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The issue of limitation in the context of transitional justice

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Abstract

The present study aims to present the difficulties of transitional justice in Hungary following the change of systems. Following the regime change, it was a legitimate need in a substantial part of society in Hungary to punish the main perpetrators of the previous communist dictatorship for the crimes committed by them, either symbolically or actually. This type of 'punishment' may take place in a democratic society in two ways: either because of a political decision, or in the form of prosecution by a court. From the 1990s onwards, Hungarian decision-makers were characterized by the absence of ability to cope with the question.

In my study relating to the statute of limitation, in addition to the description of the concept of limitation and the applicable Hungarian regulation in force, on the one hand I introduce those crimes which are not subject to the statute of limitation under international law, on the other hand I present the different approaches of the question of suspension of the limitation period in some successor states in order to determine and provide a solution to whether the statute of limitation could have been a real obstacle to criminal accountability. In this context, my study addresses, among several other issues, the breakthrough of the prohibition of retroactive effect, the issue of limitation and the question whether there is a need for transitional justice at all.

The problem of limitation in connection with the historical justice arises in the fact that, although the current Hungarian legislation in force is aware of the concept of crimes which were not subject to the statute of limitation, however, during the darkest period of the communist dictatorship, such a concept did not yet exist in Hungarian law. The Hungarian laws in force in the 1950s did not yet recognize the category non-obsolete crimes, Thus, for example under Article

25 of the Compilation of Substantive Criminal Law (Act II of 1950) in force in 1956, the limitation period for acts threatened with death or life imprisonment was only 15 years, which, however, ceased to be punishable.

In my opinion, which can be considered as one of the results of my research, in the absence of a mandatory legal background similar to German or Czech, it is a special legal reasoning that can justify the lack of limitation, the rules of which are presented in detail in my study. This is the legal reasoning on the basis of which the accountability of former party leaders could have been established under both domestic and international law. That is the legislative reasoning based on which – contrary to the decision of the Constitutional Court – in my opinion, legal liability would (would have been) take place, regardless of the fact, whether it was a plea or in the context of a traditional criminal proceedings.

Keywords: war crimes, regime change, transitional justice, limitation

Introduction

Following the regime change – in fact, even before that –, it was a legitimate need in a substantial part of the society to punish the main perpetrators of the previous communist dictatorship for the crimes committed by them, either symbolically or actually. This type of 'punishment' may take place in a democratic society in two ways: either as a result of a political decision, or in the form of prosecution by a court. From the 1990s onwards, Hungarian decision-makers were characterized by a lack of ability to cope with the question. There were pieces of legislation that did not stand the test of constitutionality, other times they wanted to bring the matter to rest with the involvement of the judiciary, somewhat shifting the responsibility away from themselves. All these rightly led the emergence of various conspiracy theories, which were though widespread and referred to as the 'Rose Hill Pact' in Hungary, which were believed to find the cause of all in the deliberate interruption of the accountability of the former party leadership. Those who called for accountability referred to the words of Hugo Grotius: 'It is not possible for serious crimes to remain unpunished' ('Crimen grave non potest non esse punible'). There were several parliamentary initiatives and bills during the first freely elected government – that were already dead-on-arrival at the time of their submission – which were rejected by the opposition or by the Constitutional Court, and then the politics took them off its agenda for a very long time, more than two decades. During this wasted period, the prosecution of alleged former perpetrators was simply shifted to the courts, which

was reflected in the volley-firing trials of the 1990s (see the 'volley-firing trial' of Salgótarján, Eger, Kecskemét, Tiszakécske, Berzence, Mosonmagyaróvár, as well as of Nyugati tér, Kossuth tér and Tata). The common characteristic of the above-mentioned criminal proceedings was that of János Strausz Dr., the judge of the 'volley-firing trial of Salgótarján' stated in the written statement of his judgement that '*no one has ever brought legal prosecution against the surviving political and military leaders who are undoubtedly responsible for the 1956 bloodshed and retaliation, and this has not even been done in the present case. Instead, ordinary people were put on the court dock, though there was no credible evidence against most of them. Furthermore, it should be borne in mind that, almost four decades after the 1956 revolution and after a long period of time, both the past and the current political system have made it impossible, difficult, or time-consuming to prosecute, or have postponed the prosecution, so the punishment may now only have symbolic significance*'.

The words of János Strausz Dr. have been fully confirmed by the time that has elapsed. From 1990 to the present day, no former leading communist politician has been convicted and only one has been placed on the court dock – in the person of Béla Biszku – who died before the first instance sentence of the Metropolitan Court of Budapest became final. I also had the opportunity to take a close look at the criminal proceedings against Béla Biszku, since I myself made the last decision – partly convicted, substantial partly acquitted the accused person. Béla Biszku, who was a member of the narrower party leadership after 1956, was prosecuted in that case because, according to the prosecution, a series of volley-firing occurred in two locations in December 1956 because of instructions issued by the party-run Military Council. First in Budapest, on Nyugati tér, and then two days later in Salgótarján. However, it has been established that, according to the experts heard, the witnesses, the documentary evidence, and the final verdict in the main proceedings a decade earlier, on Nyugati tér there was no volley-firing against the civilian population, while the instruction of the Military Council, regardless of its content, had no effect on what happened in Salgótarján, as it was addressed only for the commanders in Budapest, and the Military Council had no influence on the management of the army in Salgótarján, and certainly not even its instruction got there.

However, the indictment against Béla Biszku was not based on an idea from the air. There has been at least one criminal case in both Hungarian and German legal history based on the same logical conclusion: the former communist leaders delegate their decisions to others, who then commit the crimes on their behalf. In 1920, the so-called 'People's Commissar Trial' was held in Hungary, and in 1997 in Germany the 'Politbüroprozess' was held against the former GDR

leaders. As a result of these two criminal proceedings, the terms introduced into the legal consciousness were also uttered in the Biszku Trial, the legal doctrine called the joint criminal enterprise, which was introduced in the 'People's Commissar Trial' and was crystallized in the practice of the International Criminal Court in The Hague decades later, or the term 'ideological fire order' (ideologischer Schießbefehl), first used in the Politbüroprozess, which had in common the principle of corporate responsibility, regardless of the form of central will ('suppression of counter-revolutionary movements', 'setting up revolutionary courts' or allowing fire to be opened to citizens wishing to flee across borders).

Thus, it may be seen that the accusation of Béla Biszku on the grounds that he was one of the leaders of the party state was not a mistaken decision from the point of view of legal theory, as there were at least two examples of this in the past. All in all, the only question was whether the prosecution could find the particular criminal conduct for which it might be worth prosecuting him.

Regarding the absence of criminal accountability after the change of regime, it is also worth addressing the question of whether there is need for society for transitional justice, or as it is common in the German legal literature, for 'past processing' (in German Vergangenheits-bewältigung or Vergangenheits-aufarbeitung)? Or is it better (as a compensation for peaceful regime change or to preserve social peace) not to disturb the past, since it is no longer possible to change it anyway, and what cannot be changed is not worth disturbing?

In addition to both positions, in the international legal literature, a number of legal scholars and philosophers have set out their arguments and counter-arguments for the benefits and the disadvantages of transitional justice, how it helps society to face the past or hinders the reconciliation, of which the most important ones shall be briefly presented. Considering that there is no point in transitional justice, in fact, that it would be counterproductive – but at least pointless – the following main reasons were given:

In chronological order, it is appropriate to first refer to the position of Hannah Arendt, who found the transitional justice to be contrary to human expectations and thus meaningless (Hack, 2012). According to her high-impact argument '*it is therefore quite significant, a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable*' (Arendt, 1998). '*All we know is that we can neither punish nor forgive such offenses*' (Arendt, 1998). Thus, it is not possible to punish the person and act that Kant mentions as 'radical evil'. Approached from another side, Jon Elster found the transitional justice equally pointless, he assumed that it would also lead to injustice, as it would not be possible to

hold everyone liable and those responsible would get away with it (Hack, 2012). He described this as *'the problem of the big fish versus small fish'* (Elster, 1992), in respect of which he finally concluded that either everyone should be punished, or if that is not entirely possible, then no one ('*In this article I will lay the groundwork for the opposite conclusion, namely that one should target everybody or nobody*.') (Elster, 1992). In this context, he set out his truly unique position that '*because it is impossible to reach everybody, nobody should be punished, and nobody compensated*' (Elster, 1992). There was also a view on the part of Michael Schumann, a politician on the German extreme left-wing that sins of the communist regime would be lumped together with the National Socialist regime and punished the same way, the latter would be relativized (Schumann, 1992). Detlef Joseph, a German who also spoke out against justice, argued that transitional justice would be an unfair revenge-justice for the winners (as the courts of the FRG would judge the politicians of the GDR) (Joseph, 1992), what those who professed it referred to as 'Siegejustiz', 'Rachejustiz' (Csúri, 2004).

At the same time, however, there was a much wider camp of those who stressed the need for transitional justice in the socialist successor states, as it is the most important tool for facing the past and for social reconciliation. In this context, the legal literature has developed the following main arguments as justification:

Firstly, after the reunification, it is worth quoting the statement of Christoph Schaefgen, Chief Prosecutor and Head of the Investigating Crimes and Judicial Violations of the GDR Government Unit of the Berlin Prosecutor's Office. Compared to letting a significant number of Nazi criminals run after the war, he emphasized in 1991 that the German 'justice could not fail again' (Csúri, 2004). In that connection, in his article in a German judicial newspaper, he stressed on the basis of past failures in the application of the law by the German judiciary that '*we want to do everything we can to ensure that a situation like the one after 1945 does not occur again, which was known to ensure that no member of the judiciary was held criminally responsible for an unjust judgment*' (Schaefgen, 1991). Neil Kritz considers the transitional justice as the first test of the establishment of true democracy and the rule of law (constitutional state) (Hack, 2012), which leads from dictatorship to democracy: '*in countries undergoing the radical shift from repression to democracy, this question of transitional justice presents, in a very conspicuous manner, the first test for the establishment of real democracy and the rule of law, the very principles which will hopefully distinguish the new regime from*' (Kritz, 1995). It is, of course, a question whether past violations can be remedied afterwards and can be a cure for past wounds. If the answer to that question is yes, then the additional question arises

as to how it is possible to achieve this goal? According to the American political scientist Roman David, transitional justice in Central and Eastern European countries after the regime change (i.e. how former leaders in the former system could take part in newly established democracies) took place in four main types in each state: a) the exclusive system – '*a system under which a person associated with the previous regime is not allowed to hold certain posts in the new administration*'; b) the reconciliatory system – '*a system under which the wrongdoer has to demonstrate that he or she is worthy of receiving a fresh start through his or her confession of wrongdoing*'; c) the inclusive system – '*the official is allowed to hold a position of trust in spite of his or her past*'; d) the systems of continuance – '*people in position of influence are allowed to continue in their posts under the new government*' (David, 2011). The effect of the Hungarian regime change on leadership positions could be classified in point c) of the above categories, under the inclusive system, as opposed to the exclusive system in former Czechoslovakia or the reconciliatory system in Poland. In contrast, a model based on the tools of criminal law prevailed in Germany (Schlink, 1994), where in the post-unification period, a democracy (FRG) that has had sad experiences in this field judged with great rigor over the actions and perpetrators of a state (GDR) that has by then already been abolished.

In this context, the following dilemma arose in legal theory, namely, if justice was already necessary, then, in line with the expectations of politicians, should it really be responded to by the means of criminal law, through justice.

There were also negative and affirmative answers to this question. The first category – that is, those who did not treat criminal law responses as an all-powerful solution – includes, for example Jerome Frank, a well-known representative of American realism, who set the courts as the 'father-law substitute', which in practice meant that society expected them to finally close and resolve all their crises with a symbolic decision, but the judicial decision itself was uncertain (Frank, 1930). Jerome Frank also testified that since the judge itself was a human and over time his individual changed, it could be stated that in the same case the exact same judge could easily imagine after 10 years that – then – even would make a completely different decision, as the mechanism of judicial judgment – at least in the opinion of the representative of American realism – did not follow the formal rules of logic at all (his specific approach to judicial decisions: '*Law is what the judge had for breakfast*.') (Frank, 1931).

On the other hand, there were many legal theorists and philosophers who clearly expected the transitional justice from the judicial decision, from the catharsis of sentencing. Among them were Judith N. Shklar (Shklar, 1964), Jaime Malamud-Goti (Malamud-Goti, 1991) and Carlos Santiago Nino (Nino, 1996), all

three of whom consistently expected the prosecution of the injured truth to be restored through court proceedings and the publicity of court trials – the inevitability of facing with the past – to meet the public's sense of justice (Hack, 2012).

Perhaps Malamud-Goti gave the clearest explanation of why, in his view, trials were needed for liability. In his reasoning, he assesses the effects of court proceedings on both the victims and those responsible for the acts (perpetrators), on the basis of which it concludes that trials are important for victims, because '*only public admission by governmental institutions that we were wronged will legitimize us in our own eyes, and punishment of the violators of our rights is the clearest and strongest statement to that effect*' (Malamud-Goti, 1991). On the other hand, examining the need for criminal proceedings from perpetrators, he came to the view that this should send an important message to them: that it becomes clear to everyone that they have committed serious crimes ('*The message to the wrong-doer is: This is how wrong what you did was*.') (Malamud-Goti, 1991). At the same time, he sees the importance of transitional justice and retribution in that – even though some bloody-handed leaders do not attach importance to it – that '*the value of retribution is just that, by disregarding the effects of punishment, it places constraints on society against using individuals as tools for promoting other people's interests*' (Malamud-Goti, 1991). In his study on this topic, Péter Hack takes stock of the views of the authors listed above (Judith N. Shklar, Jaime Malamud-Goti, Carlos Santiago Nino) on the specific benefits to society of public trials in connection with the accountability for perpetrators of criminal systems: a) they highlight the dimensions and nature of the atrocities that have been committed, b) crimes are publicly acknowledged and perpetrators are publicly exposed, c) they promote the rule of law, including lawlessness, through a fair trial, d) they reduce the desire for private revenge and they prevent the bloodshed, e) they allow victims to regain their self-esteem, f) they stimulate the development of a collective conscience and the process of self-examination (Hack, 2012).

However, several substantive and procedural problems occurred in relation to possible court proceedings. First, the breakthrough of the prohibition retroactive effect, and secondly, the question of limitation.

Breakthrough of the prohibition on retroactive effect

The principle of non-retroactivity had relevance to the aspect of liability – as a possible obstacle – as in border guard trials where certain border guards who fired shots and injured or killed refugees brought before the court, almost all of them argued that they had acted only in accordance with the legislation in force

at the time, and their act had not been a crime in the GDR at the time of the criminal offence, but on the contrary, they had had a duty under the provisions of the State Border Law (Gesetz über die Staatsgrenze der DDR) (Csúri, 2004). The defense was justified to the extent that the State Border Act did allow the use of weapons for such cases at prohibited border crossings – and made it mandatory based on individual specific command instructions. Section 27 of the Act provided for the use of weapons (Anwendung von Schußwaffen), and in doing so, regarding the protection of human life, paragraph 4 also contained only that as far as possible, the lives of those affected by the use of weapons should be spared.

Once again, only the Radbruch formula ('Radbruchsche Formel') helped to break this contradiction after the World War II. In his publication in Süddeutsche Juristen-Zeitung in 1946, Gustav Radbuch explained that an unbearably unjust law must always back down from the truth (Radbruch, 1946).

The same kind of approach emerged in the proceedings against the leaders and representatives of the GDR, since – although to a different extent and in different contexts – the laws of the GDR were unbearably unfair, like those developed during the Nazi era. That is why it has become a principle in adjudicating violations in the GDR that what was a criminal offense under the rule of law at the time of its perpetration must be punished retrospectively, even if it was not punishable under the circumstances at that time. In this context, Simon Kaiser explains in one of his papers – against the defense of the accused persons arguing for non-retroactivity in border guards' trial – referring to Albin Eser (Eser, 1996) that the prohibition of retroactive effect cannot be an evasion of responsibility of border guards on the ground that they trusted the then existing state order during its existence. As far as the laws or the instructions are manifestly intolerable, the issuers of the orders and the executors of the orders cannot claim that they merely complied with the legal norms. The reason for this is that no one can trust that future forms of government will continue to accept and punish this intolerable practice that violates human rights. Thus, the perpetrators cannot therefore claim that what was a legal at the time of the crime cannot become illegal later (Kaiser, 2011).

The issue of limitation as a potential obstacle to criminal accountability

The second major issue of possible criminal liability was the issue of limitation. The difficulty of the solution was given by the fact that, during the period of regime change in Eastern Europe, the crimes whose perpetrators were to be held

liable in the newly formed democracies were largely time-barred or close to it. Of all the countries concerned, this was the most problematic and procedural difficulty in Hungary – this will be discussed in more detail later – especially given that the Hungarian laws in force in the 1950s did not yet recognize the category of crimes which were not subject to the statute of limitation. However, it is not worth keeping silent about that for example the issue of limitation in Germany – which was very common to serve as an example for the Hungarian legal system in the last century – were resolved in the simplest and most obvious way possible. This solution also arose in Hungary, but in the end, it failed due to the opposition of the Constitutional Court. According to Jörg Arnold, the root of the problem was to be found in the fact that many crimes had been committed long ago, as a result of which there was a risk of limitation. The solution to this in German law was that the limitation period was considered to have suspended during the period of non-persecution (i.e., the period was not included in the period of limitation) and then to have restarted (Arnold, 2001). This view was also adopted by the Ministers of Justice of the German provinces, who adopted a joint declaration at their conference in Berlin in November 1991. According to this, the law enforcement authorities would in the future take the view that crimes committed with the instruction or approval of the GDR regime holders, and which were not unlawfully prosecuted at the time, disregarding the rule of law, were not time-barred, and the limitation restarted with the reunification (Schißau, 2007). The reference to the Radbruch formula developed in connection with the national socialist crimes was also expressed in the wording of the joint interpretation of the law by the German provincial ministers: those kind of criteria previously developed for the limitation of national socialist crimes, they can also be properly applied to criminal proceedings for certain acts of the Socialist Unity Party of Germany (SED) regime (Schißau, 2007). Accordingly, the Act of 26 March 1993 on the suspension of limitation in respect of 'acts committed under the unjust regime of the Socialist Unity Party' (Gesetz über das Ruhen der Verjährigung bei SED-Unrechtsstaaten, briefly: Verjährigungsgesetz) provided that for the purpose of calculating the limitation period in respect of acts committed under the illegitimate SED regime, but not persecuted for other reasons incompatible with the expressed or implied will of the GDR state and party leadership for reasons incompatible with political or rule of law reasons, the period between 11 October 1949 and 2 October 1990 should be disregarded, since the limitation period was suspended during this period (Asholt, 2016).

While the German statute of limitations was not brought before the German Constitutional Court and higher court decisions consistently upheld the specific judgments rendered on that basis (moreover, in the context of the

'Politbüroprozess' proceedings against Egon Krenz and his associates, the European Court of Human Rights did not find any objections in this regard), until then in Hungary, after the change of regime, the Constitutional Court ruled by its decision No 11/1992 (5 March 1992) that the 'Act on the Prosecution of Serious Crimes Committed between 21 December 1944 and 2 May 1990 and Not Prosecuted for Political Purposes' passed by the pro-government majority of the National Assembly – with a content very similar to the German one – was unconstitutional. On the one hand, the Constitutional Court explained the indetermination and uncertainty of the wording of the act violated the requirement of legal certainty. On the other hand, it emphasized the that the act also violated the requirement of constitutional criminal law (non-retroactivity) that the criminal law in force at the time of the offense shall apply to the limitation period of the criminal offense, including interruption and suspension of limitation period, unless more favorable rules for the perpetrator entered into force during the limitation period. On the issue of unconstitutionality of certain provisions of the Hungarian law, which did not enter into force in the end, the Constitutional Court ruled that the re-criminalizing of time-barred crimes, even the extension of limitation period for crimes not yet time-barred, or interrupting their limitation period by the law, or establishing the grounds for interruption or suspension of limitation period with a retroactive law – they are all unconstitutional. The Constitutional Court also ruled that in terms of limitation, it was not possible to make a constitutional distinction according to the reasons for which the state did not previously enforce its criminal claim for political or other reasons. As a result, due to its uncertainty, it violated legal certainty and it was therefore unconstitutional to declare as a reason for limitation that 'the state did not enforce its criminal claim for political reasons'. Contrary to the decision of the Hungarian Constitutional Court, one of the authors of the legislative proposal quotes in his article the position of Hans-Heinrich Jescheck, who, in connection with the Hungarian statute of limitation, expressed his view that '*if these thesis are applied to Hungary, they are absolutely not retroactive limitation provisions which adversely affect the situation of the persons concerned, but a decision which was already in force during the limitation period. Even if this provision did not formally exist in Hungarian law, it must be said that it must necessarily be deduced from the meaning of the right to limitation, because the limitation cannot begin or continue if the legal situation makes it impossible to prosecute a criminal offense. In this way, the government could commit any crime like this without having to fear being prosecuted later. The limitation is therefore restrained by the general legal concept of suspension based on the imperious principles of justice*' (Zétényi, 2017).

On the issue of limitation, however, it is worth briefly quoting the decision of the Constitutional Court of the Czech Republic of 21 December 1993, which is radically contrary to the position of the Hungarian Constitutional Court detailed above. In this Czech decision of the Constitutional Court, the proposal to repeal the Act No 198/1992 on the illegality of the communist regime and on the opposition to the communist regime was rejected. Regarding the nature of the limitation period, the Czech Constitutional Court stated in its decision '*the argument of the political group proposing the repeal were not credible that during the period in question, limitation periods were also running to governmental, political and state-committed crime in general. A political power based on violence is fundamentally wary of freeing itself from the perpetrators of its own acts of violence. Instead, the state has become the guarantor of their impunity, practically their immunity from criminal law*' (Varga, 2006). In addition, the reasoning of the Czech Constitutional Court also pointed out that '*an essential component of the concept of limitation known in criminal proceedings is that the state has the intention, will and willingness to prosecute the crime. Without that presumption, neither the content of the concept of limitation, nor the meaning of the legal institution itself can be satisfied. The meaning of the limitation can only come from the long-term interplay of two fundamental factors: the will and aspiration of the state to punish the perpetrator and the perpetual risk of the perpetrator being punished. In so far as the state does not want to prosecute certain crimes and specific perpetrators, the statute of limitations becomes apparent and unnecessary. In such cases, in fact, the limitation period does not run and the limitation period itself will be fictitious. Written law does not know its application possibilities. For a crime to become time-barred, the limitation must first take place, that is the period during which the state seeks law enforcement. The limitation may be fulfilled, only if the continuous efforts of the state to prosecute the crime remain in vain until the end of the limitation period. This condition could not be met in the period between 1948 and 1989 for politically protected crimes. The state of mass state-protected lawlessness was not the result of individual mistakes, excesses, negligence, or errors that would have left any chance for possible criminal prosecution but resulted from the purposeful collective behavior of the apparatus of political and state power as a whole, which precluded criminal proceedings. Protecting perpetrators thus became as diverse as the system of power itself was*' (Varga, 2006).

Based on all this – according to many people's opinion – the Hungarian Constitutional Court was on the side of legal certainty at the time, when it declared the statute of limitations adopted by the legislature unconstitutional, and the Czech Constitutional Court sided with justice when it rejected proposals to declare the

statute of limitations adopted by the legislature unconstitutional. In my opinion, however, the question is not as simple as that, but rather can be traced back to the thought or lack of thought in it, which also came up in the reasoning of the Czech Constitutional Court: although it is a matter of fact that the recognition of the limitation and its occurrence by the state and the application of the law is a fundamental principle of legal certainty, however, the resulting legal certainty for perpetrators is a source of legal uncertainty for victims and thus for society as a whole. In other words, the Hungarian Constitutional Court, which followed the principle of legal certainty, sought to always guarantee the right of perpetrators to – general – legal certainty, while, to put it simply, the Czech Constitutional Court, which followed the principle of justice, sought to guarantee the right to real legal certainty for victims who had been deprived of it between the time of perpetration and the change of regime.

The solution of the issue of limitation in the context of transitional justice

Regarding historical justice, the problem of limitation arises in the fact that, although the current Hungarian regulations know the concept of crimes which are not subject to the statute of limitation, such a concept did not exist in Hungarian law when it was the darkest time of the communist dictatorship. The Hungarian laws in force in the 1950s did not yet recognize the category of crimes which were not subject to the statute of limitation. As an example, in 1956, the Compilation of Substantive Criminal Laws in force (Act No 2 of 1950) Section 25 provided that limitation period for acts threatening death penalty or life imprisonment was also limited to 15 years, after which those were no longer punishable. In my opinion, which may be considered as one of the results of the research, in the absence of a mandatory legal background like the German and Czech ones, the following legal reasoning may justify the absence of a limitation period (which was also the applied legal solution in the Biszku trial):

The international law, namely the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 may designate the conditions of the criminal category of the retaliation after 1956. The Convention was promulgated in Hungary by Decree-Law no 32 of 1954. The Article 2 orders the application of the Convention to all cases of declared war or of any other armed conflict and to all cases of partial or total occupation of the territory, while the Article 146 provides ‘effective penal sanctions’ for persons committing, or ordering to be committed, any of the ‘grave breaches’ of

the present Convention defined in the Article 147 as war crimes (e. g. willful killing of a protected person, injury to body, torture, unlawful deprivation). In accordance with Article 2 the Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. As referred to in Article 4 persons protected by the Convention are those who at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 stipulates that the Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations. The Article 42 of the annexed Section III of the 'Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex of 18 October 1907 (promulgated by Decree-Law No 43 of 1913, Par 1 point 4) states that territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. Following from Article 146 of Geneva Convention (IV) the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. Pursuant to Article 147 grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

As for the Biszku trial, as recorded in the final verdicts of the Supreme Court in both of its main cases, any legal argument applicable in retaliatory criminal proceedings after 1956 shall, in my view, be based on the following fact: at dawn on 4 November 1956, the armored divisions of the Soviet army launched a general offensive in both Budapest and the countryside to enforce the political decision of the Soviet government and party leadership. The decision was aimed at removing the legitimate Hungarian government led by Prime Minister Imre Nagy and suppressing the Hungarian revolution. This attack was met with armed resistance from some Hungarian military units, especially insurgents organized into national guards. As a result of the military victory of the Soviet troops, hostilities ceased throughout the country until 15 November 1956, after which time military operations ended. However, after the resistance broke out, Soviet troops did not leave the cities, but were stationed there as an occupying force, also performing law enforcement and administrative functions. Soviet soldiers, supplemented by army gunners, stayed in the public areas of the settlements, and took part in patrols. It follows from all this that on 4 November 1956, between Hungarian People's Republic and the Soviet Union, due to the Soviet attack, without a message of war, an international armed conflict evolved as it was enshrined in Article 2 of the Geneva Convention (IV). The Convention shall be applied in this case – pursuant to Article 6 – from the outset of the conflict. Since, following from the general cessation of military operations (15 November 1956), the country as a whole remained occupied and remained in a significant proportion of retaliation after 1956 (until one year after the end of military operations, i.e., until 14 November 1957) the scope of application of the Convention shall, subject to the period of one year referred to in Article 6, continue to apply for that period. This situation also means that the civilian population of the country's settlements was under the control of the Soviet army as an occupying power and consequently came under the protection of the Convention. Of course, as long as the occupation actually existed, this protection was extended to the army manufacturers cooperating with the Soviet forces and carrying out joint actions with them. (For the sake of clarity, it is also worth noting here that the continued presence of Soviet troops in Hungary before 4 November 1956, based first on the peace treaty and then on the Warsaw Pact, does not yet constitute occupation under international law.)

By way of example, the two events which were the basis of the Biszku trial, the mass, willful killing by volley firing of the civilian population protesting peacefully during the demonstration in Salgótarján on 8 December 1956, and the mass atrocities, inhuman treatment and grievous bodily harm therefore

were considered as the so-called 'grave breaches' of Article 147 of the Geneva Convention (IV) and constituted a war crime. The perpetrator of this crime can be anyone, whether a soldier or a civilian, regardless of nationality. In connection with Salgótarján, three bodies of armed forces were later convicted after the regime change, while in the case of Martonvásár the liability of two specific persons arose (already at that time), they were directly responsible for the perpetration of 'grave breaches' under Article 147 of the Geneva Convention (IV).

In addition to the rules of international law, in Section 26 (3) a) of the current Hungarian Penal Code (Act C of 2012) is even stated in detail that the crimes defined in Chapter XIV of the Hungarian Penal Code, which includes war crimes, are not subject to the statute of limitation.

The United Nations Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (New York, 26 November 1968) promulgated by Legislative Decree No 1 of 1971 on 2 February 1971 may be an additional applicable legislation. The Article I of the Convention stipulates that no statutory limitation shall apply to the following crimes, irrespective of the date of their commission: a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims. Article II states that if any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Based on all the above, the liability of the representatives of the state authorities, who tolerated the commission of the so-called 'grave breaches' defined in Article 147 of the Geneva Convention (IV) shall not be subject to the statute of limitation. And for the sake of such an example, referring to the Biszku trial – according to the reasoning of its first instance judgment – even Béla Biszku, the Hungarian Minister for Home Affairs was in office between 28 February 1957 and 13 September 1961 was responsible for a felony of war crime committed by five counts of felony of harboring a criminal (three counts after the three bodies of armed forces in Salgótarján, and two counts after the two principals in Martonvásár), since he tolerated the criminal activity of those five people who had committed crimes against protected persons.

This is the legal reasoning on the basis of which the accountability of former party leaders could have been established both in accordance with domestic law and international law. Moreover, this is the basis on which, contrary to the decision of the Constitutional Court described above, legal liability may be (might have been) imposed, regardless of the fact that it could have been done in the framework of a plea bargain or traditional criminal proceedings.

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Decision of the Constitutional Court of 21 December 1993

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Act of 26 March 1993 on the suspension of limitation in respect of acts committed under the unjust regime of the Socialist Unity Party

International conventions
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