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

> The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. *This means that even while there is continuity of "old laws" there is discontinuity in values from the "old regime."*[30]

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

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[30] Pl US. 19/93.

> . . . if there has been a long term interaction of two elements: the intention and the efforts of the state to punish an offender and the on going danger to the offender that he may be punished, both giving a real meaning to the institution of the limitation of actions.[31]

Courts must always have the last word, so it is hardly surprising that the Czech court makes the ultimate move—legal certainty requires this analysis: the orthodox application of the idea, treating the situation as the running of a limitation period that was not permitted to run would produce "a quite paradoxical interpretation of a law based state", the validation of a different legal certainty, the certainty the perpetrators originally had that they were safe. More fully: "This 'legal certainty' of offenders is, however, a source of legal uncertainty to citizens (and vice versa). In a contest of these two types of certainty, the Constitutional court gives priority to the certainty of civil society . . . ".[32]

Indeed, the Court argues, any other answer would legitimate a dictatorship *as law based*, giving a sign that "crime may become non-criminal". In competition to the Hungarian idea that strict application of traditional legal certainty is vital for the health of the new democracy, the Czechs argue instead that such an approach would mean "the loss of credibility of the present law-based state." In fact it would infringe Article 9 (3) of the constitution, ". . . legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state."

Further, to demonstrate this technique of showing that formal legal values may better be protected by doing the opposite of what they seem to require, it is well to point out how very briefly the court dealt with the discrimination argument. In both Hungary and the Czech Republic it had been argued that removing time-barring only for one sort of offender, the politically protected, but not others who happened to have escaped prosecution involved unequal treatment. The Hungarian court had agreed that this was unjust discrimination. The Czech answer is short and characteristic. Not at all: actually "this is the way to rectify their inequality with those who had already faced the possibility of being put on trial because, not only were they not under special political protection, but it was the state's wish and in its political interest to prosecute them."

As the interpretative methodology of the Czech approach is so different from the Hungarian, and potentially so important to our assessment of the CEE in this area, it is worth, rather more quickly, looking at what is probably its origin, in the first Lustration case.[33] Here I am now using "lustration" in the more technical sense of investigating the past records of people in the public life of the new democracies. It is, of course, well known that Czechoslovakia was the first CEE country to take

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31 *Ibid.*
32 *Ibid.*
33 Pl US 1/92.

such a policy with any rigor.[34] Considering that the Czech policy, though rather milder and affecting far fewer people than often thought, is one of the strongest, it may alarm some how easily the statute got through the Constitutional Court of the Republic of Czechoslovakia. The opinion, which, again, contains a good deal of instant history of the past regime to act as an empirical justification, starts with a very clear statement of the Court's overall attitude to constitutional adjudication. They describe the setting up of the new constitution in ambitious words, "thus an entirely new element of the renaissance of natural human rights was introduced into our legal order." They also stressed that the new constitution was not to be value free, in language already familiar from the limitations case, dismissing the merely procedurally legitimate "the concept of the law-based state does not have to do merely with the observance of any sort of values and any sort of rights, even if they were adopted in the procedurally proper manner." But it is when they come to talk directly of legal certainty that the determination to produce a novel form of constitutional adjudication become clear, all the more strongly because legal certainty as an argument hardly appears in the judgment once they turn to the issues rather than to introductory noises. Indeed it is not very clear, in the bulk of the argument, why they need discuss legal certainty at all. Nonetheless: ". . . not even the principle of legal certainty can be conceived in isolation, formally and abstractly, but must be gauged by those values of the constitutional and law-based state which have a systematically constitutive nature for the future."[35]

This is spelled out with an early version of the concern for the public legitimacy of the new state found in the statute of limitations case, and needs to be quoted in full:

> As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus the contemporary construction of a law-based state which has for its starting point a discontinuity with the totalitarian regime as concerns values may not adopt a criteria of formal-legal and material-legal continuity which is based on a different value system, not even under the circumstances that the formal normative continuity of the legal order makes possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the creditably of the democratic system would be shaken.[36]

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[34] Although the decision of the unified Czechoslovakian court remained good law in post divorce Slovakia for some years, the policy was never implemented, and the statute was ultimately repealed. See Herman Schwartz, *The Struggle for Constututional Justice in Post-Communist Europe*, (Chicago: University of Chicago Press 2000), Ch. 7.

[35] Pl US 1/92.

[36] *Ibid.*

The purpose of the statement in the context of the arguments that follows on the legitimacy of the Czechoslovakian lustration policy is logically unclear, but symbolically vital, because the main proposition they embrace is that the new state is entitled to be sure that those in leadership positions fully share the new values. When it comes to discussing the technical constitutionality of the statute the court actually takes refuge in highly definitional moves. The Czech lustration system required citizens to present a certificate proving that they had no unacceptable connections to the old security regime before they could hold a position above a certain level in a variety of institutions. For the Court there was no question of retroactivity, no question of discrimination, no breach of any international obligations under employment law. All that was happening according to them was that the state was setting an extra qualification for holding a post. This was future oriented, hence no retroactivity, it was equally applicable to all, so no discrimination, and was equivalent to similar practices elsewhere, even where it involved taking membership of a group as determinative of unsuitability without individuation of judgment.[37] And the state's entitlement to set such a qualification was the paramount need to ensure the elite of the new republic fully held to its new democratic values. The dismissal of merely "formal" rights from the past is acknowledged and dismissed:

> If compared with the preceding legal order, these conditions might appear to be, from a formal perspective, a restriction on civil rights; however, in the current legal order the basic criteria which will serve as the guide for our actions in the future are those found in the charter . . . [38]

Just as the realities of actual safety from prosecution of those working for the state had been cited to show that the statute of limitations had never been running, here the partisan employment practices of the old regime are cited as justification. But the connection is, of course, a very different one, and the Court's argument weak on this point despite the impressive rhetoric of the new meaning of legal certainty. The lustration policy was re-visited much later because parliament removed the time restriction—the original act had been intended to lapse in 1996—and the court of the Czech Republic decided an appeal, again by parliamentarians opposed to the act, in 2001. A large part of the judgment was involved in working out the status of the previous decision—did it mean the issue was *res judicata*, and if not, to what extent could the court of the *Czech* republic still follow the ruling of the court of the CSFR? It was an issue that had to be dealt with precisely because of the earlier court's stress on the irrelevance of formal continuity, but one easily enough handled because of the same stress on value continuity. The doctrine enunciated was a form of common law *stare decisis*—to the extent that the world had changed, so could the

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[37] Again they cite Germany, though the only example they could find was a prohibition on some people who been involved with the Stasi working in advanced armaments firms.

[38] Pl US 1/93.

ruling. But, and this was crucial, the world was judged not to have changed enough, and the second court was careful to limit the extent that the first court had relied, as it had, on the short term nature of the original lustration restrictions. They derived a form of "political question" doctrine to insist that it was for the legislature not the court to solve the sociological question of when a state was secure enough to do without lustration. Instead they emphasized the right of a democracy to defend itself, usefully relying on ECHR rulings on the notion of "a democracy capable of defending itself."[39] The new court did clearly regard the external legal environment as, if not decisive, certainly vitally important. They note that no international court has decided the question of the legitimacy of lustration laws and that they are thus forced to use other "indicators", leaving no doubt that any future case arising after such an international decision might be handled very differently. As it is they recite the usual list of similar measures elsewhere, taking especial care to note the 1996 Resolution of the Council of Europe legitimizing lustration as long as it is not punishment but protection of democracy.[40] The temper of the second decision is much more even, with greater acknowledgement of the problem of passing time from the old days, and, as noted, with very careful reference to the external legal world. However no single doctrinal aspect of the first decision is doubted, and we are left unsure quite what Czech law does think about the role of legal certainty in a state ruled by law.

There are two forms of lustration. One, the Czech model, restricts access to positions of power directly. The other, the Hungarian and Polish models, operate essentially by a "name and shame" policy—all that is formally at risk is that, if an individual does not resign, his past will be made public (Hungary) or if a citizen is found to have lied in his account of his past, he will be debarred from office for ten years (Poland). Other states of course have used the Czech model, and nowhere has a Constitutional Court banned it. Lithuania, for example, banned anyone who had worked for the KGB from a wide list of offices and employment sectors, taking much the same line as the Czechs—no discrimination is involved, because it is simply a matter of a legitimate technical qualification for a post applied prospectively.[41] Nor was the challenge, also found elsewhere, under the right to freely choose an occupation seen as relevant. Lithuania did object to the machinery of adjudication as not providing an adequate appeal mechanism, but in fact the original Czech decision had done the same. Some more far reaching cases about the past which are not lustration but fit in no obvious category have been dealt with by a different attitude to the continuity of the past, one more in keeping,

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39 In particular they cited *Glasenapp* v *Germany* (1986) and *Vogt vs. Germany* (1995).

40 Resolution No. 1096 (1996).

41 "On the Assessment of the USSR Committee of State (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation", Decision of the Constitutional Court of the Republic of Lithuania, Vilnius, 4 March 1999. The Court's Website is at: http://www.lrkt.lt.

perhaps with the formalism of the Hungarians. Thus the Ukraine's Constitutional court overturned legislation banning the Communist Party of the Ukraine by finding that the current party was legitimately registered in 1991 and had no institutional continuity with its predecessor. Given this, the ban on it breached the freedom of association clause of the constitution. But, neatly, as there was no institutional continuity, the party had no claims over its predecessors property either, thus giving the government much of what it wanted.[42] It is fairly clear that this case had as much to do with asserting the Court's authority within the separation of powers as solving the substantive rights claim—something which, as I have noted earlier, characterizes much of the litigation. A powerful example of this was the Polish case on retroactivity in punishing judges who had, in their words, "transgressed against the duty of issuing independent and impartial decisions in political trials conducted before 1989."[43] The Tribunal struck down the legislation because of procedural improprieties. However they clearly saw the procedural lapse in question, failing to consult the National Judiciary Council as required by legislation, as extremely important. In fact they developed a complex and far reaching doctrine covering such consultation rights, based on a scale of constitutional importance of the issues in question, which his\itself of major constitutional importance. There is no reason, therefore, to disregard what they did say about the substantive issue, in which they made it clear that the crucial necessity of an impendent judiciary did justify such retroactivity in this case. They should, therefore, be seen as on the Czech side of a robust preparedness to deal with some past injustices regardless of legal formalism. It might be thought this is even more remarkable given that judiciaries tend to be protective of their brethren. In making my point about the fact that the cases were dealt with are seldom only about the issue we look at, it might be thought particularly powerful that it was procedural propriety that stopped the court overruling a concern for procedural propriety. This is not some undisciplined court bowing to political pressure and likely to be indifferent to human rights—it is a court delicately balancing conflicting rights demands, albeit an unusual version of such a clash.

There are other examples of cases on what one might call the Czech end of the lustration spectrum, often dealing specifically with the judiciary,[44] but while nowhere has the basic principle been found unconstitutional, nor has such a developed argument about the nature of legal continuity and its relation to on value

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[42] The case is reported in Alexei Trochev, "Ukraine: Constitutional Court invalidates ban on Communist Party", *International Journal of Constitutional Law* 1:3 (July 2003).

[43] Judgment K. 3/98, delivered 24th June 1998: Website of the Constitutional Tribunal is at: http://www.trybunal.gov.pl.

[44] For example, the Slovenian case in which assessment of whether or not a judge had been guilty of favouritism to the old authorities was made a condition for his promotion or confirmation in office. *Constitutional Court of the Republic of Slovenia* U-I-83/94, 1994.

discontinuity been developed as in the Czech cases. I shall return to consider the implications of this at the end.

5. Soft Lustration

The first decision on what I have called "soft lustration", systems involving simply publicizing some individuals' past record was rendered in Poland on the early ill fated and politically transparent attempt in May 1992 which ultimately caused the fall of the Prime Minister. The case is almost infamous, and could not have got through even the laxest of constitutional reviews.[45] It is important to us because it is perhaps the best example, even more than the Polish case on retroactivity for punishing judges, to show the interaction between structural constitutional decisions and more obviously human rights issues. It is part of my thesis here that the alertness of the CEE courts to structural power issues in their constitutional jurisprudence is as much of value in their contribution to a united Europe as would be a simple "good" and "liberal" approach to individualized rights issues—but also that the two aspects have been inextricably interlinked. In this case, the Sejm gave a very ill defined instruction to the Minister of Internal Affairs to provide

> complete information regarding government officials from the level of voivode upwards, deputies, senators, prosecutors, barristers, township councilors and members of township management boards who collaborated with the UB Security Bureau and SB Security Services . . .

This instruction was issued as a mere resolution of the parliament, rather than a statute or any more normal form of regulatory instrument. Whether the format had been chosen to try to avoid judicial review or for other reasons is unclear, but it incensed the Constitutional Tribunal when the parliament tried to argue the Tribunal had no right of review over such motions. The Tribunal produced an immediate and wide interpretation of their over-view powers in what they themselves described as an "all encompassing interpretation of the provisions of the Constitution and the Constitutional Tribunal Act" which effectively said that if anything is done purporting to be a legally enforceable norm, then they get to review it. In fact, the Tribunal produced what was almost a tautology, and one that certainly empowers them:

> in a democratic state under the rule of law—a state founded on the separation of powers—legal norms cannot be established whose conformity with the constitution is not evaluated in a manner facilitating the removal of any inconsistencies.[46]

They describe this as literally "unthinkable".

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[45] Case U. 6/92, 19th June 1992.
[46] Case U. 6/92, 19th June 1992.

In a word, anything the Sejm wanted to do important enough to worry the Tribunal was by definition, a fit subject for the Tribunal. Casting the instruction as a resolution was fatal to the Sejm, because the Tribunal went on to take the position that any such intrusion into private life was a huge breach of constitutional rights, given that protection "of one's honor" was crucial to human dignity. This form of "personal interest" is "inseparably coupled with the essence of a human being." It follows from the fact that this is such a major intrusion on human rights that it most certainly could not be carried out by anything less than a full statute, and, of course, the statute itself would have to pass constitutional review. It was also cause to fail the resolution, in the Tribunal's eyes, that there had been procedural irregularities even in the process of passing it as a resolution, irregularities that prevented its proper debate in the Sejm. This accords with the style of objection in the judicial discipline case cited above—the Tribunal is very concerned about the actual working of the institutions it supervises. It is notable that Poland uses the form "a democratic state under the rule of law", not merely "a state under." As to the substance, it is unconstitutional because of vagueness—collaboration was not even defined, and, most important, because the vagueness prevented the natural assessment of whether the intrusion authorized was proportional to the good it might do—hinting at a very strong rational connection test that would have been applied.

This recognition of the human dignity aspect is stronger than anything found even in Hungry, and fully in keeping with the best standards of any Western European state. It is noteworthy that the Tribunal cites legal textbooks, in French, Italian and German on the "inalienability of human rights" as well as international human rights documents. It is also at least in part a pragmatic understanding of the cost to anyone listed in the sort of search the Sejm was calling for, building that into the understanding of the right itself by stressing that "not only the subjective feelings of the person . . . should be taken into account, but also the objective reaction of public opinion." In rendering this opinion the Tribunal was keen to buttress it with earlier opinions of its own, mainly on the structural aspect. It was typical of the decision on the Hungarian form of lustration that it should demonstrate very well this one of my initial points—the new courts' concern to weave a coherent rights jurisprudence by self-reference wherever possible. It is also a valuable further sign of how varied the concerns identified by CEE courts can be that the Hungarian Court worried a good deal less about the affront to the dignity of those exposed than about an aspect of these old secret police records which no other court appears to have noticed.[47] The records are, they say, unconstitutional in themselves, and always have been. Thus part of the problem for the constitutionality of the statute is that it failed to accept that those records not made public had to be dealt with in some other way—they could not simply be kept under lock and key. In doing this the court was relying

[47] Decision 60/1994, of 24th December 1994.

heavily on its own, already by then extensive, jurisprudence on what is called, in the Hungarian Constitution "informational self determination."[48] The act as a whole was declared unconstitutional for a variety of reasons, though none went to the basic question of disclosing the past of those in public life—the court relies on an American style concept of those in public life necessarily having a restricted "scope of private life". This is made all the more pressing by the fact of the transition and the need for transparency in public life. The court indeed regards the general thrust of the act as exhibiting "a confluence of the moral obligation that remained in the wake of the transition: the unveiling of deceit, publicity rather than punishment, and the value system normal to a state under the rule of law." They do however have very considerable concern about the way the act makes the government arbiter of what may be made public, not because they fear unfair publicity, but because of this problem of the rights of everyone to control data about them. Unusually for the court they come close to recognizing an American style "political question" doctrine in admitting that there is much room for policy latitude in working this balance in the details of this act, but they note in an apt phrase that "this political decision could not be based on the Constitution but rather on the constitutional certainty that the records can neither be kept secret not brought entirely to light." The Hungarian Court has the probably unique power of ruling that the legislature has allowed or created a state of "Constitutional Omission" and ruled that failure to provide for citizens to see and destroy those secret service records which were *not* going to be disclosed as part of the lustration process was such an omission which had to be dealt with by statute. For the court:

> The fundamental right to the protection of personal data and to access to information of public interest shall be interpreted in light of each other. This is natural for informational self-determination and the freedom of information are two complementary preconditions for individual autonomy . . . when freedom of information conflicts with the protection of personal records it cannot simply be said that the latter must always be strictly interpreted and must take precedence. In the light of the subject of the Act at issue, the Constitutional Court has established a hierarchy of these two basic rights.[49]

The other problem the Court found with the act related to the charge that unconstitutional discrimination was involved in the categorization of who would be vulnerable to these background checks. The approach here does not fit the idea that it is happy to allow much in the way of a margin of appreciation to legislatures. In keeping with much of their work during the nineties, the judgment might actually be seen in many ways as an illegitimate intrusion into policy making at the micro level,

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[48] The key early decision which laid down very strong personal rights to control data collected on one by the government was Decision 15/91 of 13th April 1991, on the use of personal data and PIN numbers.

[49] Decision 60/1994, of 24th December 1994.

à la Stone Sweet.[50] The discrimination argument was upheld on the grounds that the categories used in the act were variously too broadly or too narrowly defined to "establish consistent constitutional criteria to distinguish between public and private data." Just what these criteria would look like the court did not say, but they were quite certain that records of university and college officials and top business executives of state enterprises "were not information of public interest since such people neither exercised public authority nor took part in (public) political affairs." This can only be regarded as a bizarre judgment: and even if the claim that that circulation figures were no basis to decide when a newspaper editor might have political influence was not bizarre, it was equally clearly no business of a court to so judge. Indeed excluding academics as opinion formers went ill with the other objection, that restricting such checks to the press corps but not to other opinion formers such as church leaders, trade union leaders and political parties produced too narrow a group. We need not, perhaps, be concerned by this tendency of the court. Human Rights can probably only be strengthened, if other aspects of policy are weakened, by over active courts who verge on legislation—and it is certainly something which is commonly found in Western Europe. A large number of judgments of unconstitutionality rendered by the French *Conseil Constitutionnel*, for example, are based on detailed objections to categories used in legislation, thus arguably producing discriminatory problems.[51]

6. Concluding Remarks

One thing above all stands out—at least at the level of rhetoric, and surely much more—the idea of the state governed by law, or the democratic state governed by law is central to the way the CEE courts have dealt with their legislatures' attempts to deal with the past. The concept is the starting point of all these judicial discussions, and it is usually analyzed with considerable care, if not always to the same conclusion. Whatever may be allowed or forbidden, it is done through this intellectual sieve. Only if one is prepared to be an extreme judicial realist and discount the language of decisions completely could one doubt that the conceptual framework used is fully fitting potential members of an enlarged democratic and liberal Europe. It is equally important to see that assessments via this check relate as much to how a proposed accounting with the past is made as with its substance. Had the CEE courts simply ruled out particular proposals that western liberals might dislike without being over concerned by procedure we would have nothing but the happenstance that, in certain specified cases, policies were measured against

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[50] See his general criticisms of European Constitutional Courts usurping the legislative function, particularly in Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: OUP 2000).

[51] See Dominique Rousseau, *Droit du Contentieux Constitutionnel* (6th edn.), (Paris: Montchrestien 2001), especially pp. 409–427.

relatively inchoate values. It is precisely the great care taken over other constitutional matters that reassures us for the future. A state ruled by law is, at least in the eyes of Central and Eastern European Constitutional Justices, a state abiding strictly by the separation of powers and careful to ensure legislative procedure is abided by.

Nor does it make much sense to worry about the fit of these decisions to western legal practices when one notes the concern to cite and test against legal opinion both within the CEE itself and within the rest of Europe. One consequence of this comparative citation is that it would be hard to fault these countries without also raising serious concern about Germany, given the centrality of their experience after unification to the case law of CEE states. (One might also suggest that the ease with which many CEE justices feel at referencing the ECHR requires any doubter either to accuse them of improbable duplicity or seriously to question the standards of the ECHR itself).

There is one serious question to resolve, however. It arises primarily in the Hungary versus Czech Republic contrast. What are we to make of the radically different approach to assessing the requirement that a policy satisfies the standards of a state ruled by law? One knows, of course, that the political background to transition sharply affects the context within which a court as well as a legislature have to come to terms with the past. Were it simply a matter of accounting for why the Czechs did, and the Hungarians did not, allow an extension of the statute of limitations, it might be enough to point to their respective histories in the decades before transition.[52] I have already pointed out that much of the difference comes about by the story the two countries choose to tell about themselves. What is problematic is the fact that both courts claimed to be doing the same thing—abiding by the requirements of a state ruled by law *where legal certainty is a major part of the definition of such a state*. Because it simply cannot be the case that legal certainty is compatible both with allowing and forbidding the extension of time during which someone can be tried for a crime. It cannot be the case, for that matter, that selecting only some such criminals, those who were protected by political forces, both is and is not discrimination against one group. We must, surely, choose between the formalism of the Hungarians or the determination to ensure substantive justice of the Czechs.

Or must we? There are those who would have preferred the Czech Court, if they felt obliged to allow the prosecution of political offenders from the past, to simply say that during a period of transition exceptions had to be made to the normal standards of a state governed by law, rather than to try to show that no breach of the standards being tolerated. There will be others who very much take the Czech point, and regard Hungarian formalism as dangerous because it insufficiently couples the

[52] Sólyom op. cit., n. 10, comes very close to using this form of argument to account for differences between various CEE states.