

Memory Politics in Hungary: Political Justice without Rule of Law

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After the 1989-90 democratic transition, Poland and Hungary were the first to introduce the institutional framework of constitutional democracy and of transitional justice. For a number of reasons, including a lack of democratic traditions and constitutional culture, after the 2010 parliamentary elections, liberal constitutionalism became a victim of the authoritarian efforts of Viktor Orbán's Fidesz party. The new constitution, called Fundamental Law, systematically dismantles guarantees of the rule of law, leading to measures of 'bad political justice'¹⁾ Here I refer to "bad" political justice, using the terminology of Ellen Lutz and Caitlin Reiger, who citing Judith N. Shklar's book *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964), distinguish between "bad" political trials, in which politics gains the upper hand over justice, and "good" political trials, which reflect a desire for public accountability. See Ellen L. Lutz and Caitlin Reiger, "Introduction," in Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009), 10-11., in which politics wins out over justice through ordinary national criminal law. Unlike the 1989 Constitution, the 2011 Fundamental Law of Hungary is rather vocal about the country's dictatorial past and reveals the intentions of the new constitution-making majority. The preamble, entitled "National Avowal," opens with the statement, "We deny any statute of limitation for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships". If "inhuman crimes" refers to war crimes and crimes against humanity, then the denial of a statute of limitations complies with effective international law. However, if it refers to less serious crimes, then the Fundamental Law is in breach of the prohibition on retroactive effect, emphasized in earlier decisions of the Hungarian Constitutional Court.

At the same time, the new Preamble recognizes only the pre-1944 years of Hungarian history, not the acts and failures that give cause for self-criticism. It declares that "We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed". In so doing, the Constitution fails to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents during World War II, but also between 1920 and 1944 by extreme right-wing "free troops" and the security forces of the independent Hungarian state, not only against "the Hungarian nation and its citizens" but also against other peoples. Nor does it acknowledge that the continuity of Hungary's statehood was not interrupted: restrictions were placed on government agencies' freedom to act, but the government was not shut down.²⁾ Miklós Horthy, the Regent of Hungary remained in his office, and Parliament sat and regularly passed bills introduced by the government, and the Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers.

In April 2013, the government as part of the Fourth Amendment to the Fundamental Law

adopted Article U, which supplements detailed provisions on the country's communist past and the statute of limitations in the body text of the constitution. This new article, passed after 23 years of solid democracy and a working system of the rule of law, revisits the settlements made during the immediate transition from communist dictatorship to democracy by reopening possible cases against former communist officials. While the law could potentially serve the aim of accountability, in the only case opened so far (the Biszku case)³⁾ Béla Biszku, who played a key role as Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution was charged with crimes, which were subject to the statute of limitations. Therefore, the Parliament enacted a law, called in the media "Lex Biszku", which translated the definition of crimes against humanity of the Nuremberg Statute into Hungarian and explicitly authorized the Hungarian courts to prosecute them, without defining the contextual elements of crimes against humanity and also criminalizing the violation of common Article 3 of the Geneva Conventions in contravention of the *nullum crimen* principle. Moreover, the law introduced the category of "communist crimes" and declared that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to a statute of limitations when committed on behalf, with the consent, or in the interest of the party state. This provision clearly replicates the one that was found unconstitutional by the Constitutional Court in 1992. Based on the new law, Béla Biszku was the only person convicted for being a member of the interim executive committee of the communist party which set up a special armed force in order to "maintain order" and act with force against civilians, if need be. The court acquitted the defendant regarding the most serious charge, and found him guilty only of complicity and two unrelated petty crimes: abuse of ammunition and the denial of the crimes of the communist regime. For these minor crimes, he was sentenced for two years imprisonment, suspended for three years. The verdict was still not final, because the prosecution appealed for a heavier judgment, while the defendant asked for total acquittal, but after the verdict was made public, the defendant died., it in fact represents victors' justice by weakening the ruling party Fidesz's political rival, the Socialist Party (the successor of the Communist Party).

Article U(1) states that the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organizations that supported the communist ideology were "criminal organizations" whose leaders carry a liability that is "without a statute of limitations". In sections 7 and 8, however, that broad statement is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for communist-period crimes that had not been prosecuted.

Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including destroying post-WWII Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; "devastating the value of European civilization"; and liability for all criminal acts that were committed with political animus and had not been prosecuted by the criminal justice system for purely political motives.

Article U(2) and U(3) call for the remembrance of the communist past and create a new national committee to document national memory in this regard. New Article U(4) provides that former communist leaders are public persons with respect to their past political actions and as such must tolerate public scrutiny and criticism, except for deliberate lies and untrue statements, as well as the disclosure of personal data linked to their functions and actions. New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the communist dictatorship. This provision appears to contradict the Constitutional Court decision 43/1995, which held that people could not be denied pension payments after they had paid, as they were required to do, into the state pension scheme. But that decision, together with all others made prior to the coming into force of the Fundamental Law, has been annulled by the Fourth Amendment.

Article U(6) through (8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that appear not to be time barred by virtue of Article U(1). There is as of yet no law that defines which crimes are serious enough to justify the removal of all time limitations on prosecutions and which are subject to the newly reset clock for prosecutions. These provisions contradict the Constitutional Court's declaration in its decision 11/1992 that this sort of extension of the statute of limitations is unconstitutional. Yet, Article U(9) bars compensating victims of the communist period by ruling out the passage of any new laws that might provide compensation to individuals for harms caused to them during the period open to re-examination in light of the adoption of Article U. To reverse course after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to alter the legal framework of the statute of limitations for the types of criminal acts in question. Such provisions may not run afoul of the time-honored doctrine of *nullum crimen sine lege*, but they may nonetheless constitute violations of the right to due process of law.

The sad experience of Hungary's once pioneer democratic transition is that the initial measures of transitional justice did not help to reconcile society and consolidate democracy. Perhaps transitional justice as a substitute idealism for trying to invigorate a new democratic regime without a strong democratic prehistory was doomed to turn into political justice without any rule of law guarantees. The current Hungarian government's attitude towards public discussion of history, similar to that of the Polish one, reflects the position of these illiberal populist regimes towards the rights of their citizens. As it is demonstrated in a recently published excellent collection of essays on memory laws, the legal governance of history shapes the public understanding of the past in other parts of the world as well.

References [±]

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SUGGESTED CITATION Halmai, Gábor: *Memory Politics in Hungary: Political Justice without Rule of Law*, *VerfBlog*, 2018/1/10, <http://verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/>, DOI: <https://dx.doi.org/10.17176/20180110-123522>.