of these indirect sanctions, as well as the procedural principles applied, is quite different from ordinary criminal law. Whereas in criminal law a court makes a decision (that can be appealed under most circumstances) that if upheld causes a state-organized sanctioning (fines, imprisonment), the sanctioning that is merely triggered by the Gauck agency and the law it is based on (StUG) is implemented through an independent decision of third parties and their autonomous practices of disapproval and disqualification. The agency exercises influence, not authority, over the severity and incidence of sanctions. The output of the agency's activity is, in other words, not a sentence, but a flow of information addressed to (or selectively made available to) particular actors. What happens as a consequence of the dissemination of information is beyond the authority and responsibility of the agency to determine. Arguably, the most significant and most effectively cathartic of these consequences are those that take place in a framework of private encounters between former oppressors and the victims who have found out about them and their activities from the Stasi files. These intense and often painful confrontations cannot be ordered by administrative fiat, nor can they be monitored by state agencies or the public. Hence these types of sanctions are caused, but not controlled by, state authorities.

Apart from the cases in which the information collected by the agency serves the initiation of criminal prosecution, the impact of the information made available on the person the information is about remains to be determined by actors outside the court system. Even if public sector agencies execute the sanctions, they are not mandated by (criminal) law to do so. For instance, on learning that a particular person has been an unofficial collaborator of Stasi, that person's employer may or may not refuse to employ or dismiss the person in question. To be sure, the law of 1991 (StUG) that establishes the Gauck agency provides for the possibility of appeal in labor courts of the negative consequences that private or state actors experience from the information obtained. What these courts, however, determine is not whether or not the claimant has committed particular objectionable acts, but whether or not these alleged acts provide sufficient reason to the respective employer for dismissal or discrimination in hiring. All the agency itself does is make accessible information to large but specified

categories of actors who are entitled by law to receive such information, parts of which can (and are in fact likely to be) be used as reasons for sanctioning by public or private sector recipients.

Thus the agency can best be described as a hybrid of a public archive (distributing information) and an investigative agency triggering punishment. It differs from the first in that the information made available is, at least in part, intended to trigger the action of third parties, and it differs from the latter as crimes are not proved according to the strict procedures of criminal law, the presumption of innocence does not apply, and practical repercussions, such as civic disqualification, are not apportioned by state-controlled procedures and institutions (such as fines and prisons). It is this hybrid nature of the Gauck agency that has made it a source of controversy between those who appreciate its alleged "lustration"[6] effect of coming to terms with a painful past and those who see it as violating one of the most fundamental principles the new regime is supposedly based on, namely, the rule of law with its implications of nonretroactivity, the presumption of innocence, and guaranteed access to the court system (Brandenburger 1995).

The agency enjoys a legal monopoly over the information contained in the vast files the old regime's repressive agencies have left behind.[7] The law regulates in much detail how the wealth of information is to be used: what kind of information is to be made accessible to whom, on whose initiative, and in what form. Categories of recipients include those of the people subject to observation, third parties, the observers themselves, their actual or potential employers, and the general public who are to be served through extensive research, documentation, and educational activities. One of the purposes of the agency's information output is to provide databases for criminal prosecution. The agency also conveys information about people to be hired for public office to public sector agencies. In this case, the agency initiates the flow of information "without being requested to do so" by eventual recipients. In other cases it provides information on request, particularly in the hundreds of thousands of cases in which people turn to the agency to find out what has been reported about them and by whom. Some people may be relieved to learn that nothing has been reported and that their suspicions were unsubstantiated. Some people may learn that other people (including apparent friends, family members, superiors, neighbors, colleagues) have actually reported on them and learn what they reported,

[6] It is worth noting that the term *lustration* is in no way etymologically related to the words *lux*, *lucere*, or *enlightenment*, as is sometimes claimed in defense of the practices associated with "lustration." Instead, the term is from a Latin root that means "ritual cleansing."

[7] In a comparative perspective, it must be noted that the investment in information gathering and research that went into the elucidation of politics and society of the GDR is probably unparalleled by any other case. This is so because a skilled workforce, numbering several thousand people, was quickly made available by the West German government after the breakdown to do the job. Also, the chances of interested parties and actors of the old regime to destroy sources and conceal information were probably slimmer than in all other cases. Given this unique opportunity for throwing light on the matter, it is sobering to see how much remains in the dark.

truthful or otherwise. Others may learn that employees (or people considered for jobs) have been involved in spying activities. And still others may benefit by forming an enlightened judgment about the grim realities of the day-to-day operation of the old regime. Finally, some of those being affected by the decisions others draw from information obtained through the agency may feel that the files on which the information is based grossly misrepresent the realities of their own past. In this case, complaints of incorrect information, unjust exposure, and unfair sanctions third parties initiate in response to the data obtained tend to be particularly bitter. These complaints are difficult to process in court. Even if claimants' dismissals from jobs can be reversed through favorable decisions of labor courts (as has often been the case), the substantive question of whether or not the person in question has actually done what the files seem to document is often impossible to settle in court, as the files do not allow such proof by strict rule of law standards. Hence the danger that *aliquid semper haeret*.

The consequences of the agency's activities of gathering and distributing information have been as highly diverse as the evaluation of these consequences remains controversial. Giving victims access to their files, as well as making them aware of the actors who helped to generate these files, is widely agreed to have an often shocking and painful, but generally cathartic function. Such favorable evaluation is also often attached to the research and educational function of the agency, although concerns have been voiced that research on important matters of recent history should be left, in the interest of academic freedom, to academic institutions rather than being performed by state-operated agencies. Sanctions initiated against spies and collaborators are more intensely contested, not only from the point of view of those directly affected by these sanctions. Critical observers have taken issue with two kinds of perverse effects of the poorly controlled process of "civic" sanctioning. For one thing, people may be sanctioned (e.g., through dismissals or the deterioration of their reputation) who do not, by any standard of fairness or proven evidence, deserve to be punished. For the other and conversely, large numbers of people who deserve to be sanctioned (at least according to the standards that make up the agency's raison d'être) actually manage to escape punishment. There is an abundance of examples of either of the two cases. The first category, the "false positives," are hard to prove; the false negatives (failure to sanction persons who have deserved such sanctions according to the letter of the Unity Treaty) are problematic in terms of their effects on the emotions of victims.

Not only are people who are dismissed from public sector employment because of uncontested Stasi involvement perfectly free to try (as a rule, successfully) their luck in the private sector. It is also the case that whether or not public sector workers (such as police) are actually dismissed or denied employment as a consequence of relevant information supplied by the agency is a matter that is often determined not by the charges raised against them, but ultimately by the contingencies of local and sectoral labor markets and other discretionary considerations entertained by public sector employers. For instance, 7,300 persons,

or 12 percent of the 62,680 police officers employed as civil servants (i.e., in the highly privileged and secure status of German Beamte) by the state governments of Berlin and the five new Länder are known to have worked for the Ministry of State Security as regular or unofficial collaborators *and* have been reemployed although this is known (*Frankfurter Allgemeine Zeitung*, February 14, 2000). The proviso of the act of 1991 that sanctioning must take place on a case-by-case basis has allowed them to appeal successfully to labor courts, claiming excuses such as young age or reluctant involvement in Stasi activities. But often such appeal was not even necessary, as state governments, to an extent that differed from state to state and from ministry to ministry, chose to ignore the files and extended clemency to police personnel applying for jobs according to the demand and supply situation that prevailed at the time in particular labor markets. Such inconsistency and unevenness of the implementation of sanctions are sometimes taken as proof of the harmlessness of the practices of the Gauck agency, or, more precisely, of the third parties that put to use the information acquired through the agency. But contrary to that benign assessment, the opposite conclusion can well be drawn because the rule of law principle is severely violated when – even in the highly sensitive field of police services – the rule that Stasi involvement must be sanctioned is frequently, arbitrarily, and opportunistically suspended.

EXPLORING THE PAST: THE COMMISSION OF INQUIRY

A third instrument of performing the "work of coming to terms" (*Aufarbeitung*) with the GDR past is, besides the criminal courts and the Gauck agency, the Commission of Inquiry of the German Bundestag. It was chaired by Rainer Eppelmann, a member of parliament and deputy of CDU, who is, as is Gauck, a theologian and opposition activist from the former GDR. The commission's statutory mandate was to explore and evaluate major institutional sectors and policy areas of the defunct regime and its history of fourty years. Its focus is thus not on actors and acts, but on structures, events, strategies, and developments that cannot be attached to individual actors. In a little more than two years of intensive work (from spring 1992 to summer 1994), the commission held seventy-six sessions, hearing the testimony of politicians, GDR opposition activists, academic experts, and victims. It commissioned dozens of detailed analyses of experts. The major themes of inquiry were the power structure of the old regime, the role of the state socialist ideology, the role of the repressive state apparatuses, the policies toward the West German state and intra-German relations, the role of organized religion within the GDR, forms of oppositional activities, the Ministry for State Security, and policy considerations concerning the question of how to deal with the legacies and memories left behind by the "two dictatorships in Germany" in the twentieth century. This major and comprehensive project resulted in the publication of eighteen volumes (15,187 pages) of testimony, documentation, analysis, and political evaluation plus two plenary debates of the Bundestag.

If the Gauck agency is a hybrid of an archive and a criminal court, the commission headed by Eppelmann can perhaps best be described as a hybrid of a political conference and a huge research project on contemporary history. In the first paragraph of her introductory note to the eighteen volumes, the president of the Bundestag tries to refute the suspicion that what is being published here is an "official," if not a "partisan" and "preceptorial" writing of history. Such suspicion is not supported by the politically diverse composition of testimony and expertise, but, if anything, by the virtually exclusive focus on the repressive nature of the regime as well as the intention to appreciate the suffering of victims and to draw lessons that are capable of "strengthening democratic consciousness." Unsurprisingly, the arguably less objectionable institutional sectors of the regime (such as its health system) do not figure at all in these volumes. More curiously, the economic and ecological disasters the old regime left behind are generously bypassed, except to the extent they triggered the activity of oppositional movements. As a result of the sheer quantity of the materials printed here and the relatively early stage of scholarly exploration of the GDR regime at which the volumes were compiled, the attention these eighteen volumes were able to generate was neither widespread nor lasting.

ADDITIONAL POLICY OPTIONS

The three policies of transition justice discussed so far – criminal prosecution, Stasi archives, historical inquiry with educational purposes – have accomplished a great deal in making the past transparent, defining a normative perspective as to why its essential features must be rejected, and affording comfort and satisfaction to victims. However, in unified Germany as a whole, the topic of coming to terms with the state socialist past is of an almost marginal significance. It was the past of a fraction of the nation, and the vast majority have no personal and direct access to the realities of that past. Moreover, the *present* problems of the new Länder, ranging from record rates of unemployment to high levels of violent xenophobia to manifest signs of poor political integration as indicated by the strong electoral performance of PDS, seem largely to absorb the attention that can be mobilized for the affairs of the new Länder. Frustration with the failure of both the courts and the Gauck agency to sanction those responsible for the old regime to the extent that had been hoped for seems to have contributed to a loss of attention and support for these forms of transition justice.

Even at the early stage of 1990–91, before (in December 1991) the law that established the Gauck agency was passed, alternative approaches in addition to criminal prosecution and civic disqualification were widely discussed by the East German public. Among these alternatives the idea of holding "tribunals" stood out. Such tribunals, as opposed to criminal courts, would be made up of national and international experts and prominent figures whose moral qualities were undisputed. Instead of punishment or even revenge, their function

was conceived to be moral condemnation without individual verdicts, with the hoped-for consequence of a societywide catharsis and the sharpening of moral sensitivities in the public at large. The attractiveness of this idea was seen in the possibility that East Germans themselves, rather than West German legislators and judges, would be given the chance to initiate autonomous acts of finding out the truth and hence of self-purification. But in the absence of charismatic figures (such as Havel or Tutu) in East Germany who would be able to perform this highly visible and potentially intensely controversial role, it was feared that the practice of tribunals might do more harm than good because of the suspicion of arbitrariness that tribunals in general as practices of informal justice are likely to trigger (cf. the essays in Schönherr 1992). The concern was that justice cannot be done, at least not justice widely recognized as such, if it is done by "self-appointed" and therefore possibly biased judges. Nor was it clear how tribunals could induce significant actors to give truthful and comprehensive testimony, which is a matter that courts can perform through formal investigations, hearings, and oaths and that even the South African Truth and Reconciliation Commission (TRC) could perform through its mandate to grant impunity in return for truthful testimony. In fact, tribunals have never been tried as a form of coming to terms with past injustices (except in the context of military defeat, as in Nuremberg), whereas they seem to perform best if the injustice under scrutiny is a present one (as in the case of the Russell tribunal investigating the American war in Vietnam in the seventies).

As a final possibility, "amnesty" is being proposed, sometimes in a fuzzy sense that shades into amnesia, as neither the clarification of acts and responsibilities nor the consent of the victims or their representatives ("forgiveness") is consistently deemed a prerequisite by proponents of amnesty. In 1998–99, that is, immediately prior to the conclusion of ZERV and StA II, the former GDR civil rights activist Friedrich Schorlemmer (another Protestant theologian) advocated amnesty as the lesser evil, given the inconsistencies, disappointments, and emerging conflicts over criminal and other forms of sanctioning practices. But amnesty can also be viewed as a necessary condition to motivate actors of the old regime to enter into forms of communication, confession, and critique of the old regime that they would never consider appropriate under the threat of criminal punishment or civil disqualification. There are various forms of amnesty, some of which are the opposite of amnesia. Amnesty can be used as an alternative to criminal prosecution or as a subsequent step. Furthermore, if amnesty is obtained individually (rather than collectively or categorically), if it must be applied for by individuals (rather than granted unilaterally by the state), if it is limited to less serious categories of crimes (excluding all homicides), and if it is granted as a reward for truthful confessions and the public expression of regret, it might well function as a serious instrument of achieving transition justice and its intended effect, namely, the "reconciliation" (meaning just the recognition that all fellow citizens are entitled to the enjoyment of equal rights) of the citizenry of new democracies and thus the stabilization of the new regime. Such reconciliation and stabilization are probably the uncontroversial

standard underlying the ongoing controversies over the appropriate methods of administering transition justice.

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12

Rough Justice

Rectification in Post-authoritarian and Post-totalitarian Regimes

Aviezer Tucker

1

This chapter examines positive transitional justice, how and why post-authoritarian and post-totalitarian democratic governments legislate and proceed with the transfer of property, money, or less tangible goods such as honors, jobs, and other privileges to persons legally recognized as entitled to compensations for acts that were committed in an organized fashion on behalf of previous nondemocratic regimes. Those entitled may have lost easily quantifiable assets such as movable and immovable property, or less quantifiable goods such as years of their life, jobs, health, or family members.

Rectification may be divided into compensation for losses in personam, such as loss of time (in prison, barred from practicing one's profession, etc.), and restitution in rem, which attempts to rectify the loss of property. Restitution may be divided into *natural*, when lost property is returned to its original owners or their heirs in the form it has acquired by the time of restitution, and *restitution in kind*, when owners or heirs receive similar property or financial compensations.

Restitution in this sense should not be confused with the standard legal and occasionally philosophical use of restitution as "the correction of unjust enrichment." In the post-totalitarian context, the loss of one person does not necessarily or even often result in the equal or greater *enrichment* of others. This is obvious in the case of losses in personam such as the loss of years in the gulags. The imprisonment or professional banishment of qualified workers resulted in net loss for the economy with no corresponding gain. Even in the case of material losses in rem, confiscations did not usually generate much wealth for those who benefited from them, certainly not to the extent of the losses of the victims, because totalitarian mismanagement usually decreased the value of properties. In other words, we usually deal here with a negative-sum game. Unlike in most discussions of restitution in criminal justice, except in cases of natural restitution, the responsibility for rectification is spread through the society in transition and is executed through the government.

There are four types of positive retroactive justice:

Classical ancient positive retroactive justice is affected by lack of differentiation between civil society and the polity. Regime changes in the classical world tended to be accompanied by changes in the distribution of property among the landowning upper political class. Cycles of confiscations and restitutions form much of later Republican Roman history from the Gracchii to Caesar. Eventually, citizens were considered political enemies for the purpose of confiscating their properties. Wealth in ancient Rome was land with slaves, at least until Pompeii's conquest of the rich in liquid wealth Eastern Mediterranean. Since slaves did all the work, and owners did not usually take great interest in managing their estates, frequent property changes probably did little to affect the low productivity. In the classical ancient world it is difficult to differentiate rectification from cyclical change in property distribution among competing political cliques.

One of the defining characteristics of modernity is the differentiation of civil society from the political sphere. After the end of feudalism, political changes are no longer associated with direct interventions in a relatively independent system of property entitlement. Properties are rarely confiscated (a direct intervention), through they are taxed (an indirect intervention). The major exceptions to these generalizations are modern totalitarian regimes, Nazism and Communism, that intervene directly in the system of property titles (Tucker et al. 2004).

In comparison with post-totalitarian regimes, post-authoritarian regimes are marked by fewer claims for rectification. Since authoritarian regimes do not have to eliminate all actual and potential competing elites, the middle class and professionals, they tend to kill, torture, and imprison far fewer of their citizens than totalitarian regimes. Consequently they generate far fewer demands for compensation after thy give up power. For example, the sizes of the Argentinian and Hungarian populations are similar. Under the authoritarian Argentinian Junta, 10,000–12,000 or about 0.1 percent of the population "disappeared," were tortured, and were murdered. In Hungary, 600,000 citizens were deported to Soviet labor and prison camps in 1945. About 200,000 of these tortured citizens did not return and are presumed dead. Between 1948 and 1953, about 750,000 Hungarians were convicted of crimes, mostly crimes against state property, many of them before "popular" extraordinary courts. Some were tortured and executed; most provided the labor force for about 50 labor camps within Hungary, mostly near mines, where many died of exhaustion and bad treatment. In the 1956 uprising, about 3,000 Hungarians died in street fights, 229 were executed, 15,000 were wounded, and 100,000 were jailed (Bartošek 1999). In sum, if we compare the categories of loss of life, torture, and imprisonment, typically totalitarian regimes generate about a hundredfold more victims than authoritarian regimes, 10 percent versus 0.1 percent of the population, respectively. Additionally, totalitarian regimes commit extensive violations of property rights that authoritarian regimes usually do not engage in: the confiscation of factories, shops, businesses, bank accounts, investment assets, land,

and homes. These generate claims from most of the population. At the end of the Second World War, millions of ethnic minorities such as Germans and Poles were expelled, respectively, from Czechoslovakia and the Soviet Union. Though reliable statistics are hard to find, it is reasonable to assume that the number of forced exiles from totalitarian countries far exceeds that of those from authoritarian countries. The Soviet oppression in Hungary in 1956 and in Czechoslovakia in 1968 led to migration of about 5 percent of each population. Authoritarian members of government of course enrich themselves. But their usual methods, raiding the state budget to embezzle tax revenues and foreign aid, renting monopoly rights to international corporations, and accepting bribes for favors and kickbacks for government contracts, do not involve direct intervention in the civil system of property rights and therefore do not generate so many claimants. I do not wish to distinguish blood from blood here. The horrors that the victims of authoritarianism had to go through were just as severe as those of victims of totalitarianism. Still, the scope of totalitarian evil far outpaces that of authoritarian bestiality. Consequently, post-totalitarian governments face an incredibly more demanding, indeed an impossible, task in attempting to compensate claimants.

Authoritarian regimes tend to be less destructive of the economy than totalitarian regimes. In the exceptional case of Chile, the authoritarian regime left the national economy in better shape than it had received it. Consequently, the resources for rectification are more available in post-authoritarian than in post-totalitarian contexts.

Post-totalitarian regimes tend to be poor because of the command economy and/or destructive wars. The revolutionary nature of totalitarian regimes is exhibited in their extensive intervention in property titles, confiscations, and redistributions of property. Consequently, post-totalitarian regimes may face a massive task of sorting out properties.

South Africa presents a special case. Clearly, most of the population was victimized by the apartheid regime. The resources necessary to rectify the results of apartheid, let alone compensate its victims, are so vast that the issue of positive retroactive justice merges with the complex issue of distributive justice, how to distribute wealth to the black majority without generating capital flight and emigration of skilled professionals.

Since I attempt to understand pure rectification, I ignore the ancient and South African cases to deal exclusively with modern post-authoritarian and post-totalitarian positive transitional justice, compensation, and restitution. This study examines exclusively compensations that are enacted by national governments and parliaments and concern their own current or former citizens. Cases of international compensations typically involve different sets of independent variables and so are beyond this study.

Though normative arguments for and against particular types of rectification from various philosophic perspectives abound (e.g., Morris 1984, Waldron 1992, Tucker 1995, Cowen, this volume), theoretical attempts to understand the varieties of rectification are more rare. To clarify the distinction between

normative considerations and the present comparatively based explanatory theory, I refer henceforth to *claimants* rather than *victims*. For example, people who were murdered for being members of a constructed "race" or "class" are clearly victims, but they are not claimants because they are dead. Somebody else, a claimant, must make a claim on their behalf. Though this is not a normative analysis, it would be useful for normative discussions of restitution in clarifying the limitations on the scope of possible normative prescription in situations of transitional justice. The following analysis utilizes the model that Jon Elster (1998) developed for analyzing transitional justice.

II. INDEPENDENT VARIABLES

II.1. The relevant social groups of actors include the following.

II.1.1. Claimants may be *direct*, people who lost years of their life in jail or labor camps, whose physical and mental health deteriorated as a result of torture, or who lost their worldly possessions from art and bank accounts to land and houses, or *indirect*, the family or heirs of people who were killed by the authoritarian regimes or would have been direct claimants had they not died naturally in the period that elapsed before the democratic transition. Claimants are also divided into resident citizens of the country in transition and emigrés who rebuilt their life in other countries. Foreign governments and public opinion are significant when they represent emigré claimants, especially when the transitional government requires their help and cooperation. Finally, property claimants may be divided into real persons and organizations or institutions. Individual claimants may have also been perpetrators, who performed acts that resulted in other claims for rectification. As we see later, legislation tends to exclude dual membership in the classes of perpetrators and claimants.

II.1.2. The *beneficiaries* of acts that are recognized as requiring rectification may be divided into *direct*, that is, those who received expropriated goods such as houses, land, or movable goods through the state, and *indirect*, those who benefited, became wealthy, and obtained greater chances for advancing their career from the nondemocratic social order, for example, those who joined the elite by assuming the positions of people who were jailed or otherwise expelled and excluded from the elite. Beneficiaries may also be divided into institutional (collectives, state industries) and individual. The managers of institutional beneficiaries, especially in the decentralized post-Communist context, can be considered direct beneficiaries because they enjoy actual property rights in the absence of corporate governance.

II.1.3. Democratically elected bodies, government, and parliament must try to make the rules of rectification, while balancing the interests and political powers of the various groups of claimants and beneficiaries and considering their own interests. Since totalitarian regimes tend to leave their economy in shambles, economists as the institutionalized voice of economic reason tend to be significant actors either as advisers to the political actors or as unwitting ideological facades for what the political actors are actually up to.

11.2. Political decisions must be made within limits set by several constraints.

11.2.1. Governments in transition are constrained by their meager human resources. When predemocratic governments allocate legal personnel, they obviously do not plan for the contingency of dealing with the rectification of the wrongs that they commit. Especially in post-totalitarian cases, legal institutions cannot supply the massive demand that would result from claims for restitution and compensation for what took place under totalitarianism. The legal system is usually not flexible enough to supply the excess demand in a reasonable period, and the real or imaginary cost of adjusting the system may be prohibitive (Elster 1998, p. 31). Post-totalitarian judges are usually professionally incompetent and morally tainted through their execution of the orders of their totalitarian bureaucratic superiors. The rules for selection and promotion of judges in totalitarian regimes ensure that judges are loyal to the regime and especially to its elite, while being susceptible to corruption in relation to those below them in the hierarchy of political power (see Chapter 9, this volume). The following couple of quotations about the Czech and Slovak judiciaries are typical:

> The court system in Czechoslovakia is very weak, the number of judges is very small and, irrespective of their quality and moral calibre, they are already overburdened. Furthermore, as its designation as a law on "extra-judicial rehabilitation" implies, the restitution act was intended to obviate litigation in this area.
>
> (Cepl in Kritz 1995, Vol. 2, 582–83)

> A far more pressing problem, however, is the lack of qualified judges. The Czech Republic alone is said to be short of at least 330 judges. After November 1989, some 100 judges were dismissed and another 120 left their positions voluntarily. Only 115 judges have since been appointed to replace them. Moreover, assigning judges to rehabilitation cases has created considerable backlogs in earlier proceedings.
>
> Only a few of the judges who were dismissed during the notorious "normalization" period have agreed to return to their position, and various administrative hurdles slow down the appointment of new judges. Most lawyers and law students are not interested in becoming judges because the salaries are low; in fact, many lawyers earn more than judges. . . . The social status of judges is rather poor, and the working conditions unsatisfactory. (Obrman quoted in Kritz 1995, Vol. 2, 585–86)

Entrusting to them the administration of rectification implies a disadvantage for claimants, advantages for beneficiaries if they include members of the former political elite, and a great deal of corruption.

Transitional democratic governments are usually weak. They have a shaky control over institutions such as the police and the judiciary who should enforce the law and coerce those who resist it. The functionaries of the institutions that enforce the rule of law in democratic countries may be committed in the post-totalitarian context to subverting it in favor of their post-Communist or post-Nazi network and may have no sympathy for the plight of claimants. Newer judges may be too timid to challenge the major center of power in society, the network of the totalitarian elite. These constraints are predictable and

factored into decisions on forms of compensation and restitution that attempt to bypass the judiciary and police.

11.2.2. *Budgetary constraints* limit the amounts that can be allocated for compensations and nonnatural restitution. This problem is further exacerbated in post-totalitarian contexts because the claimed amounts are considerable, while the state is poor.

11.2.3. Transitional democratic governments cannot weaken their political legitimacy by introducing types of rectification that clash with what most of the populations could accept. Such internal political constraints may have to be balanced against external political constraints. Internal constraints forced the German government to reverse course and prefer investment (privatization) to restitution in its March 1991 investment acceleration law because the previous preference of restitution to investment paralyzed the property market.

11.2.4. *Time constraints* are significant for both claimants and the government. As direct claimants age, they like to receive compensations while they can still use them. This constraint is particularly significant when there is a time lapse between the time the acts that require compensation and/or restitution took place and the ascent of a transitional democratic government. In cases of natural restitution, while a property is in legal limbo, sub judice, at best no planning or decisions that involve the future of the property will be taken and nothing will be invested. At worst, those in actual control of the property, the managers, will use the time gap to strip the property of its assets, for instance, by selling parts of it to family and friends for a symbolic price or by simply embezzling its liquid or movable assets. This may result in the destruction of the property and loss of production and jobs for the economy. De facto allocations of property rights that are not backed by a legal system are imprecise, preclude alienation (buying and selling), and therefore make raising capital against property and creating efficient labor markets with mobility difficult. Neoclassical economics requires clear allocation of property rights to achieve Pareto efficiency. Absence of clarity of property rights in socialist regimes in which the state owns de jure accounts partly for the inefficiency of socialist economies. The immediate effect of the demise of the Communist regime was a further decrease in clarity due to decline in the power of government and restitution claims. Unclear allocation and alienation rights restrict movement of assets to their most valued users. Without state enforcement of property rights from trespass, protection of property rights involves private security militias or mafias and the hiding of property. It also reduces the cost of criminal theft and extortion, thereby raising the cost of doing legitimate business, and diverts resources to predatory practices. The greater is the perceived future risk, the more would be the tendency to consume now rather than invest, innovate, and plan (Weimer 1997). In the post-Communist context of open borders, geographical proximity to Western Europe, where there are clear and secure property rights, and a post–information revolution world, where funds have added liquidity, it implies a process similar to chemical osmosis when capital moves from areas with insecure property rights to banks in areas

where strong states with a rule of law guarantee them. This is a destructive process for capital-starved economies. As former the Czech prime minister Václav Klaus put it, quick but rough justice in restitution is better than precise but delayed restitution.

II.2.5. *Information*, records of imprisonment and execution, confiscation of real estate, and original titles to property, is usually available. But records of torture and "smaller" confiscations of movable property have never existed or are hard to find. Legislatures tended to reason that since evidence is scarce in such cases, rectification of many deserving claimants would be denied and thus destroy equality under the law. Therefore, legal rectification for classes of acts that did not generate indisputable documentary evidence is rare.

II.3. Following the French moralists and Elster, I divide the motivations of the actors into passions, interests, and reasons.

II.3.1. Some potential claimants refuse *passionately* to stake their claims because they feel that financial quantification of their suffering demeans it. The personal value of the death of loved ones or of personal pain is far higher than any possible material rectification and is therefore rejected. Some Holocaust survivors chafed at the stress on restitution in reference to the Swiss banks issue because they feel it demeans the horror of the Holocaust (Morse 1998). This is only a faint echo of the massive civil protest in Israel during the fifties against the Ben-Gurion–Adenauer reparation agreement. In Bulgaria former political prisoners created a "Union of the Repressed" that objected to compensations because they would not make up for what they have suffered (Kritz 1995, Vol. 2, pp. 713–14).

Envy may lead people who were socialized under communism to reject restitution even if it is likely to benefit the economy (and indirectly them) in the future. Envy may be directed toward emigrés who had greater economic opportunities if they immigrated to free and prosperous countries and toward locals who may suddenly stray from the egalitarian social facade just because their grandparents were wealthier than average grandparents.

II.3.2. Each group of actors has obvious interests: claimants have an interest in benefiting from compensation and restitution. Some found civil organizations to represent their interests, such as associations of former political prisoners. Some political parties cater to particular interest groups, for example, the Hungarian Smallholders Party represented the interests of claimants for restitution of farms; the Czech Christian Democratic Party has represented the interests of the Catholic Church in restitution. The former German minister of justice Klaus Kinkel represented the interests of former East German proprietors. Emigrés and their organizations attempt to channel their claims through their government or to influence the transitional government.

Direct beneficiaries have an interest in minimizing restitution and, in case they cannot prevent it, protect their privileges despite the legal transfer of ownership by limiting the property rights of the old/new owners: tenants in restored buildings wish to maintain their protected low rents and workers in restored

firms have an interest in protecting their job. "Red" managers of firms, the nomenklatura, have an interest in keeping control over company assets, so they can appropriate them irrespective of the nominal owners. They have little interest in agricultural land and real estate that have protected tenants because they are difficult to liquidate. The red managers have an interest in keeping the decentralized state industry in the vague hands of the government or in transferring the ownership to a great number of shareholders who cannot control the managers, if they cannot own it outright themselves.

The "neutral" population of those who are neither claimants nor beneficiaries has an interest in minimizing compensations and unnatural restitutions from the state budget at the expense of other items and eventually from their taxes. The democratic transitional government has to try to balance politically the demands of claimants and beneficiaries, while maintaining its legitimacy among the larger part of the population and to do what it can to favor economic growth and restructuring.

The interest of individual rent-seeking politicians and bureaucrats is to prevent the restitution of the most valuable and lucrative properties such as monopolies. The get-rich-quick method for politicians is through commissions on privatization. Restitution limits the kind of political-economic maneuvering space that privatization allows. Rent-seeking officials on lower rungs of the bureaucracy have an interest in vague rules of restitution that allow them greater discretion in individual cases and greater opportunities for commissions.

11.3.3. General reasons, local concepts of commonweal or justice, can be divided into three groups according to their philosophical grounding, though they rarely appear in actual political discourse in well-articulated, sophisticated, or rigorous forms as in philosophic discourse.

A relativistic approach to compensation and restitution follows Proudon and Marx in declaring all property to be theft. But such relativism reflects also the history of Central and Eastern Europe, where waves of conquest and radical revolutions followed each other in quick succession and were accompanied by changes in the distribution of property. Each new elite expropriated the properties and positions of its predecessor. For example, in Czechoslovakia, positions and properties were redistributed when new elites gained power in 1918, 1938, 1945, 1948, 1968, and to an extent in 1989. In this historical context, it is easy to believe that today's victims were yesterday's oppressors. For example, a young Communist could have been tortured by the Nazis, then torture counterrevolutionaries, be jailed for belonging to a losing Communist clique, and finally become a democratic dissident leader. From this relativistic perspective rectification makes little or no sense.

Nozick distinguished historical entitlement theories of justice (such as his own and Locke's) from current time-slice principles of justice, such as Rawls's or utilitarianism. Time-slice principles regard a distribution as desirable if it is likely to lead to certain social end results, a certain social structure, irrespective of the place of particular individuals with special rights in that new structure.

> In contrast to end-result principles of justice, *historical principles* of justice hold that past circumstances or actions of people can create differential entitlement of differential deserts to things. An injustice can be worked by moving from one distribution to another structurally identical one, for the second, in profile the same, may violate people's entitlement or deserts; it may not fit the actual history. (Nozick 1974, p. 155)

Historical theories of property rights and rectifications have been subjected to numerous criticisms as internally inconsistent, impossible, impractical, or undesirable (Tucker 1995). In the actual cases when backward-looking principles were implemented, they were never the exclusive criteria. In some cases, they were supplanted with forward-looking principles of compensation. In most cases, they were limited by border conditions that limit rectification to acts that were committed in a prescribed time frame, to certain types of claimants, and to certain types of government actions. A cap on the total value of rectifications was applied in all cases, mostly in combination with progressive taxation. In societies where some kind of civil society had existed before the totalitarian intervention, as in the Czech Republic, restitution is more legitimate than in societies where communism swept revised forms of feudalism, as in Russia. In the case of compensations for hardships, backward-looking reasoning is less controversial, but also less substantial.

Four types of restitution are possible: "natural," returning the property "as is"; restitution in kind of a similar property; financial compensations; and compensations in vouchers that can be used to bid for properties in the privatization process. "Natural" restitution is simple, is emotionally satisfying, and ensures that properties will not be misappropriated yet again by totalitarian elites who used the late totalitarian period to amass capital (Cepl in Kritz 1995, Vol. 2, p. 583). Financial or voucher restitutions have been favored by those with forward-looking reasoning.

Forward-looking reasoning cares for the effects of rectification. One possible effect is the establishment of moral norms. Even symbolic payments of compensation or the granting of honors should assist in establishing liberal democratic norms, in stating clearly that the victims of totalitarianism were right and their oppressors were wrong, in stating yet again that virtue leads to happiness, something that had been known to be false ever since the Greeks formulated this problem. Legislators may hope that acts of rectification will entrench moral norms in society, so the kinds of politics that require rectification will not be repeated in the future. Similarly, natural restitution should strengthen trust in property rights and consequently encourage investment and economic growth. Law had a declarative more than a normative function under totalitarianism. Laws of rectification may be used to make different kinds of declarations by a new democratic legislature.

The generation of prosperity through economic growth is a particularly significant end in the post-Communist context. This seems to imply privatization in the interest of transferring commercial property to the kind of owners who are likely to develop it, invest in it, and generate growth and jobs, and so forth.

Claims from those who are not likely to manage and develop a property because they lack the capital or the experience and expertise in that line of business or because they live in a different country should then be denied irrespective of the history of the property.

The Czech constitutional court judge Cepl, who coauthored his country's restitution law, supplanted his support for historical principles of restitution with a host of end-result principles (Cepl in Kritz 1995, Vol. 2, pp. 581–85): The 1948 base date for restitution was decided because after World War II the government confiscated the properties of Nazi collaborators; employers of more than fifty workers, who were promised compensation but in fact got nothing; and about 3 million expelled ethnic Germans. In Cepl's opinion, restitution of properties that were expropriated prior to 1948 would have been politically unacceptable and a bad precedent because it would have returned Jewish property to Nazi collaborators and Südeten German-Czech issues would have opened endless litigation revolving around responsibility for the Second World War and its results. Since the post-1945 confiscations were ordered by a democratically legitimate government on the basis of presidential decrees and the 1920 constitution, pre-1948 restitution would have created conflicting obligations for the government. Czech restitution was intended to create quickly a class of non-Communist property owners, an instant middle class. Therefore, the definition of entitled persons was broadened as far as grand-nephews of original owners, beyond the Czechoslovak legal norm of inheritance for immediate relatives. This policy reflected an interest in quick and smooth privatization, no matter on which philosophical grounds. As Elster (1998, pp. 36–37) noted, backward reasoning may legitimize forward privatization in the guise of restitution, especially when the government is forward looking, while sections of the population are more sympathetic with historical theories of property rights. As Cepl stated it, restitution was not about justice but about the transformation of the system of ownership. The past cannot be restored; broken lives cannot be mended; it may only be possible to establish necessary conditions for a better future.

II.4

II.4.1. *Beliefs* concerning the extent of restitution and compensations that would follow various schemes of rectification and estimates of the capacity of the legal system and the financial resources of the state are significant for making feasibility assessments during the decision-making process.

II.4.2. In the post-Communist context, economists advocated an influential model along the following lines: assuming privatization and given time, free-market mechanisms tend to create the most efficient distribution of private property, economic growth, and prosperity irrespective of the past or the initial post-Communist distribution of property. Still, some initial distributions of properties are more likely to be conducive to economic growth in the short term than others. Former owners or their descendants are not likely to have maintained their business skills after decades of exile or to have the capital and

interest to improve the properties they would gain through restitution; they are more likely simply to sell them, thus prolonging the process of economic transition until the property finally begins to be productive. If unqualified beneficiaries of restitution attempt to manage their properties, they are liable to allocate resources wastefully. Accordingly, the Czech economist Václav Klaus, minister of finance from 1990 to 1992 and prime minister from 1992 to 1997 (who replaced Havel as president in 2003), objected to restitution because he held the belief that it is inferior to other kinds of privatization. Klaus (Kritz 1995, Vol. 2, p. 577) argued that the past cannot be rectified; present attempts at rectification of the past would be at the expense of present and future generations. Privatization without restitution appeared superior.

A likely group of people to win properties through privatization without restitution are the "red" managers who controlled the properties. As managers of state firms they have been inefficient and have been stealing, but once they become the owners, so went the model, their incentive for theft would disappear as they begin to behave as rational owners and maximize their wealth. Once the red managers become bourgeois owners of the means of production, asserted the model, they would become a propertied class with an interest in building and sustaining the rule of law and a liberal political superstructure to protect their properties and class. This model had implicit assumptions:

1. The red managers would be interested in managing once they become owners.
2. The red managers acquired valuable managing experience and therefore would understand better how to turn failing state industries into profitable businesses than aging original owners or their inexperienced descendants.
3. The market is closed from the outside world, as in introductory courses to economics, so no properties can be stripped, liquidized, and deposited abroad.
4. The state would remain throughout the processes of privatization and economic transition a disinterested enforcer and arbiter of the rules of the free market, immune to influence peddling and bribes from the red managers to maintain subsidies, protectionism, and monopolies.

These assumptions have been tragically erroneous and yet affected the preference of privatization to restitution.

11.5. Though the exact details of aggregations of distinct social groups differ from country to country, generally a coalition of direct beneficiaries, politicians, bureaucrats, and economists tends to object to large-scale restitution, against claimants. The restitution of land and buildings, properties that cannot be stripped, liquidized, and deposited safely abroad, does not threaten the interests of the nomenklatura or the politicians. Conflicts between protected tenants as direct beneficiaries and old/new owners can be prolonged, tangible, and messy, nothing like taking over a bank or an insurance monopoly in which the assets are liquid and large, can be stripped without undue fuss, and are

sufficiently intangible that nobody actually notices for a while or even quite understands later where all the money went. The presence of some restitution may create the appearance that the new democracies are serious in their attempt to create a free market based on property rights and thus assure foreign investors and allay foreign pressure for reforms. "Privatization" whereby foreigners are barred from bidding means the transfer of properties, or assets, if not their liabilities, from the state to the nomenklatura often in return for kickbacks to bureaucrats and politicians because there is nobody else left with capital resources to bid.

Restitution to emigrés depends on their ability to pressure through their adopted states the transitional democratic government, because no pressure group within the society in transition represents their interests. Immaterial or modest compensations, whether immaterial, honors, medals, degrees, or modest financial rewards from the state budget, are not likely to be resisted by the beneficiaries and, depending on the number of claimants, the modesty of the proposed financial compensations, and the exact state of the state budget, are within the means of the transitional government.

III. DEPENDENT VARIABLES

Rectification can be analyzed into the legal definition of victims, kinds of compensation and restitutions, and the process established to distribute rectifications.

III.1

III.1.1. The definition of recognized direct victims varies from country to country. It is possible to use the formal legal criteria of the predemocratic regime itself, declaring all conviction or losses that resulted from certain laws and regulations to entitle their victims to rectification. This method may be too narrow because totalitarian regimes do not bother always to use their legal system to legitimize their actions and do use nonpolitical laws as excuses to persecute their opponents. It is also too broad because some political victims were also perpetrators, namely, members of totalitarian elites who lost an inner struggle within their own oppressive organization and consequently got a taste of their own medicine. It is also possible to use the institutional divisions of the predemocratic regime to define persons who were "treated" by certain institutions as victims. This method is useful only in countries such as Argentina where nondemocratic regimes used only their own special institutions to oppress and did not delegate some authorities and duties to the civil police and judiciary, as totalitarian regimes do. A third possible method is less formal and objective, more precise but also much more expensive; it defines victims according to the *reason* for their suffering, defining political reasons as entitling. This method is much more expensive because it requires litigation and interpretation to achieve precision. Usually, noncitizens and co-members in a class of perpetrators are excluded. The cheaper first two methods are usually preferred in transitional

contexts, though they may be supplanted by some possibility of appeal for those excluded by the rougher, extrajudicial, methods.

The most inclusive rectification law is probably the West German law that defined "persecutees" as those persecuted because of their political opposition, race, religion, or ideology; or because of their conscience's leading them to oppose Nazi policies; or because of their holding to scientific and artistic values; or because of their connections with another persecutee (Kritz 1995, Vol. 2, pp. 47 ff). The law excluded claimants who were not persecuted because of their politics or race such as 350,000 victims of forced sterilization, the families of victims of "euthanasia," and homosexuals. Former members of the Nazi Party and those who assisted them could not apply for compensation, to maintain a distinction between victims and perpetrators. Only citizens or those who had a legal right for citizenship (according to criteria of territory, blood, and membership in a cultural community) are entitled.

The Czechoslovak Large Restitution and extrajudicial Rehabilitation law of February 1991 (Kritz 1995, Vol. 3, pp. 704–17) recognized victims as persons who suffered persecution as a result of their democratically motivated social and political activities or membership in a specific social, religious, or property-owning strata. Claimants who lost stocks, bonds, and bank accounts were not recognized as victims. Emigrés were not recognized as victims, unless they chose to reassume citizenship and resettle. Rectifications were limited to acts committed after the Communist takeover in 1948, thus excluding non-Czech and non-Slovak ethnic groups (Jews, Germans, and Hungarians) and the larger Czech employers whose properties had been confiscated prior to the 1948 Communist takeover.

The definition of victims in other post-Communist countries resembled the Czechoslovak one. In Bulgaria (Kritz 1995, Vol. 3, pp. 672–74), victims were people oppressed because of their nationality or political or religious convictions between September 12, 1944, and November 10, 1989. Bulgarians convicted by the 1944–45 People's Courts were excluded (presumably because they were collaborators). In Albania (Vol. 3, pp. 661–66), victims were defined as those persecuted by the state between November 8, 1941, and March 22, 1992. The law excluded members of the nomenklatura and state security and political prisoners who were also convicted of serious nonpolitical crimes such as murder, rape, and theft. A uniquely Albanian excluded group is of people who publicly denied their convictions and cut ties with their relatives. According to Russian law, political prisoners are victims except if they were "traitors," terrorists, World War II traitors, gang members, war criminals, or people convicted of vaguely defined "crimes against law and order" (Vol. 2, pp. 751–54).

In Argentina (Kritz 1995, Vol. 3, pp. 667–69) the criteria for victimhood were institutional because the organs of oppression were clearly distinct from the civil police and judiciary. People placed at the disposition of the "National Executive Authority" during the period of emergency (prior to December 10, 1983) and civilians put at the disposition of military courts are victims.

III.1.2. Some rectification laws consider indirect victims, family members of dead victims. In West Germany (Kritz 1995, Vol. 2, pp. 47–60) close family members are entitled to compensations if life was lost during, or at most eight months after, the end of persecution. Wives are considered most entitled: smaller amounts go to parents, orphans, and grandchildren. Courts extended these criteria to death as a result of exile in unhealthy environments in the tropics and suicide but demanded a clear causal chain connecting persecution with death.

In post-Communist countries immediate family members of deceased victims are usually entitled to some rectification and restitution (if it takes place). In the Latin American post-authoritarian regimes immediate family was entitled to extensive rectification, in the Chilean case, as a substitute for compensations to direct victims.

III.1.3. Institutions and organizations as well as individual persons may be recognized as victims requiring rectification. Institutions are usually entitled only to restitution because unlike persons, institutions cannot be "imprisoned" or suffer. In the Czech Republic restitution was limited to real persons. Then, it was expanded to the properties lost by the Jewish community because the policy was popular, the extent of the properties was rather small, and the old synagogues and cemeteries have no obvious economic use but cost to maintain. The restitution of Jewish communal property was supported by the Catholic Church and the Christian Democratic Party to serve as a precedent for restitution of the extensive confiscated properties of the Catholic Church, which include 6 percent of Czech agricultural land. The state agreed to return to the church some churches and monasteries and the church agreed to forsake others that were beyond repair because of neglect. They still dispute the fate of churches and monasteries that were converted to other uses and of the agricultural land.

The case of West Germany is exceptional (Kritz 1995, Vol. 2, pp. 47–60). There, legal persons, institutions or associations, were recognized as victims as well, if they suffered damage. If no successor organization is obvious, successor in purpose is entitled under restitution laws. Still German legal persons were entitled for compensations only for property and possessions. In the same vein, the West German government recognized the state of Israel as the inheritor of the Jews who perished in the Holocaust without immediate relatives. Under ordinary circumstances, democratic governments have no interest in paying compensations to claimants who do not vote for them, most notably to emigrants, certainly not to organizations that have no clear relation with victims. But in the case of Western Germany reparations had an ulterior motive, gaining acceptance into the world community. West Germany had to seek some entity that could grant it absolution, if it pays reparations, a kind of entrance fee that was paid not just to the victims, but to a state that did not exist at the time of the acts and whose connection to the victims is purely ideological – the United States could have claimed equally well that it was the inheritor of the Jews who had no survivors, since more Jews including Holocaust survivors live in the United States and given the choice it is likely that more Holocaust victims

would have immigrated to the United States rather than to Israel, had they followed previous immigration patterns of European Jewry.

III.1.4. Recognized direct and indirect victims may be entitled to compensations for the following losses.

Loss of liberty is recognized if anything is; the sole exception to this rule is Chile, and even there the civilian authorities got around this commitment to the junta by generously compensating family members of former political prisoners. In all post-Communist countries, release and rehabilitation of political prisoners followed the collapse of communism, often in the context of general amnesty, resulting from the inability of the judiciary, such as it is, to review all cases. Local variations depend on the kinds of deprivations of liberty that were favored by local regimes. In Czechoslovakia, "work battalions" were recognized in addition to traditional incarcerations. In Russia (Kritz 1995, Vol. 2, pp. 751–54) the Supreme Soviet recognized in November 1991 internal and external exile, forced psychiatric "treatment," as well as prison as forms of deprivation of liberty. In Albania (Vol. 3, pp. 661–66), people who were forced to live as outlaws or were victims of internment or deportation were recognized. West Germany recognized loss of liberty to include internment by a foreign government that resulted from loss of German citizenship or of intervention by the German government. It also recognized life underground and forced labor as forms of loss of liberty. The courts later limited this interpretation to forced labor and life underground that were clearly similar to prison conditions (Vol. 2, pp. 47–60).

Loss of job and career is also often recognized, though not always meaningfully compensated. *Loss of educational opportunities* may be recognized when victims were prevented from receiving higher education, either because they were expelled from institutes of higher education while studying or because they were denied admission for nonacademic reasons. *Loss of health* including mental health by direct and indirect victims, such as children of political prisoners, may be compensated financially or with provision of free medical treatment.

Loss of property by direct or indirect victims may include real estate such as houses or land, as well as liquid assets such as bank accounts, businesses, bonds and stocks, or movable property such as cars and furniture. Hertz (Kritz 1995, Vol. 2, p. 47) pointed that East Germany paid more in compensation to victims, while West Germany concentrated on restitution of property. In Hertz's opinion this reflects capitalist values, an emphasis on material rather than human loss. Hertz overlooked the political basis of the East German regime. Restitution of property would have been rather odd in a regime devoted to the abolition of a propertied class, whereas compensations to anti-Nazi political prisoners amounted to state pensions to the older founding members of the Communist Party, the power base of the regime. West Germany compensated for destruction, defacement, or the looting of property in the Reich since the beginning of 1938. West German courts limited compensations for direct action against property and to confiscation.

In the post-Communist context, restitution was practically limited to immovable property. In the Czech Republic (Kritz 1995, Vol. 3, p. 711) a person could not be compensated for loss of movable property by more than 60,000 crowns (US$2,000).

III.2. Forms of rectification may be located on a continuum from economic to political poles. Nearer to the economic pole, we may find lump sum cash rewards, payments in monthly installments, natural restitution, payment in vouchers that can be used to bid for privatized properties, and shares in privatized firms. Nearer to the political pole we may find honors, decorations, and symbolic financial rewards. In between we may find affirmative action in education and jobs, preference in the allocation of scarce state goods such as housing, medical treatment, and phone installation (Elster 1998, p. 23). Generally, post-authoritarian democracies and wealthy post-totalitarian regimes (West Germany is the only case here) practice all forms of rectification, whereas post-Communist countries tend toward the political pole and the poorer post-Communists more so.

Post-authoritarian Chile practiced all forms of rectification from pole to pole (Kritz 1995, Vol. 2, pp. 490–92). After the report of its Truth and Reconciliation Commission, the president and congress made a declaration about the dignity of the victims, followed by Congress and by symbolic acts by artists in cemeteries and designated parks. The Retting commission recommended three types of reparations, symbolic rehabilitation, legal and administrative measures to solve problems such as the status of spouses of the disappeared and their inheritance, exemption from the draft for their children, and financial reparation for loss of health and education (Medina-Quiroga in Kritz 1995, Vol. 2, 502–9). Spouses of the disappeared receive a monthly tax-free pension for life, and an allocation for their children until age twenty-five and one lump sum equal to one year of pension. A monthly pension of $370 is divided along the following lines: 40 percent to surviving spouse; 30 percent to the mother or, if she is dead to the father; 15 percent to mother or father of natural children; and 15 percent to each child. Free health care, including psychiatric care, is extended to all relatives and to families in which one member was traumatized by torture or detention and to returning exiles. Children of the disappeared receive free tuition and maintenance scholarships up to age thirty-five. These generous compensations reflect the inability of the transitional government to compensate the political prisoners themselves, including the victims of torture, after its agreement with the military. The Ministry of Justice initiated also a reincorporation program for former political prisoners with foreign assistance, again, not to contravene the agreement. In Argentina (Kritz 1995, Vol. 3, pp. 667–69) former political prisoners are paid according to the civil service salary scale. The families of dead victims receive a lump sum equal to civil service salaries for the time of incarceration and five years; people who suffered serious wounds are paid 70 percent. These entitlements are inheritable. In Brazil (Vol. 3, pp. 670–71) people who lost their job for political reasons gained the right to reinstatement and

customary promotions and compensations for time lost. Similarly in Uruguay (Vol. 2, 395–97), civil employees who lost their job through the military regime for political reasons were entitled to have it restored.

West Germany practiced political forms of rectification by restoring citizenship, university degrees that the Nazi state ceased to recognize, and rehabilitating political prisoners. Other compensations included disability compensations, compensations for inability to work, free medical care, annuity, capital indemnity, out of hospital allowance, and subsidies for retaining assistance and maintenance of survivors (Kritz 1995, Vol. 2, pp. 47–60). Relatives of deceased persons receive an annuity or lump sum in case of remarriage. These compensations were based on the maintenance payments that would be granted to survivors of comparable federal civil servants. Property restitution followed the value of the property up to a cap of DM 75,000. Courts agreed also to pay compensations for expenses relating to emigration. West Germany also recognized damage to vocational and economic pursuits, if a victim had lost earning power since 1938 as a result of persecution. Self-employed were entitled to receive help in reestablishing their businesses and in receiving licenses and reduced-interest-rate loans. Compensations for lost labor are based on 75 percent of the salary of a comparable civil servant for that period and a pension based on two-thirds of that of a comparable civil servant, if the person could not work after the war. Dismissed workers were entitled to regain their job if they were not too old or otherwise unable. Loss of education was valued by up to DM 10,000. Children who could not study because of the identity of their parents were also entitled to up to DM 10,000. The restitution of identifiable property followed the legislation of the Western occupying forces, initially with a total cap of DM 1.5 billion that was abolished in 1964 after the revenues that flowed from the German "economic miracle."

In the former East Germany (Southern quoted in Kritz 1995, Vol. 2, pp. 640–44), natural restitution was agreed in the unification treaty of August 31, 1990. As elsewhere in the former Communist bloc, the restitution law also defended the rights of protected tenants. Under U.S. pressure, East German restitution was extended through the Nazi era to January 30, 1933, to pay 130 percent of the 1935 value of properties up to DM 250,000, tapering off after DM 100,000. As a result of the worsening economic conditions in the former East Germany, a new investment law ruled that investment (privatization) takes precedence over restitution. Such investment must safeguard or create jobs or provide housing or improvement of infrastructure.

In Czechoslovakia already by April 1990 (Kritz 1995, Vol. 2, pp. 572 ff.) all political prisoners were rehabilitated, their pensions were adjusted to compensate for lost years in prison, and they became entitled to compensations for legal costs and loss of earning and health during incarceration. These compensations were standardized to preclude litigation. State institutions independently issued instruction for rehabilitations of former employees who were dismissed for political reasons, especially after the post-1968 "normalization" purges. Academic institutions as well reinstated employees and students (irrespective

of their competence after a twenty-year hiatus). By law, though, former employees were not *entitled* to restoration of their job or compensations for lost labor. If they requested to resume their job within six months of the enactment of the February 1991 law and had the relevant qualifications and requirements for the job, and it was possible for the organization, they would be eligible to receive the same type of job under similar contractual conditions. They were entitled to receive from their former employers a statement of facts regarding the circumstances of their dismissal (Vol. 3, pp. 714–17). Retirees who lost their jobs could apply for readjustment of pension from the Ministry of Labor and Social Affairs. The pension formula counted all the time from dismissal and doubled time spent in work battalions or the military, on the basis of the salary in the year before dismissal adjusted for general wage growth. The rate of compensations to political prisoners was CK 2500 per month of incarceration up to CK 30,000 (US$1,000); then the compensations were paid in installments over ten years or less. Former prisoners were also entitled to compensations for damage to their health, legal fees, and fines. Relatives of dead victims were entitled to CK 15–20 (US$0.50) per month of incarceration in addition to the pension of the deceased; these payments were capped at CK 3800 (US$130).

In October 1990, the Czechoslovak Federal Parliament restituted some seventy thousand small businesses and apartments that were confiscated from 1955 to 1961. In February 1991 restitution was extended to properties confiscated from the Communist takeover in February 1948 to 1955 valued at CK 10,000,000,000 (US$330 million). Since the Czechoslovak government had already confiscated all enterprises that had employed more than fifty workers in 1945, 90 percent of Czechoslovak firms, especially the bigger ones, which have many employees, were not restituted. Jews and Südeten Germans who lost their properties before 1948 were excluded as well. By the end of 1991, natural land restitution, of the same land that was expropriated rather than a similar parcel of land or a sum of money, was enacted as well. Land that was built on since confiscation was not returned, and the rights of present tenants on the land were protected as those of tenants in general. Initially, the law set a cap on the size of land that could be returned to a single owner through restitution. This restriction was eased later, allowing the restitution of estates larger than 250 hectares, including the symbolically significant restitution of some of the estates of the old Czech nobility, the Schwartzenbergs, Kinskis, and Lobkowitzes.

In Hungary (Paczolay quoted in Kritz 1995, Vol. 2, pp. 667–85), restitution stretched back to May 1939, but it consisted exclusively of vouchers for participation in the privatization process: for purchasing property, stocks and business shares, arable and land property, state housing units, collateral for small business loan, or for annuity payments. Hungarian restitution was subjected to "progressive" caps. Up to 200,000 forints (US$2,700) restitution was in full; from 200,000 forints to 300,000 only 50 percent was restored; up to 500,000 forints, restitution was of 250,000 + 30 percent of the rest; above 500,000,

310,000 + 10 percent up to an ultimate cap of 5 million forints (US$70,000). Former landowners who promised to cultivate their land for five years got the full 200,000 forints plus 800,000 forints as a development loan. All cooperatives that kept confiscated land had to auction it. But beneficiaries of restitution had to compete in auctions. Inflation fears made the government add a clause that allowed it to suspend the value of vouchers for six months. Hungary (Kritz 1995, Vol. 2, pp. 691–92) compensated for unlawful deprivation of life or liberty between March 11, 1939, and October 23, 1989, at a rate of 11,000 forints (US$150) per month of imprisonment for the victim and half for a spouse in the case when the victim is deceased. The families of victims who were killed received one lump sum of 1 million forints (US$13,500).

In Russia (Kritz 1995, Vol. 2, pp. 751–54) former political prisoners gained the right to free legal consultation and regained sociopolitical rights and military and other titles. They were allowed to reside where they had lived before (i.e., internal exile was abolished), receive back their citizenship if it was taken away from them, and review the materials against them. Rehabilitated victims received 180 rubles per month of incarceration (which was in 1991 about US$100) up to 25,000 rubles, paid at once or in installments over three years. Some former prisoners would receive priority in state housing allocations if they lost their state-owned house or if they needed a better one. Workers in rural areas gained the privilege of receiving interest-free loans and priority in buying building materials. Disabled individuals or pensioners gained priority in sanatorium treatment, extra medical treatment and 50 percent reduction in the cost of medicine, free public transport, 50 percent reduction on the cost of housing and other municipal services, priority in phone installation, priority in assignment of boardinghouses, free manufacture and repair of dentures, and other preferential treatment in obtaining foods and industrial goods. Russia has no restitution.

In Albania a 1993 law (Kritz 1995, Vol. 3, pp. 661–66) promised compensations to direct victims and their family, lump sums, life pensions, compensations for lost salaries, and properties. But the exact sums were left to the discretion of the government. Further unspecified rights would be in the privatization of state property, credit, housing construction, tourism, education, employment, benefits of national and international social programs, and health service. Payment for prisoners should be based on the highest salaries of miners (a privileged group under communism) at the time of the imprisonment, corrected for inflation.

III.3. The *procedure* for rectification may be judicial, through the courts, or extrajudicial, through special commissions or designated government departments. Usually, a judicial review supplants the extrajudicial procedure as a court of appeals. In post-totalitarian transitions, governments tend to opt for an extrajudiciary process because of the scarcity of judicial resources relative to the overwhelming number of claims. The absence of judicial review allows rough but quick and broad-scope justice.

In post-authoritarian contexts an extrajudicial process may serve to democratize the proceedings by involving civic leaders in the compensation process, but it is usually not as necessary as in post-totalitarian regimes because there are more judicial resources and the number of claims in relation to population is significantly lower. In all cases of restitution and most cases of compensations there is a time limit, usually six months, for filing claims, to preclude ambiguity in ownership in the first case, and to limit litigation in the second case. In the post-totalitarian cases when judicial review was involved in the process of rectification, the judges tended to limit or to attempt to limit the scope of rectification. For example, in West Germany decisions on compensations were assigned to agencies of each Länder, with an appeal process to compensation divisions of districts, appeal courts, and the Federal Supreme Court. Courts and bureaucrats interpreted racial victimization cases as falling under other clauses. For example, they did not recognize Roma (Gypsies) who were persecuted before March 1943, because the official Nazi excuse for their persecution was their alleged asocial behavior, rather than race. The first post–World War II German law on rectification contained a clause about "unworthy reparations" that was applied to the inheritors of a dead Jewish businessman because of his adulterous relations with a German woman. In another case, German courts denied compensations to the family of a girl who died as a result of concentration camp internment after a love affair with a Polish prisoner of war (for more cases see Müller 1991, pp. 201–98).

According to the Hungarian Constitution (Paczolay quoted in Kritz 1995, Vol. 2, pp. 667–85), the Constitutional Court can review all laws and their drafts on its own initiative. The court is composed of ten judges, five chosen by the Communist parliament and five by the post-Communist one. Restitution was the main election issue of the Small Holders Party in the 1990 elections, from which it emerged as the third biggest party and a member of the coalition. Their demands led Prime Minister Antall to ask the Constitutional Court to consider whether restitution according to property types violates the antidiscrimination equal protection clause of the constitution. The court ruled that restitution ("reprivatization" in its *newspeech*) constitutes discrimination in favor of former owners in the process of privatization. The court also ruled that discrimination among former owners according to the type of property they claimed (e.g., land vs. industrial property) was unconstitutional. Finally they sought to protect the collectives by forbidding discrimination against agricultural cooperatives that received the confiscated land in privatization. The court ruled that members who leave cooperatives cannot get part of the common property, irrespective of the way the cooperatives were created (coercion). They also ruled unconstitutional the privatization of the properties of the cooperatives without compensation. These rulings led to questioning of the legitimacy of the post-Communist Constitutional court. In April 1991 a compensation bill passed. President Goncz sent the bill to the Constitutional Court for review with six questions. Under pressure, the court gave the government a great deal of discretion. To prevent discrimination, the court abolished the base date for

restitution of June 8, 1949. This ruling may have been intended to make restitution politically unviable by including Jews and Germans.

Considering the Communist past of the post-Communist judiciary all rectification laws sought to restrict the role of the judiciary to the end of an appeal process (Cepl quoted in Kritz 1995, Vol. 2, pp. 582–83). In Hungary, restitution decisions were assigned to County Offices, with an appeal process to the National Damage Claim Office, with judicial review only as the final appeal authority. In Czechoslovakia the February 1991 Law on Extrajudicial Rehabilitation was just that. In Bulgaria (Kritz 1995, Vol. 3, pp. 672–74), requests for compensations had to be filed with the Ministry of Finance within three years from the 1991 law. Claims for confiscated property had to be submitted to municipal authorities within two years. Judicial review was available again only on the level of appeal, after an initial determination was made by a bureaucratic committee. In Albania (Vol. 3, pp. 661–66) a uniquely democratic process was envisaged in a 1993 law: documents substantiating claims for rectification would be collected by local branches of the Associations of Political Prisoners and Former Victims of Political and Economic Persecution, which would submit them to a commission composed of three representatives of the Justice Ministry, three from the State Commission for Former Victims of Political Persecution, and three representatives from the National Association of Victims of Political Persecution.

After the reunification of Germany, the united state did not suffer the kind of scarcity in legal resources with which other post-Communist states had to contend. Still, the proportion of claims to populations was just as staggering. In the former East Germany (Kritz 1995, Vol. 2, pp. 600–601), a strict adherence to judicial review and due process had the unintended opposite effect of clogging the courts with restitution claims that in the meanwhile created ambiguity in ownership, despite the assignment of initial decisions on restitution to local and land offices. By the deadline at the end of 1992, hundreds of thousands of claims for properties lost to the Nazis or Communists were filed with the central land registry, each requiring weeks or months for processing. Two million claims were made to more than half of the land area of the former East Germany. By the end of 1992 only about 10 percent of them were resolved. The decision on multiple claims is in the hands of 216 local offices, six land offices, and one federal office. Appeals are to the Administrative Courts. Completing the process should take ten to thirty years. The procedure in post-Communist countries produced far quicker but rougher and less precise justice.

IV. CONCLUSION: THE RESULTS OF RECTIFICATION

Colossal historical events such as the collapse of totalitarian regimes create expectations for unlimited possibilities for change. In fact, forms of justice that can follow totalitarian regimes are quite limited. When comparing reality to the philosophical literature on restitution and rectification, many of the philosophical solutions irrespective of their theoretical foundations pale into

irrelevance for lack of taking into account social conditions. The evil that totalitarian regimes perpetrate is so radical that it transforms the social and economic fundamentals in such a way that it makes it near impossible to rectify.

In post-Communist countries it is striking that irrespective of local legislation, circumstances, and precise balance of political alliances, the major beneficiaries of communism, the nomenklatura, the cadres of the Communist Party, again were on top through the process of privatization such as it was; the victims received mostly symbolic compensations, awards, and decorations; and the direct beneficiaries, who had to bear the brunt of restitution such as it was, were the weakest members of society, old women who had received confiscated apartments from the government. Restitution did not include the best properties, the monopolies, large industry, and anything that could be liquidized. It pitted beneficiaries of small restitution of houses against tenants who received apartments through the luck of the draw from the housing office, enjoyed protected rent, and would not be able to pay market rents. The perpetrators and main direct beneficiaries remained uninvolved in this process. Altogether restitution transferred fairly small percentages of the economy to private hands. Time, emigration, and technological and business innovation cast doubt on the economic value of restitution, as the economists were quick to point out. I am just skeptical whether the actual alternative, the further enrichment of the nomenklatura, followed by asset stripping, embezzlement, and collusion with politicians for the creation of subsidized monopolies, has been the better of the two bad choices.

I do not wish to underestimate the value of rehabilitation and gaining of some symbolic tokens of appreciation for former political prisoners and their families. When people are poor as a result of oppression, even small financial rewards may help if not rectify. Especially in the post-authoritarian cases such compensations are meaningful. Still, totalitarian evil is marked by the fact that people suffered quite literally for nothing. Nobody benefited very much from their travails, certainly not to the extent that they lost, and nobody in particular is held accountable or pays for their rectification, apart from the obvious fact that no amount of money can rectify years lost in the gulags.

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13

Truth and Reconciliation Commission in South Africa Amnesty

The Price of Peace

Alex Boraine

INTRODUCTION

In order to understand the nature and implications of the Truth and Reconciliation Commission in South Africa it is important to see the commission in both the national and the international context.

South Africa has experienced racism and oppression of one form or another ever since the earliest days of colonialism. There are those who argue that the period under review for the Commission in South Africa should have started as far back as the first arrival of white settlers in 1652! Others are of the view that at the very least the commission should have looked at the period that began with South Africa's first constitution in 1910. There are also many who maintain that the starting point should have been 1948, when the National Party came into power. After careful consideration the Standing Committee on Justice in South Africa's Parliament decided to recommend that the period to be covered would be March 1960 to December 1993. The first date coincides with the banning of political organizations, severe oppression of any resistance to apartheid, and the Sharpeville massacre. The end date was arbitrarily chosen as the date when the negotiation teams decided on an amnesty provision in the Interim Constitution (this date was later changed to May 10, 1994, largely to include a number of right-wing Afrikaners who engaged in violent acts immediately prior to the election in April 1994).

In 1910 when the first South African constitution was promulgated, it characterized white hegemony and was fundamentally undemocratic, excluding as it did the vast majority of the population. It was also structurally racist, because the exclusion of the majority was in terms of skin color. However, this undemocratic and racist constitution was further entrenched when the National Party gained power in 1948.

Under the National Party, through its policy of apartheid, a policy of domination was enforced that was not only a denial of basic political rights but a systematic piece of social engineering that embraced every area of life

from birth to death. Thus the system of apartheid determined state policies relating to the franchise as well as to land, housing, residence, schools and universities, transport, health services, sports, hotels, restaurants, and even cemeteries.

In other words, apartheid was a system of minority domination of statutorily defined color groups on a territorial, residential, political, social, and economic basis. It was a system that was entrenched for almost fifty years.

Although the cards seemed to be stacked against South Africa's achieving a relatively peaceful and relatively democratic election, the transition from oppression, exclusivity, and resistance to a new negotiated, democratic order in 1994 was realized. The chains that bound the majority of the people in what appeared to be perpetual servitude were shattered. Many people, both within South Africa and beyond its borders, have described this transition as nothing short of a miracle.

However, because of the social and economic legacy there remains *unfinished business*, even after more than ten years of democracy, which has to be tackled, otherwise it will be impossible to sustain the miracle, consolidate democracy, and ensure a peaceful future for all South Africans.

Therefore any serious attempt at dealing with the legacy of the past must include at least a strong commitment to transformation in the economic and social life of the majority of South Africa's citizens.

There was also a compelling need to *restore the moral order*, which was put in jeopardy by the abdication of the rule of law and gross violations of fundamental human rights. Thus the birth of the Truth and Reconciliation Commission. But economic justice and the restoration of the moral order should be seen as two sides of a single coin. Whereas the focus of the commission was on truth seeking in the search for reconciliation and unity, serious delays in delivering social services could bring into disrepute any talk of reconciliation.

One of the ways in which to start the healing process in South Africa was an honest assessment and diagnosis of the sickness within that society in an attempt to give people, both perpetrators and victims, an opportunity to face the past and its consequences and to start afresh. The Truth and Reconciliation Commission was an opportunity to make a serious contribution in order to deal finally with the past without dwelling in it and to help create the conditions for a truly new South Africa.

Although it is true that South Africa's commission was shaped very much by its own history and the circumstances and the nature of its particular and peculiar transition, there were many similarities to the experience in Eastern Europe and South America that impinged on the Commission in South Africa. Briefly these were

- A shift from totalitarianism to a form of democracy
- A negotiated settlement – not a revolutionary process
- A legacy of oppression and serious violations of human rights
- A fragile democracy and a precarious unity

- A commitment to the attainment of a culture of human rights and a respect for the rule of law
- A determination to make it impossible for the gross violations of human rights of the past to happen again

South Africa, in company with many other countries, had to face up to three critical questions:

First, how do emerging democracies deal with past violations of human rights?
Second, how do new democratic governments deal with leaders and individuals who were responsible for disappearances, death squads, psychological and physical torture, and other violations of human rights?
Third, how does a new democracy deal with the fact that some of the perpetrators remain part of the new government and/or security forces or hold important positions in public life?

Priscilla B. Hayner reminds us that there have been some nineteen truth commissions in sixteen countries over the last two decades, including those now in formation. In the work leading up to the appointment of the Truth and Reconciliation Commission we were greatly influenced and assisted by studying many of these commissions, particularly those in Chile and Argentina.

There were several choices open to South Africa as it sought to come to terms with its past. First, a blanket or general amnesty was proposed. This was strongly motivated by the former government, led by F. W. de Klerk, as well as the security forces, including the military and the police. This option, however, was untenable for the African National Congress, representing the majority of people who suffered gross human rights violations in the past.

The second option was that of calling to account those who were directly responsible for the gross human rights violations that took place and putting them on trial and prosecting them so that justice could be seen to be done. This approach, akin to the Nuremberg trials, was for a very long period strongly supported by the liberation movements while they were still in exile.

As Thabo Mbeki, deputy president of South Africa, put it, "Within the ANC the cry was to 'catch the bastards and hang them' but we realised that you could not simultaneously prepare for a peaceful transition. If we had not taken this route I don't know where the country would be today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment we would never have undergone the peaceful change."

A third option was the one that gained majority support. This was to appoint a special commission, which was at first referred to as a truth commission and was later introduced formally as a truth and reconciliation commission. This commission would offer the possibility of truth relating to victims and perpetrators, the restoration of dignity for victims and survivors, a limited amnesty, and a search for healing and reconciliation.

Judge Richard Goldstone put it this way: "The decision to opt for a Truth and Reconciliation Commission was an important compromise. If the ANC had insisted on Nuremberg-style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy, and if the former government had insisted on blanket amnesty then, similarly, the negotiations would have broken down. A bloody revolution sooner rather than later would have been inevitable. The Truth and Reconciliation Commission is therefore a bridge from the old to the new."

Although there can be little doubt that Mbeki's commitment to "a peaceful transition" was a valid reason for not following the Nuremberg option, there can be no doubt that the strength of the right-wing and state military and security forces was a major factor that informed choices at the negotiating table. In a private interview with President Mandela he made it absolutely clear that senior generals of the security forces had personally warned him of dire consequences if members of those forces had to face compulsory trials and prosecutions after the election. According to Mandela, they threatened to make a peaceful election totally impossible. Some compromise had to be made, and in the Postamble of the Interim Constitution provision was made for the granting of amnesty in order to advance reconciliation and reconstruction, and for its legislative implementation.

The point has already been made that South Africa learned a great deal from other countries that had undergone transitions toward democracy, but there were some unique features to the South African model in terms of its Truth and Reconciliation Commission, and I now turn to some of the more important of these features.

1. UNIQUE FEATURES OF THE SOUTH AFRICAN MODEL

1.1. The process by which South Africa arrived at its commission was quite different from any other that I know of. It was essentially democratic and gave as many people as possible an opportunity to participate in the formation of the commission.

The idea of a truth commission was introduced by the African National Congress (ANC) prior to the election in 1994. Ironically, that is, seen against the background of widespread human rights violations committed by the South African state over many decades, the ANC was accused of perpetrating human rights violations in some of its camps while in exile. The response of the ANC was to appoint an internal commission of inquiry. A report was published, but there was considerable criticism that it lacked impartiality. A second independent commission was appointed.

Its findings were made known to the national executive of the ANC, and their decision was that there were grounds for criticism, but that these should be seen against the overall human rights violations that gripped South Africa over a very long period, and the way to resolve this was to appoint a truth commission.

A very important contribution was made by Kader Asmal when he held the Chair of Human Rights at the University of the Western Cape and delivered his inaugural lecture, "Victims, Survivors and Citizens – Human Rights, Reparations and Reconciliation." Many who either heard or read the lecture lent their voices in support of South Africa's having its own commission.

Two major conferences were held under the auspices of Justice in Transition, a nongovernmental organization. The first, simply titled "Dealing with the Past," was held in February 1994 in Cape Town. A number of leading scholars and human rights practitioners from Eastern Europe, Central Europe, and South America were invited to share their experiences with a group of South Africans. A book was published under the title of the conference, *Dealing with the Past: Truth & Reconciliation in South Africa*, and was distributed widely throughout South Africa, and the debate was joined.

A second conference was held in July of the same year, also in Cape Town, "Truth and Reconciliation." The majority of participants were from South Africa, but there were key participants from Chile and Argentina as well. The minister of justice, who had been appointed soon after the election, was the keynote speaker; he outlined the idea of a commission, notice of which he had already announced in Parliament. A second book was published by Justice in Transition under the title *The Healing of a Nation?* A number of workshops and conferences were held throughout South Africa looking at the concept of a truth and reconciliation commission and considerable input was gained from these deliberations, which contributed significantly to the final model.

In fact, this input from participants in civil society was placed before the Parliamentary Standing Committee on Justice, which was charged with the finalization of the Parliamentary Bill. Public hearings were held; they were followed by the debate in Parliament itself, where the Promotion of National Unity and Reconciliation Bill was finally passed by an overwhelming majority.

One further contribution to the democratic process was President Mandela's decision to appoint a small representative committee consisting of individuals from major political parties and civil society, who together accepted responsibility for the selection process that would lead to the appointment of members of the commission. People in all walks of life were encouraged to nominate potential appointees and approximately three hundred names were received by the selection committee. After a lengthy process, which included public hearings, the committee sent twenty-five names to President Mandela, and he, in consultation with his cabinet, appointed seventeen commissioners, who formed the heart of the Truth and Reconciliation Commission.

It will be seen, therefore, that from the very outset the process leading to the actual promulgation of the act as well as the appointment of the commissioners was as open, as transparent, and as democratic as possible. This is in marked contrast to most other truth commissions. I think it contributed in no small measure to any success that the commission achieved.

1.2. I have already referred to the act of Parliament that brought the Truth and Reconciliation Commission into being. This, too, was very different from conditions in any other commission that I know of. In most instances the commission is appointed by the president or prime minister of the country concerned and has to work out its own procedures, objectives, methodologies, and so on. The benefit of a commission's being based on an act of Parliament is that a democratically elected group of people participated in the debate and finalized the content of the commission. Objectives were clearly set out, restraints were laid down, and the commissioners had to abide by the act.

In the act provision was made for seventeen commissioners, who served full time.

The commission had to complete its work in two years (an additional three months was allowed in order for the Final Report to be completed). The act also provided for three separate committees.

The Human Rights Violations Committee conducted public hearings for victims/survivors. A prescribed form was made available to all applicants, who were asked to complete it. Many victims and survivors appeared in public before the commission, thousands more completed the application form itself, and it is estimated that approximately twenty-two thousand applications were received before the life of the commission ended. The first public hearings for victims/survivors took place in East London in April 1996.

The Reparation and Rehabilitation Committee was charged with developing a policy for long-term reparation as well as urgent interim relief for ratification by the president and Parliament. It was decided very early on not to finalize any such policy until the Human Rights Violations Committee hearings were complete so that the policy could be informed by the victims/survivors themselves.

The Amnesty Committee heard applications for amnesty (because the amnesty hearings took far longer than anticipated, the life of the commission was extended for a further four months; this required an amendment to the act, which had to be passed by a majority in Parliament). There were initially five persons appointed to the committee, of whom three were judges of the Supreme Court. This committee was tripled in size to cope with the volume of work.

In addition to the seventeen commissioners, fifteen permanent committee members were allowed for, plus a professional and administrative staff and an Investigative Unit. Provision was also made for a Witness Protection Programme. The total staff complement was in the region of three hundred. In order to cover as much of South Africa as possible four offices were set up. The first, which was also the head office, was in the Western Cape, the second in Gauteng, the third in KwaZulu/Natal, and the fourth in the Eastern Cape. However, hearings were not confined to the major centers.

Commissioners traveled the length and breadth of the country in order to accommodate victims from the remotest, most rural parts to the urban townships and city centers.

1.3. A critical decision was made during the Parliamentary Standing Committee hearings as to whether the commission's hearings, both human rights

violations and amnesty, should be held in public or in camera. Despite the risk and the additional complications, it was decided that hearings should be open to the media and to the general public. This placed a heavy burden on the commissioners, who traveled throughout South Africa conducting hearings because they did not have the benefit of working quietly and in private, but were constantly under the scrutiny of the media and the public. On the other hand, there was the enormous advantage of the nation's participating in the hearings and the work of the commission from the very beginning through radio, television, and the print media and the right of anyone to attend any of the hearings. This arrangement allowed transparency and a strong educative opportunity so that truth telling, healing, and reconciliation were not confined to a small group but were available to the entire nation.

1.4. A further difference from most commissions is the *powers* vested in the commission. The commission had powers of *subpoena* and of search and seizure. This enabled the commission to invite alleged perpetrators or those who may have had critical information to go before the commission and share that information. If that invitation was spurned it could proceed to *subpoena* those concerned.

It also meant that the commission could secure files and documents that had been secreted away by the previous government and its agents. This capacity resulted in agreements by political parties and military and security institutions to make public submissions to the commission.

The South African model also widened the mandate to include public hearings of major institutions such as political parties; the legal system; the business, labor, and health sectors; the faith communities; and the armed forces.

There was also a major difference in the approach of South Africa's commission to the granting of *amnesty*. This is of such importance that it deserves a separate section.

2. AMNESTY PROVISIONS

The provision of amnesty to perpetrators of gross human rights violations was a source of heated debate and controversy. Many prominent jurists and human rights activists were totally opposed to any form of amnesty, and this opposition arose in the main from the many cases of general or blanket amnesty that had been granted in countries that moved from a dictatorship to a democratic society. The following excerpts exquisitely sum up the contradiction inherent in "blanket amnesty":

> How can I ever have peace when every day I risk meeting my unpunished torturer in the neighbourhood? (tortured former political prisoner, Argentina)

> How is reconciliation possible when lies and denials are institutionalised by the responsible authorities? (human rights activist, Chile)

and

> No government can forgive. No commission can forgive. They don't know my pain – only I can forgive and I must know before I can forgive.
>
> (widow testifying to a Truth and Reconciliation Commission amnesty hearing in South Africa in 1997)

A serious question that faced all involved in the process leading up to the Truth and Reconciliation Commission (TRC) was, How do we limit crass impunity? There is, of course, considerable merit in securing justice through prosecution, and that does strike a blow at impunity. Further, such a process helps to restore to victims in some measure their personal and social dignity and to an extent can expose the truth. But this process has certain limitations, and full justice is not always possible in a society in transition.

It is my own view that when considering historic human rights violations committed during a period of oppression and conflict the historical, political, and social circumstances as well as the nature of the particular transition must be borne in mind. In the case of South Africa, the resolution of conflict was through negotiation, not through victory on the field of battle, nor through the collapse of the former regime. Inevitably, negotiation politics involved a search for consensus, and this included compromise.

Even when a war crimes tribunal has been appointed, it cannot always fulfill in its entirety the mandate to bring to book all of those who were directly involved in gross human rights violations. In the former Yugoslavia and in Rwanda it will not be possible to bring all those implicated in gross human rights violations before the tribunals. In addition, criminal prosecutions are time-consuming, and securing evidence leading to a conviction is often problematic. Most countries are simply unable to afford costly trials so relatively few are prosecuted. The majority of offenders go free.

A very important point to make is that in war crimes tribunals the final word is punishment. But in a deeply divided society this cannot be the final word if healing and reconciliation are to be achieved. Stern measures have to be taken against genocide, but consideration must always be given to reconciliation so that the risk that the process will be repeated is at least to some extent diminished. There is a strong case for the introduction of a mechanism similar to the Truth and Reconciliation Commission in countries that have experienced widespread conflict and remain deeply divided. In the South African model attempts were made to limit impunity, and the first decision was to reject a general amnesty. In many other ways the amnesty provisions tried to ensure that amnesty was not something cheap and easily accessible.

First, amnesty had to be applied for on an individual basis – there was no blanket amnesty.

Second, applicants for amnesty had to complete a prescribed form, which was published in the *Government Gazette* and called for very detailed information relating to the specific human rights violations.

Third, applicants had to make a "full disclosure" of their human rights violations in order to qualify for amnesty.

Fourth, in most instances applicants appeared before the Amnesty Committee and those hearings were open to the public.

Fifth, there was a time limit set in terms of the act. Only those gross human rights violations committed in the period 1960 to 1994 were considered for amnesty. Second, there was a specified period during which amnesty applications had to be made, from the time of the promulgation of the act, which was in December 1995, to May 10, 1997.

Finally, there was a list of criteria specified in the act that determined whether or not the application for amnesty would be successful.

Whether a particular act, omission, or offense was an act associated with a political objective was decided with reference to the following criteria:

- The motive of the person who committed the act, omission, or offense
- The context in which the act, omission, or offense took place, and in particular whether the act, omission, or offense was committed in the course of or as part of a political uprising, disturbance, or event, or in reaction thereto
- The legal and factual nature of the act, omission, or offense, including the gravity of the act, omission, or offense
- The object or objective of the act, omission, or offense and in particular whether the act, omission, or offense was primarily directed at a political opponent or state property or personnel or against private property or individuals
- Whether the act, omission, or offense was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement, or body of which the person who committed the act was a member, an agent, or a supporter
- The relationship between the act, omission, or offense and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission, or offense to the objective pursued

However, it did not include the following criteria:

- For personal gain: provided that an act, omission, or offense by any person who acted and received money or anything of value as an informer of the state or a former state, political organization, or liberation movement, shall not be excluded only on the grounds of that person's having received money or anything of value for his or her information

or

- Out of personal malice, ill will, or spite, directed against the victim of the acts committed

Finally, it is important to bear in mind that the truth and reconciliation process was not a substitute for criminal justice. A number of trials and prosecutions took place simultaneously with the work of the commission. The combination of judicial stick and TRC carrot was a potent force in flushing out former operatives who were adopting a "wait-and-see" approach in relation to the commission.

Notwithstanding those points, there were problems relating to the amnesty provisions. There are those in South Africa – some organizations and individual families – who suffered very grievously from human rights violations and believed that there ought to be no amnesty provisions whatsoever. They wanted nothing more and nothing less than trials, prosecutions, and punishment. More especially, they were concerned that in terms of the act those who applied for amnesty and were successful would never again be liable, either criminally or civilly. Some were even prepared to accept that if one had to pursue the way of amnesty as a price for peace and stability in South Africa there still ought to have been an opportunity to bring civil action against either the organization, the state, or the individual.

There are those who felt so strongly about the question of amnesty that they brought a case against the commission before the Constitutional Court of South Africa. The court ruled in favor of the commission. They did so on the grounds that the Constitution (Section 33) sanctioned the right of limitation to access to the court based on the Postamble of the Constitution granting amnesty. They also held that the amnesty provisions were not inconsistent with international norms and did not breach South Africa's obligations in terms of public international law instruments relying on the distinctions between conflicts between parties within the same state and, for example, conflicts between a colonial power and a struggle for self-determination against colonial and alien domination of their countries. Despite this ruling, there remained some deep-seated opposition to the amnesty provisions.

On the other hand, there was also a strong view that if reconciliation was to become a reality in South Africa, then both victim and perpetrator had to be encouraged to participate in the life and work of the Truth and Reconciliation Commission. The dilemma was that if people were encouraged to apply for amnesty but were still liable in a criminal court or in a civil court, where was the incentive for their coming forward? There surely had to be a window, or a period of grace, to give public expression to private grief and suffering and to grant a second chance to those who participated in gross human rights violations under particular circumstances and during a particular period in a country in conflict.

South Africa's experience was very similar to that of many other countries in that witness after witness at the Human Rights Violations Committee hearings emphasized their deep fundamental need to know the truth surrounding the loss of a loved one. Over and over again people pleaded to know what happened to a father, a mother, a sister, a brother, a son, or a daughter. They wanted to know where they were buried; they wanted to know why they were killed and

under what circumstances. This was a common refrain at every public hearing. It is significant that almost exactly the same set of words was used by witnesses whether they were in South America, Northern Ireland, or South Africa. Their plea in different languages was "I want to forgive, but I must know whom to forgive and for what." In other words, knowing the details and circumstances of the human rights violation in itself is part of the healing process. But how will they know the truth if perpetrators do not come forward? The fact of the matter is that repression and concealment have been with South Africa for generations, and there was very little likelihood that new evidence would come to light or that witnesses would be prepared to testify. The only way victims were going to know some of the truth was for perpetrators to tell their story of what they did and to whom and how. This may be small comfort, but in terms of the pleas of victims it was of some consolation to them as they tried to reconstruct their life.

Truth revealed offers not only comfort and peace of mind but also a limited form of justice. Amnesty is a price that South Africa had to pay for a relatively peaceful transition. It is also a price many victims had to pay in order to know some of the truth of the horrendous past.

Earlier the point was made that amnesty was the price South Africa paid for a free and fair election and a relatively peaceful transition. The haunting question that has yet to be answered is, Are the needs and objectives of the state synonymous with those of the violated individual?

Essentially the Truth and Reconciliation Commission was committed to the development of a human rights culture and a respect for the rule of law in South Africa. In this sense, therefore, the commission was not so much about the past but about coming to terms with the present challenges and future goals. It was, however, impossible to cope with the present, invaded as it was by the dark shadows of the past, and it was impossible to plan with any certainty for the future without jettisoning some of the baggage of the past that threatened to overwhelm and paralyze every effort. In attempting to build for the future there is an irreducible minimum and that is a commitment to truth. As President Patricio Aylwin of Chile said when he assumed office in 1990:

> This leaves the excruciating problem of human rights violations and other violent crimes which have caused so many victims and so much suffering in the past. They are an open wound in our national soul that cannot be ignored. Nor can it heal merely through mere forgetfulness.
>
> To close our eyes and pretend none of this ever happened would be to maintain at the core of our society a source of pain, division, hatred and violence. Only the disclosure of the truth and the search for justice can create the moral climate in which reconciliation and peace will flourish.

More recently, Switzerland has been confronted by its past, especially in relation to its treatment of Jews during the Second World War and its cosy relationship with the Nazi regime. Thomas Borer, who has been entrusted with the investigation, stated, "Jews are not our enemies. Our history is not our enemy.

But the way we deal with or not with our own history – that would be our enemy."

Switzerland's foreign minister Cotti echoes this approach: "I have spent ten years in the government and until last year no one, I mean no one, spoke of the fundamental necessity of reexamining Swiss history. Now I realise this must be done because a country that has not really faced its past cannot decide its history."

However costly the search for truth and knowing the truth might be, it was of fundamental importance if South Africa was to achieve a degree of peace and unity.

South Africa had come out of a period when its society was based on lies and deceit. Radio and television were little more than a giant propaganda factory producing a packaged product to reinforce oppression and exclusivity. The search for truth and the recording of that truth could exorcise the fantasy of denial that made transformation impossible.

A critical question was, *What kind of truth telling lies at the heart of the commission's work?* The commission distinguished among four kinds of truth. First was *factual or forensic truth*. The act that governed the work of the TRC required the commission to "prepare a comprehensive report which sets out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal" [Section 4(e)].

This mandate operated at two levels. First, were findings at an individual level; the commission was required to make findings on particular incidents with regard to specific people concerning what happened to whom, where, when, and how and who was involved. In order to fulfill this mandate the commission adopted an inclusive policy of verification and corroboration to ensure that findings were based on accurate and factual information. Second, the commission was responsible for findings on contexts, causes, and patterns of violations. It was this search for patterns underlying gross human rights violations that engaged the commission at a very broad and deep level.

Although the commission, through its Investigative Unit, through its database, through its research, attempted to perform its work with the highest degree of efficiency possible, there were always limits in the search for truth and even in truth telling.

Michael Ignatieff's words are pertinent:

> All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people.

It follows, of course, that in the South African context it really was no longer possible for so many people to claim that "they did not know." It became impossible to claim that the practice of torture by state security forces was not systematic and widespread; to claim that only a few "rotten eggs" or "bad

apples" committed gross violations of human rights. It was also true that it was impossible to claim any longer that the accounts of gross human rights violations in ANC camps were merely the consequence of state disinformation.

Second, there is *personal and/or narrative truth*.

Through the telling of their own stories, both victims and perpetrators gave meaning to their multilayered experiences of the South African story. Through the media these personal truths were communicated to the broader public. Oral tradition was a central feature of the commission's process. Explicit in the act was an affirmation relating to the healing potential of truth telling.

One of the objectives of the TRC was to "restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims." It is important to underline that the stories the commission heard were not presented as "arguments" or claims as in a court of law. They were often heart-wrenching, conveying unique insights into the pain of the past. Hearing one man relate how his wife and baby were cruelly murdered was much more powerful than all the statistics in the world and gave insight into the conflicts of the past.

By facilitating the telling of "stories" the commission not only helped to uncover the existing facts about past abuses but assisted in the creation of narrative truth. This enabled the TRC to contribute to the process of reconciliation by ensuring that the silence relating to individual subjective experiences was at last broken. The commission was concerned with the task of "restoring memory and humanity."

Third, there is *social or "dialogical" truth*.

Judge Albie Sachs, even before the commission began its work, talked about "microscope truth" and "dialogue truth": "The first is factual, verifiable and can be documented and proved. Dialogue truth, on the other hand, is social truth, truth of experience that is established through interaction, discussion and debate."

People from all walks of life were invited to the TRC process, including the faith community, the SADF, nongovernmental organizations (NGOs), the media, the legal and health sectors, and political parties – and obviously the wider South Africa through the media and public scrutiny. What I am emphasizing here is that the *process* of acquiring the truth was almost as important as the establishment of the truth. This process of dialogue pointed to a promoting of transparency, democracy, and participation as a basis of affirming human dignity and integrity.

Finally, there is *healing and restorative truth*.

The act required the commission to look back to the past and to look to the future. The truth that the TRC was required to establish had to contribute to the reparation of the damage inflicted and to the prevention of its recurrence in the future. But for healing to be a possibility, knowledge in itself is not enough. Knowledge must be accompanied by *acknowledgment*: in other words, the accepting of accountability. To acknowledge publicly that thousands of South Africans had paid a very high price for the attainment of democracy affirmed

the human dignity of the victims and survivors and was an integral part of the healing of the South African society.

In *The Healing of a Nation?* I stated as follows:

> It is when South Africa begins to take its past seriously that there will be new possibilities for all; for some to say sorry and for many more to be ready to forgive.

South Africans desperately needed to create a *common memory* that can be acknowledged by those who created and implemented the apartheid system, by those who fought against it and the many more who were in the middle and claimed not to know what was happening in their country.

H. Richard Niebuhr puts it succinctly in his book *The Story of Life*:

> Where common memory is lacking, where men do not share in the same past, there can be no real community and where community is to be formed common memory must be created. . . . The measure of our distance from each other in our nations and our groups can be taken by noting the divergence, the separateness and the lack of sympathy in our social memories. Conversely, the *measure of our unity* is the extent of the *common memory*.

3. RECONCILIATION

The Truth and Reconciliation Commission was criticized from its very inception, this despite the fact that the title of the founding act speaks volumes for the fundamental intent of the commission: "The Promotion of National Unity and Reconciliation Act." The long title of the act develops this theme:

- The commission was created to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in the future.
- The pursuit of national unity, the well-being of all South African citizens, and peace require reconciliation between the people of South Africa and the reconstruction of society.
- South Africa has a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.
- In order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions, and offenses associated with political objectives committed in the course of the conflicts of the past.

There is a Zulu saying "All truth is bitter," and there is no doubt that many in South Africa found the disclosures made by the commission unpalatable. Many victims and survivors had to revisit their own experiences of grief and mourning while those who claimed they did not know that gross human rights violations were taking place had to come to terms with the fact that either their eyes were tightly shut or they actually did know what was happening but preferred not to acknowledge it. This is never easy individually or collectively.

It is for this reason, possibly, that there was so much direct opposition to the commission. A number of individuals, through their lawyers, took the commission to court, in the main protesting against the lack of due process. The National Party, always lukewarm if not hostile to the commission, finally decided to take the chairperson and the deputy chairperson of the commission to court, demanding a public apology from the former and the resignation of the latter. The Inkatha Freedom Party referred a long list of complaints against the commission to the public protector. The ANC unsuccessfully sought a court injunction to stop the publishing of the report.

Many in the white Afrikaans community accused the commission of being biased, of being one-sided, of actually trying to destroy the white Afrikaner, and made their feelings known in newspapers and on radio and television programs, but also in anonymous letters, many of which were extremely threatening. Some of the commissioners had a barrage of anonymous phone calls including death threats.

In other words, Not only was the Truth and Reconciliation Commission born in controversy with very powerful constituencies opposed to it at its very inception, but a lot of opposition continued. What price then reconciliation?

It must be conceded that although the opportunities presented by the appointment of the Truth and Reconciliation Commission were far-reaching, nevertheless there were clear limitations as well. In the same way that the healing of a nation and effecting of genuine reconciliation cannot be achieved merely by holding conferences or writing books, it must also be stated that there is no guarantee that through the life and work of the commission healing and reconciliation can be achieved. Discussion, debate, analysis, listening, and the recording of the truth can be significant parts of the healing process, but only that. Much, much more will need to take place over many years. The wounds incurred in the long and bitter period of repression and resistance are too deep to be trivialized by imagining that a single initiative can on its own bring about a peaceful, stable, and restored society. In particular, it must be restated that without measurable steps taken to address the ever-widening gap between wealth and poverty, conflict rather than reconciliation will be the order of the day.

At best the commission could, through its work and through its recommendations, establish what could be termed building blocks that could lead to the possibility of coexistence, of mutual respect, beginning the long and difficult and painful process of reconciliation. That in itself may be a significant contribution, and it could be argued that the commission made other contributions that impinge on the quest for reconciliation.

There have been a spate of books and articles (as well as videos, films, plays, and poems) written on the commission; the jury is still out. Nevertheless, it is possible to point to a number of modest goals that the commission achieved.

First, it ended the deathly silence surrounding the grotesque consequences of the apartheid system. The commission was enjoined in the act to "establish as complete a picture as possible of gross human rights violations perpetrated between 1960 and 1994 by conducting investigations and hearings."

These investigations and hearings took place in public, and their impact was not inconsiderable. The investigations were not merely scientific and legal but also essentially human. Thousands of victims/survivors from all parts of South Africa appeared before the commission and told their simple and yet powerful stories of human suffering and indignity. As a consequence the stories of victimization and human rights violations have been told not merely in statistics and incidents but in a poignant human voice. Furthermore, the victims/survivors themselves experienced a degree of catharsis because, for the first time, they were received by a compassionate and a sympathetic state-appointed commission. Their experience prior to this was of a hostile state. When loved ones were missing they went first to the local police station and were treated in many instances as nuisances and in many more as people who were of no consequence. When they went to state hospitals looking for sons and daughters and fathers and mothers, they received similar treatment. It was no better when they went to the mortuary in a final attempt to find a missing person. Now at least they were received publicly, with dignity, and the whole of South Africa had an opportunity to share their grief and sorrow.

Second, against the background of a country where for decades coverup was the order of the day and propaganda masqueraded as truth, the commission's ability to bring forth truth thus far not known was perhaps one of its greatest contributions to an open society. Many victims who never knew who had taken their loved ones into custody, where they had been taken, under what circumstances, the nature of the torture, the manner of the killing, now knew. Perpetrators came forward not in their scores, not in their hundreds, but in their thousands, to confess their involvement in gross human rights violations. The truth has now, in no small measure, been uncovered and has helped everyone to understand and appreciate what was taking place in a climate created by politicians and a system implemented by generals and by foot soldiers.

There has also been not only an accumulation of knowledge, but in many instances of acknowledgment. Through the hearings of major institutions, including political parties, the business and labor sectors, health, media, judiciary, and the faith community, many people have publicly acknowledged their own collusion with apartheid. This acknowledgment should never be underestimated in its potential to trigger a generous response from those who have been victimized and indeed dehumanized in the past. The generosity of spirit of the majority of victims/survivors was one of the most remarkable experiences of those of us who sat on the commission, and it spilled over to the wider community.

But acknowledgment has gone one step further. The commission made it impossible, particularly for white South Africans, to continue to declare "I did not know." If they did not know then, they certainly know now. It takes a conscious effort to ignore the story of South Africa's Truth and Reconciliation Commission. A remarkable feature of the commission was the media coverage of its progress. There was hardly a day from the beginning of 1996, when the commission started its work, when newspapers did not feature the commission,

either on their front page or in the body of the paper, in editorials and feature articles. As far as television is concerned hardly a day passed when the life and work of the commission were not featured in major news bulletins, over and above the highly professional and effective one-hour weekly program on a major television station. But radio probably had even more impact. Not only were hearings broadcast live throughout South Africa for four hours per day, but broadcasts, commentaries, discussions, and debates featured prominently in all the eleven languages used in South Africa so that even those who could not read or write but had access to radio participated in the story that emerged from the work of the Truth and Reconciliation Commission.

Finally, within the restraints of a negotiated settlement major compromises were made. It can be argued that South Africa's Truth and Reconciliation Commission, despite those restraints, achieved the best possible outcome. South Africa decided to say no to amnesia and yes to remembrance; to say no to full-scale prosecutions and trials and yes to forgiveness. South Africa chose the third way. Those who committed violations of human rights, if they applied for amnesty, in most instances went free. In South Africa's circumstances, in which there was no victor and vanquished, there was no real alternative.

For South Africa, as for many countries, the central tension has been between the politics of compromise and the radical notion of justice. This tension has been expressed in different ways by different analyses of the process from authoritarian rule in South America and Eastern Europe to a democratic form of government, and is a genuinely universal issue.

Garreton, from Chile, sees it as "ethical logic" versus "political state logic" (*Journal of Latin American Studies*, 1994). Jelin, drawing on Greek tragedy, sees the tension as the "logic of mourning/ remembrance" versus "political logic" (*Latin American Perspectives*, 1994). Political scientists, such as O'Donnel, state the dilemma somewhat more pragmatically. For them it is the need for democratic or stable democratization as against the notion of justice, equality, and restitution.

Another way of stating the tension is to distinguish between retributive justice, on the one hand, and a prudential focus on the common good and future injustice on the other. The former is the Nuremberg model based on the positive duty of successive governments to dispense justice for past crimes. This approach, as an analysis of the Nuremberg trials will reveal, has very real limitations and indeed challenges the very notion of justice itself. Furthermore, many countries emerge from a totalitarian system not via a military victory but through a state of collapse and/or through negotiation and therefore have to deal with the messy business of compromise. Restorative rather than retributive justice can be a potent force for transformation and healing.

In South Africa the transition was essentially determined by a political compromise, and a recurring question was, Was there a moral basis to that compromise? I think in a real sense there was. It is morally defensible to argue that amnesty is the price we had to pay for peace and stability. Whether in fact a military coup was a reality or not, one point is certain: if negotiation

politics had not succeeded, the bitter conflict would have continued and many more human rights violations would have occurred and hundreds, and possibly thousands, would have been killed. Hard choices had to be made, and it does not follow that the choices that were made lie easily on the conscience of the politicians who made them. The alternative was, in my view, far less desirable and potentially much more destructive.

One of the overarching problems the commission faced was the unwillingness of some political leaders to accept accountability for the past. As in so many other parts of the world, it was the foot soldiers, the middle management of the security forces, and even the generals who were blamed for implementing the policies and laws devised by political parties and political leaders.

The political leaders of the previous regime found it excruciatingly difficult to assume accountability for the consequences of the racial laws they placed on the statute book. They found it even more difficult to accept that the climate created by these laws made it possible for gross human rights violations to occur.

The moral order can only be restored when it begins where people make laws, that is, in Parliament. It can only flourish when judges and magistrates interpret those laws for the benefit of the disadvantaged, the oppressed, and the poor. Reconciliation begins when new laws and their interpretation are implemented. Without political will and courage they remain words and phrases with no life.

This is emerging in South Africa. In government, in civil society, and in the professions there is a determination that what we experienced in the past must never happen again. It was this new spirit, this commitment, that was the TRC's primary contribution to a country emerging from a very dark night of the soul into a new day.

14

Conclusion

Jon Elster

The contributors to Part II and Part III of this volume have surveyed some fifteen cases of transitional justice in new or restored democracies, clustered around 1945–50 and 1983–98. In this final chapter I shall go beyond these individual cases, to consider some broader issues.

LESSONS FROM THE PAST

Democratic transitional justice is almost as old as democracy itself. In 411 and then again in 403 B.C. the Athenian democrats had to come to terms with defeated oligarchic regimes (Ostwald 1986). In 411, they chose to proceed with considerable severity, without, however, departing from the rule of law. They did not, for instance, enact retroactive laws. In 403, the returning democrats proceeded more leniently, passing a general amnesty and allowing those exempt from it to go into exile. Part of the explanation for the leniency may be that the reconciliation agreement was written under the auspices of Sparta, which had helped the oligarchs to gain power. There are indicators, however, that in 403 the Athenians had learned from experience that severity might work against its purposes, angering its victims rather than deterring them.

I shall return shortly to the idea of learning from experience. First, however, I want to draw attention to a remarkable speech by Lysias, "Defense against a charge of subverting the democracy," written shortly after the 403 amnesty for a (anonymous or hypothetical) candidate for public office. In this speech Lysias prefigures three important topoi of transitional justice in the twentieth century. First, he offers an explicit *defense of the passive bystander*, telling the jury, "You would not be justified in hating those who have suffered nothing under the oligarchy . . . ; or in regarding as enemies those who did not go into exile." Second, he presents an objection to *indiscriminate persecution of indiscriminate persecutor*s: "It is not right . . . that you should resort to those offences which you saw the Thirty [the leading oligarchs] committing, or regard those deeds, which you deemed unjust when done to you, as just when you do

them to others." Third, he makes a claim of a *negative correlation between resistance and vindictiveness*: among the democrats, "those who are in highest repute, who have run the highest risk, and who have rendered you the most services, had often before exhorted your people to abide by their oaths and covenants, since they held this to be the bulwark of democracy" By contrast, "the men who give us good cause to wonder what they would have done if they had been allowed to join the Thirty are the men who now, in a democracy, imitate those rulers" (30) by their indiscriminate persecution.

The next episodes of transitional justice occurred more than 2,000 years later, in the English and French Restorations. Although these were transitions to constitutional monarchy rather than to democracy, they share many features with the more recent cases. I shall only draw attention to a few selected features. First, a comparison between the English and French Restorations confirms Mill's "generational hypothesis," cited in the Introduction. In the English Restoration, which took place after an interregnum of eleven years, properties confiscated from the royalists were returned to their owners, while some purchasers received compensation (Thirsk 1954). In the French Restoration, which occurred twenty-five years after the Revolution, the purchasers were allowed to keep their property while the original owners were compensated (Gain 1928). Second, the two French restorations, after 1814 and after 1815, separated by Napoleon's Hundred Days, again illustrate the idea of learning from experience. In this case, however, the perception that the First Restoration had been too lenient, notably in the purge of the administration, induced much greater severity in the Second. Third, independently of this learning effect, a "recency effect" made the Second Restoration judge more severely those who followed Napoleon during the Hundred Days than the First had judged those who had voted for the execution of Louis XVI.

In the twentieth century, too, we found that transitional justice can he shaped by learning effects, the most striking case being that of Germany. Although the reparations imposed on Germany after the First World War hardly count as transitional justice *stricto sensu*, they formed a negative lesson from experience in the debates in 1944–45 over how to treat the soon to be defeated Germany. The Morgenthau plan (US Senate 1967), in particular, was based on the premise that since reparations out of current production would allow Germany to rebuild its industrial and military power, the only acceptable option was to dismantle German industry altogether and turn the country into a "pastoral" economy. At the same time, drastic punitive measures were envisaged. Morgenthau suggested, for instance, that they deport the whole Schutzstaffel (SS) "out of Germany to some other part of the world" (p. 448). Because the Allies largely withdrew from the trials and purges even before the Cold War changed their priorities, the retribution against Nazi leaders and officials was left to the Germans themselves. By the 1980s, many Germans had come to regard these early efforts as shamefully weak. When the German Democratic Republic collapsed in 1989, therefore, the denazification process was often held up as a negative model for decommunization. As I noted in the Introduction,

citing Offe and Poppe, many claimed that "this time we are going to do it right." Recalling the humiliations from 1945, others might have a more murky thought, "This time we're going to be on top."

In Belgium, the memory of transitional justice (or rather its failure) after World War I contributed to the strong desire for immediate retribution after 1945. As Huyse notes in his chapter, "The perception of World War II collaboration was affected by the memories of what happened in the aftermath of World War I. Many of the Belgians who between 1914 and 1918 collaborated with the German occupier and were granted amnesty afterward repeated the offense in 1940. In the eyes of many of their co-citizens leniency had led to recidivism. This circumstance made understanding and clemency for the collaborators of 1940–44 less probable." Moreover, on the basis of the experience from World War I "it was believed that after a while, the popular willingness to impose severe sentences on the collaborators would give place to indifference" (Huyse and Dhondt 1993, p. 115). Hence some Belgians wanted the trials to proceed as quickly as possible, before passions had time to cool down.

RECTIFYING HISTORICAL INJUSTICE

In transitional justice, processes of reparation and compensation often show the following two features. First, they start up in the immediate aftermath of transition. Second, they compensate for wrongdoings that took place shortly before the transition. When these features obtain, as they mostly did in German-occupied countries, Latin American ex-dictatorships, or South Africa, the *victims themselves* receive compensation for the wrongs done to them. An exception occurs if the wrongdoings led to their death, in which case the new regime may allow or deny compensation to the heirs. As Cowen argues in his chapter, compensating heirs for the physical or mental suffering of their ancestors hardly seems justified. A better justification arises if the heirs suffer from the loss of earning capacity of the dead victim.

When the first or the second feature is lacking, the victim will often have died in the meantime, of causes that may or may not be related to the persecution. In Eastern Europe, most victims of the Stalinist terror that ended in 1953 were dead by 1989. Most of those who worked as slave laborers or forced laborers for German firms during World War II were also dead when in 1999 the German government and German firms agreed to pay DM 8 billion in compensation. In these cases, in which heirs have no valid claims, many sufferings are not compensated. By contrast, loss of property may receive restitution or compensation even when the first or the second feature is lacking. Heirs of East Europeans whose property was confiscated in the 1940s got it back or were compensated after 1989. Heirs of the "dormant" Jewish accounts in Swiss banks received compensation after a $1.25 billion settlement was reached in 1998.

When the time span is extended in either direction, from sufferings to transition or from transition to reparation, restitution and compensation may remain strictly individualized, based on documented entitlements. In principle,

surviving Jews who claimed compensation for suffering had to *prove* that they or their ancestors had suffered in one of several enumerated ways. Membership in a group who as a whole had undergone indescribable suffering and losses was not enough. Briefly stated, the post-1945 and post-1989 reparations were guided by the principles of *ethical presentism* and *ethical individualism* (Elster 1993). In practice, this requirement may be relaxed. In recent negotiations between the French and American governments, the French negotiators "found it 'abhorrent' for Jewish survivors to recover funds based solely on their religious affiliation, and not on hard evidence that they or their families had personally lost assets in French banks" (Eizenstat 2003, p. 307). Under pressure, however, they admitted a concern to avoid false negatives and granted the possibility of making payments on a claimant's "intimate and personal conviction" of entitlement (p. 330). As in the actions against the Swiss banks, some compensations were granted on the basis of "rough justice" – legally uncertain but morally compelling claims.

When the time span is extended even further, the connection between individual sufferings and individual claims inevitably become looser, as illustrated by the restitution of land to indigenous peoples in former British colonies (the United States, Canada, Australia, and New Zealand). The acquisitions of indigenous property took place in the eighteenth and nineteenth centuries under generally coercive conditions. From the 1970s onward titles of indigenous populations have been widely accepted by courts and legislatures, and some land restitutions have taken place. In the United States, where some 800 million hectares of land were transferred from Native Americans to the United States, about 200,000 hectares have been returned (Newton 1994). In New Zealand, some 100,000 hectares, or 1/250 of the territory, have been restituted (Sharp 1997, p. 292). Restitution has also been combined with or replaced by monetary compensation. Thus in 1980 the U.S. Supreme Court awarded the Sioux Nation $17 million, plus more than $100 million in accrued interest, in compensation for an 1877 taking of the Black Hills (448 U.S. 371). The Sioux Nation refused to accept the money, stating that only in-kind restitution of this religiously important land would be acceptable. Earlier monetary awards had, however, been accepted.

One might ask whether the demand for reparations is based on *interest*, not on justice. Perhaps those who would benefit from compensation or restitution are mainly preoccupied with their material interest. Their lawyers are certainly very likely to be so motivated. But these motivations have presumably been more or less constant over centuries. What is new is that legislators and judges, with no personal interest at stake, are willing to listen to the demands. The growing importance of the international human rights community probably counts for something in explaining this attitudinal change. More conjecturally, we might invoke the emergence of a culture or even cult of victimhood that leaves nonvictims disarmed before the perceived moral superiority of their interlocutors, whatever the motivations of the latter might actually be (Novick 1999). But even if these facts (assuming they are indeed

facts) can explain the changes we observe, they are themselves in need of explanation.

The demand for reparations has been extended to other cases, notably to the victims of American slavery (Winbush 2003) and of European colonialism (see http://www.hrw.org/campaigns/race/reparations.htm). So far, neither claim has made much headway, partly, I suspect, because many would find it more appropriate to base assistance on current needs than on entitlements generated by past sufferings with weak or unidentifiable links to the present. In the case of British colonialism, the issue is confused by the fact that the British empire probably ran at a loss, so that there are no gains from exploitation to compensate the victims of exploitation (Davis and Huttenback 1988). In another realm, there is a persistent demand for the return of cultural treasures to the country of origin (Greenfield 1996). The demand of the Greek government for the return of the Elgin marbles is an emblematic if unsuccessful case. Among the many arguments that have been advanced from 1816 to the present against their return were (i) that "if the works of art had not been brought [to England], they would have been destroyed by the Turks" and (ii) that if returned, "the marbles would face the hazard of air pollution" and, therefore, noncounterfactually this time, the hazard of destruction (pp. 61–62). A model of success, by contrast, is the negotiation for the return of medieval Icelandic manuscripts from Denmark to the country of origin.

The limited and sharply targeted reparations in processes of transitional justice thus appear as special cases of a vaster project of *rectifying historical injustice*. (Introductions to the issue are Brooks 1999 and Barkan 2000. The latter is, however, marred by gross inaccuracies, e.g., pp. 115–16 and p. 118 on Eastern Europe and pp. 107–8 on Norway.) Often, the demand for monetary or material compensation goes together with a demand that the descendants of the wrongdoers *apologize* for what their ancestors did. Although an apology would be literally meaningless when the acts in question occurred before the apologizers were born, these demands may nevertheless be taken seriously when emanating from groups with enough political clout.

REMEMBERING HISTORICAL INJUSTICE

In addition to the generalized demand for rectifying historical injustice, there is a novel focus on the *remembrance of historical injustice*, the memory of the Holocaust the prime example. The number of scholarly books with titles such as *The Politics of Memory* is large and growing rapidly. (A search on amazon.com for "Politics of memory" on April 27, 2003, gave 190 results. A search on August 21, 2003, gave 201 results.)

A memory of a bad experience is itself a bad experience. To think about an occasion when one was made the object of deliberate humiliation is painful. If I was once caught cheating on an exam, the memory may still make me cringe with shame. From these truisms we should not draw the conclusion that we should try to forget our bad experiences. As Montaigne (1991, p. 551) observed,

"There is nothing which stamps anything so vividly on our memories as the desire not to remember it." Yet we may conclude that it is at least better if we somehow manage to forget the bad things that happen to us than if we constantly dwell on them in memory. A counterargument might be that if we forget bad things that happen, we may also fail to take precautions to prevent them from happening again. In Santayana's much-quoted dictum, "Those who cannot remember the past are condemned to repeat it."

These statements refer to memory in the everyday sense – a residual cognitive trace in an individual who personally witnessed or was otherwise very close to the event that is remembered. I shall use the term remembrance as a term of art for abstract knowledge of past events that is acquired well after the events themselves, for instance, because the agent was not alive when they occurred. Specifically, I shall focus on remembrance of injustice as knowledge of wrongdoings that took place before the remembering agent was born. In *victim-centered remembrance*, the wrongdoings targeted a group of individuals to which the remembering person also belongs. In *perpetrator-centered remembrance* the wrongdoings were carried out by a group of individuals to whom the remembering person also belongs. The group may be defined by ethnic criteria (e.g., Jews, whites, or blacks) or by national ones (e.g., Germans). In *impersonal remembrance*, the remembering agent has no special relation to either victim or perpetrator.

The three kinds of remembrance induce different emotional reactions (see my Chapter 3). Impersonal remembrance creates Cartesian indignation. Victim-centered remembrance may have the same effect, if the events belong to the distant past or the affective ties to the group are weak. If the remembering agent identifies strongly with his ancestors, however, anger rather than indignation may ensue. If the perpetrators are dead, the anger may not have a natural outlet, since one cannot take revenge on the dead. There may be a tendency, however, for descendants of victims to feel anger at descendants of perpetrators. The emotion may be justified if (i) the latter are at the same time beneficiaries of the wrongdoings of their ancestors, (ii) the latter refuse to give up their ill-gotten gains, and (iii) the descendants of the victims are worse off than they would have been if the wrongdoings had never happened. The anger may still arise if these conditions are not satisfied, but it would not be justified anger.

Perpetrator-centered remembrance may, again, merely induce indignation. The more complex case arises if descendants of perpetrators feel shame or guilt. The guilt may be justified if (i) they benefited from the wrongdoings of their ancestors and (ii) the descendants of the victims are worse off as a result. In that case, we might observe the natural action tendency of guilt, which is to make reparations. (If the gains from wrongdoing are sufficiently large, the descendants of the perpetrators might instead engage in denial or subterfuge.) There might still be guilt if these conditions are not satisfied, but it would be irrational guilt – analogous to, although different from, "survivor's guilt."

Shame, in these cases, is always irrational. There is, to be sure, "vicarious shame," which is not necessarily irrational. I cringe with shame when I see a

friend making a fool of himself in public. One might, perhaps, even feel shame for having chosen as a friend someone who could commit shameful acts. But the shame felt by descendants of perpetrators is not of these kinds. Rather it is the shame of belonging to a specific group, members of which have committed wrongdoings before the remembering agent was born. Since ancestors, unlike friends, cannot be chosen, there are no rational grounds for this emotion, which is not to say that it does not exist. Many Germans born after 1945 assert, I believe sincerely, that they feel shame for being German. They may even display some of the action tendencies of shame, such as wanting to hide or run away. Yet for the emotion to make sense, they would have to accept the Morgenthau-Goldhagen thesis according to which the German *character* is intrinsically and irredeemably bad. Since this thesis is absurd, their emotion, too, is irrational.

I have asserted that emotions of anger or guilt are unjustified if descendants of perpetrators are better off as a result of the wrongdoings but no descendants of victims are worse off. This claim may be controversial. Suppose my great-grandfather made a lot of money killing people and was so efficient that he also killed off all their legal heirs. Now the money has come to me with interest, and I am immensely wealthy. Individuals belonging to the same group as my ancestor killed other individuals belonging to the same group as his victims, leaving descendants today who are worse off as a result of the wrongdoings. Do these descendants have a moral claim on my wealth? I do not think so. Harm must be *harm to someone*. By assumption, my ancestor harmed nobody currently alive. I am assuming, of course, that he was not part of a *system* of repression, in which wrongdoers mutually supported each other. In that case, my ancestor would be coresponsible for the harm inflicted on currently living descendants of victims. This, however, is a *causal* issue that it is orthogonal to the issue of group membership. Mere membership creates neither duties or entitlements. I might still have a moral duty to give up my tainted wealth for the benefit of needy individuals more generally. It would be perverse for me to benefit simply because my ancestor was so efficient that he killed off anyone I could compensate. I would add, however, that it is morally arbitrary for *anyone* to benefit from the fact that his ancestors made a lot of money, however honestly.

Remembrance of injustice may, therefore, generate justified emotional reactions as well as unjustified ones. The deliberate cultivation of remembrance is harmful to the extent that the effect is on balance on the latter side. For me, the lesson of Peter Novick's masterful *The Holocaust in American Life* is that the fixation of Jews in America, Israel, and elsewhere on remembrance of the Holocaust has by and large had negative consequences. It has contributed to expanding the group of wrongdoers to include passive bystanders, who are thereby made to feel irrational guilt. "When the word 'guilt' surfaced [among American Jews] after the war, it usually referred to not having been *able*, rather than not having been *willing*, to effect rescue [of the European Jews]" (Novick 1999, p. 75). In addition, there was the equally irrational survivor guilt caused by the knowledge that "only the accident of geography saved them from the fate of their European brethren" (p. 75). As Novick also argues, the justified

component of their guilt was minimal. There was little the American government could have done to rescue European Jews (ch. 2), and little American Jewish leaders could have done to influence their government (ch. 3).

The Holocaust has come to be seen as "moral capital" for the Jews and for Israel (p. 156, citing David Singer of the American Jewish Committee). The capital can have diverse uses, the most important being its efficacy in generating financial and moral support for the state of Israel. "It's likely that the notion of Israeli statehood as the act of atonement of a repentant West simply appeals to some people's moral and aesthetic sensibilities. And to some unknowable extent, the myth is probably sustained . . . because of its utility: if initial American support for Israel's birth was partial atonement for complicity in the Holocaust, the never-fully-cancelable obligation demanded continued support of Israel" (p. 74; see also p. 159). Visits to the extermination camps by American Jews were orchestrated to make them feel that they could never be safe anywhere outside Israel (p. 160).

To protect that capital Jewish leaders have become adamant that the Holocaust was unique among all large-scale massacres in history. In an edited volume, *Was the Holocaust Unique?*, the Holocaust is compared to the massacre of Armenians in 1916, the onslaught on Native Americans by European immigrants, the Atlantic slave trade, the attempted extermination of Gypsies (Romani and Sintis) by the Nazis, the Nigerian and Bosnian genocides, and Stalinist terror in the Ukraine. With some exceptions, the contributors tend to say that the Holocaust *was* unique. This stance is not surprising, given the editor's statement that "efforts to deny its uniqueness converge with attempts to deny its existence altogether" (Rosenbaum 1996, p. 4). As Novick (1999, p. 196) argues, the question is essentially meaningless, since any event can be seen to be unique if some appropriate perspective is adopted. In the case of the Holocaust, uniqueness is ensured by focusing on the genocidal intentions behind the killings rather than on sheer numbers. Unique or not, the Holocaust may still be negotiable, as shown in "the insistence of Chancellor Helmut Kohl's party that as a price for supporting a law against denying the Holocaust, the law had to include a provision against making it illegal to deny the suffering of Germans expelled from the East after 1945" (p. 14).

The uniqueness of the Holocaust is so jealously guarded that using the term *ghetto* to refer to black inner-city neighborhoods is viewed as "stealing the Holocaust" (Novick 1999, p. 195). Extreme elements in the black community responded in kind, when Louis Farrakhan said, "Don't put your six million down our throats when we lost 100 million" (p. 193). Also, "Let Ted Turner, denouncing what he regards as Rupert Murdoch's autocratic behavior, refer to Murdoch as a 'führer', and the Anti-Defamation League (I'm not making this up) sends out a press release demanding an apology for Turner's having demeaned the Holocaust"(p. 9). In the recent negotiations over compensation to slave laborers and forced laborers, the uniqueness of the Holocaust was used to argue for higher rates of compensation for the former (mostly Jewish) group. One Jewish lawyer (and Auschwitz survivor) said to another (who had lost ten

relatives to the Nazis), "You are a disgrace to the memory of the Holocaust and your father. You are equating slave and forced labor. You should be ashamed of yourself" (Authers and Wolffe 2002, p. 231). When memory becomes a moral capital, the rectification of historical injustice and the remembrance of injustice may go together.

Individual memory of sufferings may, as noted, be useful in preventing further sufferings. If people learn that they are particularly vulnerable in some respect, they may take precautions against specific threats or dangers. There is, however, a risk of taking needless precautions against the recurrence of low-probability disasters. By a well-known mechanism ("We believe more easily what we hope and what we fear," as a French proverb says), the disastrous nature of the possible outcome may cause us to think it more likely to occur than it actually is. The same mechanism may occur at the level of collective remembrance. Rabbi Irving Greenberg, director of the President's Commission on the Holocaust, asserted that heightened Holocaust awareness would prepare American Jews for the day when they might have to flee the United States (Novick 1999, p. 173). It does not seem, however, that many American Jews have a suitcase packed to leave the United States on short notice when the pogroms break out.

THE FUTURE OF TRANSITIONAL JUSTICE

The age of spontaneous transitional justice is probably over. Rather than successive episodes unfolding in relative isolation from others, processes of retribution and reparation now find their place in a preestablished pattern. There exist both a set of precedents and a set of institutions that shape expectations and constrain behavior to a very considerable extent. (As shown by the fall of the Iraqi regime, spontaneous *private* justice may still occur in the immediate aftermath of transition, but that is another matter.) The efforts of the international human rights community, notably Amnesty International and Human Rights Watch, have contributed to the expectation that regime leaders will be put on trial (but not receive the death penalty). The International Criminal Tribunals for Rwanda and for the former Yugoslavia have created a framework that may be adapted to future cases. The idea of truth commissions has struck deep roots and is being steadily fine-honed, as shown by the findings of the Peruvian commission that were published in August 2003. We may now, in fact, talk about an *institution* of transitional justice (in the sense defined by Offe 2003). The contributions to the present volume trace parts of the prehistory of that institution.

We may in fact distinguish *three stages* in the history of transitional justice. After the downfall of any repressive regime, there will be a spontaneous desire for retribution, especially if the worst atrocities took place in the recent past. When the incoming regime is as repressive and autocratic as the one it replaces, the retribution may be hard to distinguish from simple vengeance, combined

perhaps with a more instrumental desire to prevent the former leaders from reassuming power. This is the first and most primitive stage.

Liberal and democratic regimes want to proceed in accordance with the rule of law. Although the desire for retribution may to some extent override the desire for legality, the latter will still exercise a constraining influence. In the transitions examined in the present book, these processes are mainly national in character. To be sure, countries may try to learn from experience, as did Germany after 1945 and after 1989 or Belgium after 1945, yet mainly from their own experience. In the episodes discussed in this volume, there was little transnational learning. (In Chapter 3, however, I cited references to such learning in Uruguay and Myanmar.) These processes represent the second stage.

All this is now changing. As we already see in the case of truth commissions, we can expect a steady refinement and elaboration of the legal procedures for bringing dictators to account. This learning and streamlining process will be based not merely on cognitive models, as in the case of truth commissions, but on active supervision and enforcement by the international community. In addition, the tendency in Spain, Belgium, and elsewhere for national courts to claim international jurisdiction may harden into well-established international law. The diffusion of the process of compensating exploited communities also contributes to this institutionalization of transitional justice.

This third stage of transitional justice is only in its inception. Its full development may well be blocked by states that are reluctant to expose their own actions and their own citizens to the judgment of the international community or to pay compensation for unjust takings that took place a long time ago. The establishment of the rule of law at an international scale may take longer than the corresponding national processes (where they took place) and may not happen at all. All we can say is that as we move into the twenty-first century, transitional justice is sure to exist in a tension between domestic and international forces.

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