

Legal Consequences of Past Collective Wrongdoing after Communism

By András Sajó*

*“without courage, there cannot be truth,
and without truth there can be no other virtue”*

Sir Walter Scott

In these notes, I reflect on the possibilities of confronting the darkest chapters of East-Central European history, namely, genocide. This problem is closely related to the moral refoundation of society, law and politics. My concerns are primarily related to the role of law in the process, both descriptively, by trying to explain very contradictory developments in Hungary, and normatively, by arguing for a shame dictated legal policy.

A. A Reason for Shame

What should a society's proper moral attitude be towards genocide if its majority previously victimized a group within society? I argue that it is both morally correct and useful in practice if the majority (and the whole country) feels shame,¹ when discussing the problem in the context of the discrimination and extermination of Hungarian Jews during World War II. The Hungarian authorities were active participants in the Holocaust in Hungary. My proposition is that Hungarians and the Hungarian nation should feel ashamed for having participated in the persecution of Jews. This is a moral obligation of the political community.

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¹ National shame of this kind is also justified in cases where the acts of genocide were directed against groups in other countries. Such acts have specific legal implications. This paper will not discuss the specific problems of international (transboundary) genocide.

I take it as a fact that the Hungarian state was responsible, in the strictly legal sense, for the racist discrimination against, and the persecution and extermination of, the majority of Hungarian Jews. The death toll was roughly 600,000 in total. Beginning in 1920, the Hungarian parliament enacted a series of laws which restricted the rights of Jews. These laws were adopted by an overwhelming majority of members of parliament, without foreign pressure, and met with little public resistance or criticism. By 1941, Nuremberg type race laws were in place. In 1944, Jews were deported upon the technically lawful order of government officials acting within their jurisdiction and competence. (State authorities carrying out such orders often acted with excessive brutality.) Even the 1944 decisions to deport Jews to Germany for extermination and forced labour cannot be explained away by irresistible German pressure.² While the Jews were persecuted by their compatriots in violation of the prevailing and known norms of the twentieth century, István Nemeskürthy, a conservative historian, assumes that 80 percent of the population found the discrimination against the Jews to be “natural” in the 1940’s. Jews have witnessed little public or official systematic condemnation of this attitude. To find the community responsible for, or associated with, this genocide is different from *ex post* condemnation of murders. Announcing that what was done to Jews was outrageous is unsatisfactory. It must be made clear who committed this crime. However, as Istvan Bibó demonstrated, the Hungarian public reactions to the Holocaust remained at the level of the condemnation of antisemitism. The idea that the Hungarian people might be responsible or should assume responsibility was rejected as self-debasement. When an unofficial assembly of pastors asked the Jews for forgiveness in 1946, this was rejected with “very noticeable” irritation.³

I have argued elsewhere⁴ that there is a moral obligation to feel shame for the Holocaust, and that the Hungarians and the Hungarian public authorities should follow the dictates of such shame. The obligation is understood here as a kind of collective moral obligation, which is satisfied by institutional and collective action. Most moral theories posit the autonomy of the individual’s conscience, and I have no reason to consider them otherwise. In applying this approach, a community or

² There were additional killings after the Hungarian Arrow Cross Party came to power in the autumn of 1944. The pro-Nazi (Arrow Cross) government in Hungary was clearly a German puppet. But, in Budapest, where many of the murders occurred, the Arrow Cross government had at least some legality as well as broad discretion to act. It is fair to say that, during this period, many of the murders were committed under the colours of the Hungarian flag.

³ István Bibó, *Zsidókérdés Magyarországon 1944 után* (The Jewish Question in Hungary after 1944), in: *VÁLOGOTT TANULMÁNYOK* (Selected Writings) II. 624-625 (1986).

⁴ András Sajó, *Affordable Shame*, in: *THE PARADOXES OF UNINTENDED CONSEQUENCES* 163 (LORD DAHRENDORF ET AL., EDS., 2000).

group cannot be a moral entity and cannot be the subject of moral obligations.⁵ However, the moral obligation of the community means that all members of a community must have this obligation specifically because of their belonging to the community.

Members of the contemporary community (the citizenry), whose earlier members were and are exposed as being involved in both the discrimination and the genocide, should feel shame for the previous crimes of their forefathers. Otherwise, the community will seemingly identify itself with the earlier generation of murderers. Those who look at past genocidal actions as acts which expose a profoundly negative trait of a society do not need Holocaust victims and survivors to feel shame for living in that community. With the presence of Jews in the population, or with their ghosts in the minds of the morally sensible members of the community, the conditions of feeling shame are present. Exposure is perpetuated, and, thus, the precondition for shame is present. Clearly, it is possible that the majority continues to agree with the persecution; hence, there is no shame. The shameless society, in this case, is amoral.

Whereas Holocaust survivors are actual victims, the other contemporary Hungarian Jews are potential victims (though more likely for social exclusion than for genocide). Both groups still qualify to be persecuted under the original criteria. In their eyes, the 'others' (the nation, the society, the community), as a group, are historically exposed as the perpetrators of the crime. This perspective might be shared by large numbers of morally sensitive people. As long as the community does not feel shame, and, more importantly, does not express shame, both through the acts of its individual members and as a collective, the shameful conditions persist in the eyes of the potential victims. Expressions of shame may or should include begging for reconciliation and leniency through legislation; at a minimum, some symbolic compensation should be made to the victims, and spontaneous local action to restore and maintain abandoned Jewish cemeteries at the community's or the individual's expense.

The Soviet-dominated Eastern European states never had an opportunity for soul searching. It is interesting to note here that both the pre-Soviet ultra-conservative rejection of national responsibility and the dictates of communist power and ideology were against any serious public scrutiny of the genocidal past. In the Stalinist period, the non-indoctrinated presentation of contemporary history was prohibited, partly because the Communists used many Hungarian Nazis. The

⁵ There is a second preliminary objection that regards shame as a moral obligation stemming from the Holocaust. Is it meaningful to speak of shame as part of the collective consciousness?

democratic governments of France did the same. And, for about forty years of German and Austrian politics, revelations that former Nazi and SS members were working in high government positions came to the fore. Rakosi, the Stalinist ruler of Hungary, made remarks about a "guilty nation", but not for the sake of rendering justice. His interest was only in making the population even more frightened and submissive. This kind of handling of the past, in a mental tradition that used to glorify its past, resulted in an even firmer rejection of responsibility, or even a refusal to recognize that something wrong had happened to the Jews during the war. The public's need for historical justice was satisfied by the cheap slogan that the Hungarian people "have already atoned for their past and future." (This line is from the Hungarian National Anthem, written in the early nineteenth century, and, clearly, it is known by all Hungarians as the simplest truism.) This line exonerates Hungarians from all soul searching. It would be unfair to state that the majority of Hungarians were involved in the genocide; it is, however, fair to say what Istvan Bibó said in this context: that the Hungarian peasants (the majority of the population in 1944) were neither for nor against such "faraway things".⁶ This lack of condemnation itself amounts to moral fault and creates lasting moral obligation.

After 1989, antisemitism became accepted as one of many views, although openly racist political remarks seldom come from mainstream actors. Circumlocution remains the language of political antisemitism. Open racism would antagonize potential victims too much. The government avoids radicalism as it can easily spin out of control, or, would, at the very least, result in embarrassment for the government in the international arena. If antisemitism exists in Poland, it is directed against a non-existent community. In Hungary, anti-Jewish sentiment is palpable; yet it is denied that antisemitism exists as part of party politics, except within the fringe parties which lost badly at the 2002 elections. Nevertheless, the "Judenfrage" (a non-extermination version of antisemitism) *i.e.*, a policy of exclusion, remains a mobilizing factor in ordinary politics.

Until recently, the problem was characterized as a by-product of excessive Jewish sensitivity. In a more "conciliatory" tone, this is termed as the "understandable ultra-sensitivity of Jews". However, the accusation that Hungarian society is anti-Semitic is unfounded according to many commentators and political actors, and this is documented by public-opinion surveys (with less than 20 per cent of the population admitting anti-Jewish prejudice, though with a much higher incidence among young intellectuals). As a result, there is nothing to expose; hence, there is no place for shame. But the issue is not whether antisemitism exists or not. What

⁶ BIBÓ (note 3), 631.

we are talking about is shame. The issue, here, is the moral obligation of shame. The absence of shame reinforces anti-Jewish patterns (and racism in practice), especially where structured, traditional anti-Semitic prejudice exists. Fear of persecution may be reinforced without directly encouraging racism .

The absence of shame must be interpreted in the context of historical experience. It is not sufficient for the victims and potential victims to perceive that the majority of the population shows no sign of outrage when confronted with racism today. The growing visibility of the recurrent anti-Semitic atrocities in Hungary and the insufficiency of a collective reaction to such actions allow these attacks to proliferate. The lack of any firm collective and governmental condemnation of, and sanction against, racism allows antisemitism to become increasingly and openly admissible.

It should be admitted, however, that there have been positive developments recently. The commemoration of the 60th anniversary of the deportation resulted in the official recognition of Hungarian responsibility by all dignitaries and all the mainstream political parties' spokespersons gave moving speeches in which they admitted certain responsibility and recognized the importance of remembrance.

B. Justice Undone

Here, I would like to sketch a few legal developments which indicate that political law, although very much a chambermaid of politics, is perhaps even less responsive to considerations dictated by shame than politicians are. The alternative reading is that, notwithstanding the apparently honest position held by many members of the élite, they sense that it is still not acceptable to have legal action based on shame. It should be added that such action is highly problematical from the perspective of the rule of law and important fundamental rights (especially free speech and freedom of assembly and association) are at stake.

The post-war conditions of Hungary (the trauma of the war followed by communist rule) did not help law to face issues of responsibility and restoration. Even retaliation was carried out rather capriciously and against only a few. It is true that the 1945 legislation restored the civil rights of the Jews, but could not provide for reparation for loss of life, property, or suffering. The 1945-46 verdicts against Nazi perpetrators and war criminals were reached hastily, as acts of political justice. The court proceedings followed the worst traditions of Hungarian political justice as administered in the pre-1945 authoritarian regime. In the felony cases of the various Hungarian prime ministers, the presidents of the panels acted as if they were prosecutors, and the rights of the defence counsels were restricted (neither for good nor for pragmatic reasons). To the extent that legal retaliation was initiated by

the Soviet occupiers and their Hungarian Communist puppets, the entire administration of justice lost its sincerity and authenticity. In Hungary, as in most East European countries, public reflection on past crimes is not part of the discussions that shape national identity. Reference has already been made to the hasty and compromised nature of post-war justice. Jews were not fully compensated; their property was not restored. All this was secondary as most of them had been murdered, and the survivors lived on with lasting mental and physical suffering. Not only was this injustice not undone, but also, with the quick advent of communism, even the possibility of justice became illusory. History froze once again in lies. Generations grew up without understanding their intimate relationship to history. The latest generations may have learned only delusions of grandeur from the doctored pages of what is offered to them as history. History is perceived as a continuum of events sealed for good and is, therefore, devoid of relevant problems. Indifference to history is believed to be a pragmatic rational handling of the past. After all, as history (of all East European nations) is full of so many tragic victims, there is no other way to handle them except through oblivion.

In light of the above tradition, which refuses to consider responsibility, it is not surprising that, in most former communist states, there was no serious calling to account of the crimes committed under communism. Informers and spies cannot be held accountable when there are no clear expectations of morality and where it became impossible and irrelevant to differentiate between sinners and victims (although, paradoxically, the perversion did not go as far as to say that good and bad made no difference in the past or that these are completely meaningless categories.) Handling the problem in this way reinforced the tradition that even if there were misdeeds in the past, they are not to be related to perpetrators. The prevailing attitude suggested that Hungarians had suffered enough for everything, and since individual responsibility was not practiced, there were no patterns for introspection or for collective introspection. The issue of morality was not on the agenda at the time of the transition of power. Clearly, one cannot just blame the lack of a historically conditioned moral sensitivity on the absence of collective soul searching. Most people made their small immoral bargains with the oppressive regime, at least in Hungary. Bad consciousness did not help moral scrutiny. Once again, this made morality dubious as a category of collective consciousness, even frightening, nonsense. As there was no genuine self-respect, there was no sense of shame. The result is another round of indifference to the victims of history. The pattern repeated that of 1945. In Romania, some people simply butchered the dictator, and that was all that was done about responsibility for the past. But contrary to the post-war period, the transition offered genuine democratic opportunities. Discontent with the insufficient treatment of the past was openly voiced, and some people tried to engage in serious study of the past in order to create some kind of memory. One could no longer blame Soviet oppression for

suppressing memory. I mention these issues because the handling of antisemitism and the genocidal past is only part of a larger scheme that constitutes the collective memory of the peoples of post-communist countries. This larger scheme of selection and denial of past political injustice is decisive and not antisemitism or racism as such.

Antisemitism was, without question, strictly prohibited in communist times. A repetition of the persecution of Jews was firmly rejected. But the prohibition itself was again without authenticity, as far as public opinion was concerned, as there was no public opinion. The rejection of antisemitism was not a genuine act of the community's consciousness. Moreover, antisemitism was neither less nor more prohibited than any other independent view; hence, the recurrence of persecution was not authentically rejected. There was nothing in the system that would have recognized Jews in their Jewish capacity - quite the contrary.

A perverse pastime of the survivors and concerned citizens (including other potential victims) is to search in the present for analogies and indicators of the Holocaust. It is a perversion of our time that the term "concern" means perversion. It is perverse, too, that rationality leads to perversion. After all, in light of neurophysiology, this is a rational strategy, to the extent that memory is nothing but the search for consistency.⁷ If a person's concern is the repetition of the Holocaust, he or she should look for patterns of Holocaust preparation. The brain constructs consistency; thus, the occurrence of the events which led up to the Holocaust are construed as the actual preparation of a new holocaust. Anti-Semitic slogans were often chanted in 1944, and the authorities could not have cared less. If similar chants go unprosecuted, in the year 2000, to the mind (which construes consistency all the time) this means the repetition of the Holocaust. I am not arguing that the repetition of the Holocaust is a realistic assumption in the current Hungarian and international situation (although one cannot rule out lesser atrocities). What I am arguing, however, is that, given the history of the Holocaust, and the fact that it has not been treated properly, and given certain similarities between 1938 (the year before the First [anti] Jew Act)⁸ and our times at the level of visible public (community based) attitudes, the historically impregnated mind cannot disregard the similarities and the consequences.⁹ I am also arguing that one

⁷ Niklas Luhmann, *Law as a Social System*, 83 NORTHWESTERN UNIV. LAW REVIEW 136, 140 (1989).

⁸ Act XV of 1938 "on the more efficient safeguard of equilibrium in social and economic life".

⁹ BIBŐ (note 3), 632, was of the opinion that anti-Jewish mob sentiment, if left to itself might very easily turn into persecution and murder. "Such historical experience was built into the nerves of the Jews in the thirties."

could easily make such similarities disappear with public and governmental acts dictated by, and expressing shame.

It is against this background that one has to look at the recent history of the compensation to the Jews. Act XXXII of 1992 provided for compensation for unjust deprivation of life and liberty on political grounds, in principle, to all who suffered injustice under totalitarian regimes.¹⁰ The Act did not provide for compensation for deportation to Germany, although it did provide it for unlawful deprivation of liberty on other political grounds. The descendants of those who perished in connection with the above-mentioned deprivation were entitled to HUF 1,000,000 (Hungarian florins) in compensation. In practical terms, the Act also denied compensation to the Jews who had served in forced labour battalions on the Soviet front in the so-called non-combatant units between 1941 and 1944. The Hungarian Constitutional Court found these provisions discriminatory and, therefore, unconstitutional in 1995 (AB hat. 1/1995). The delay in the handling of the case kept the former victims in a state of renewed inferiority and humiliation. However, the Court did, at least, order that a new law be enacted in order to provide compensation for those who were discriminatorily disregarded by the 1992 Act.

In 1996, Parliament asked the Hungarian Constitutional Court (HCC) to provide a preliminary review with regard to a draft law which would have provided HUF 300,000 to the descendants of those deported to Germany as well as to those whose relatives perished in Soviet labour camps (usually prisoners of war). In an opinion written by C.J. Sólyom, the Court declared that there can be no discrimination among the various groups of the deceased victims, *although it is up to the legislation to determine the level of compensation, on the basis of the possibilities of the national economy*.¹¹ In other words, while racial discrimination is not permissible, it does not amount to impermissible distinction to provide a group that is distinct on the grounds of the previous race law with lesser compensation. (By American standards, this would mean that there is compelling state interest in budgetary considerations in matters of racial classification!) In practical terms, the higher

¹⁰ Earlier, the Act on partial compensation for loss of property was applicable only for the period beginning in 1949. The Constitutional Court ruled that this date is impermissible discrimination with regard to the victims of the previous totalitarian regimes and ordered the clock to be set back to 1939. Thus, Jews who lost their property during the race laws and had not been compensated became eligible. However, the Jewish victims received compensation vouchers later than other groups, and, consequently, could not participate in most of the 'land for voucher' transactions.

¹¹ 22/1996 AB hat. (VI. 25.). It would be unfair to accuse the Hungarian Constitutional Court of being too slow in these cases. They simply failed to act in accordance with the dictates of the social sensitivity of the matter. Furthermore, the HCC ruled twice that the special restoration provisions of the Paris Peace Treaty in favour of the victims of racism had to be implemented. Any speculation about special bias must, therefore, be ruled out.

compensation paid to certain groups of victims under the 1992 Act was not taken into consideration.

The coalition of socialists and free democrats did not react for two years. In 1998, the new centre right majority adopted a government-sponsored bill. The new scheme offered HUF 40,000 as compensation. In a new ruling (46/2000) of the HCC that took two years to be handed down (in December 2000), the Constitutional Court found the amount discriminatory, but only because the amount was less than the compensation for bodily injury that the 1992 provided for to the non-Jews. This implied that any compensation above HUF 50,000 (about 160 US Dollars) was constitutional. The centre right government did not enact any modification to the law, while the Socialists and Free Democrats who came to power in 2002 settled for HUF 400,000. This was granted in consultation with the representatives of the religious Jewish community. It took more than a year to effectuate the payments in cases that were declared to be clear cut and already fully settled between 1994 and 1998. Needless to say, every instance of this process communicated something negative about their fundamental claim of existence to the survivors.

C. A Shame Dictated Policy

After the collapse of communism, a widely shared sentiment of justice dictated that the perpetrators of totalitarian crimes be punished and that the victims be compensated. After all, the delegitimation of communism required proof of the injustice of communism, and the victims of communism fit into this picture well. But this public interest - as the lack of any serious compensation in Russia proves - faded quickly. For a number of political and rule of law reasons, there was neither revenge against, nor serious calling to account of the perpetrators of crime and injustice. Compensation for the loss of property confiscated by communists was, at best, partial (partly for genuine economic reasons, and partly because it would have hampered the stealing of state assets that was the main political interest of the day). However, in order to be faithful to its justice dictated political promises, the first freely elected government, a conservative one, offered some financial compensation for the deprivation of life and liberty under communism.

The above is not an assertion that shame in the current Hungarian situation would be sufficient to resolve the injustice of the past genocide and the current racism. Both the discriminatory attempts to grant compensation and the current rampant racism require special governmental and societal action. Hungarian legislation, supported by the Constitutional Court, concluded that it was sufficient to pay about 98 percent less to the relatives of murdered Jews than to the relatives of any other category of murdered Hungarians. This is even more outrageous, as Jews were murdered with the active complicity of the Hungarian authorities, while most

of the other victims died in Russian camps as prisoners of war. Not only is shame not working here, but the solution itself is a source of additional national shame.

This lack of sensitivity is even more blatant as it violates not only the justice-based rights of the victims but equality, too. The discrimination occurred exactly on the same (racial) basis that formed the grounds for the primary injustice that the legal rules allegedly intended to rectify. Once again, the equal dignity of citizens was disregarded. Adding insult to injury, the group that fared best was closely related to the people who were clearly the “others” during the war. While non-Jews served in the army, Jews were not allowed to serve in the army, except in forced-labour battalions. Jews were killed in minefields or by Hungarian soldiers, while Hungarian soldiers died later, in the Soviet prisoner of war camps. The descendants of the first group received 2 percent of what the descendants of the second received. It is difficult to resist the drift of continuity where the freely elected representatives of the nation repeat an injustice by casting their votes for discrimination. Shame would have been able to break this continuity.

In the absence of condemnation, antisemitism is normalized. Week after week, year after year, the mob praises *pogroms* at soccer games. *The Protocols of the Elders of Zion* and other officially banned publications are on the shelves of bookstores. Jews and non-Jews request state intervention, so far, mainly in vain. Requests for special official concern are met with surprise and with little understanding. As to breaking the image of continuity, the deputy prime minister stated that it was time to discuss the *Judenfrage*, in order to “clarify the situation of the Jews”. He was incapable of grasping what was wrong with his statement even after repeated criticism. Ironically, the leader of the extreme-right (pseudo-opposition) parliamentary faction claimed that allegations of antisemitism in Hungary were simply part of a campaign to discredit Hungary abroad. When a pastor (a former member of parliament) who proposed in writing that Hungarians should exclude Jews from the nation as a measure of self-protection was acquitted in 2003, the socialist government once again tried to criminalize hate speech (racist group libel). The law was enacted by a slim majority, but about half of the coalition partners voted against it on the grounds of free speech. The Constitutional Court subsequently ruled that the law was unconstitutional. This was and is seen as another instance of a lack of genuine willingness to take action against racism, and, given the history of the compensation legislation, the reactions from the formerly persecuted persons is understandable. However, the rejection of such measures on constitutional grounds indicates how difficult it is in strictly constitutional terms to accommodate the otherwise legitimate concerns of the victims and even the shame of the majority.

It would be unfair to accuse the Hungarian Constitutional Court of not being aware of the special sensitivities of the previously oppressed and persecuted minorities:

“In addition to the most extreme of the harmful consequences of incitement to hatred, demonstrated by current as well as historical experiences, these everyday dangers which accompany the unbridled expressions of ideas and thoughts capable of arousing hatred must also be borne in mind. These are the occurrences which prevent certain communities from living in harmony with other groups.”¹²

The decision expressly refers to the consequences of racial supremacy and hatred and finds that the “everyday dangers which accompany the unbridled expressions of ideas and thoughts capable of arousing hatred must also be borne in mind.” The Hungarian Constitutional Court refers to the cumulative consequences of hate speech that “weaken the prospect of creating a society based on a pluralist value system”. These considerations justify the ban on incitement to hatred, albeit narrowly construed, but not even the cumulative effects would be sufficient to criminalize denigratory expressions that are directed against racial and other groups (group defamation). In this regard, the Hungarian Constitutional Court only considered the impact of the defamatory hate speech on public order and found that its impact is remote.

The Hungarian Constitutional Court was well aware of the tensions that emerged in the political transition, which are undoubtedly exacerbated if people can give vent to their hatred, enmity and contempt of certain groups in public with impunity.

But the unique historical circumstances give rise to another effect. Only through self-cleansing may a political culture and a soundly reflexive public opinion emerge [from authoritarianism].

Hence, the strategic conclusion that bars the criminalization of group libel: “The denigrative language must be answered by criticism”. The Hungarian Constitutional Court chose to apply the speech norms of an already tolerant open society. In a way, such speech liberalism did survive (at least in the hate speech area). Whether it contributed to freedom of communication and enabled the formation of a democratic discourse space, or whether it enabled the uninhibited growth of hate speech and social intimidation, is a different matter; and even if it did so, there might be compelling pragmatic considerations and values in favour of the Court’s choice. Our concern is different here: did the liberal uninhibited discourse space assumption survive, and if so, in what form and at what compromises?

¹² (30/1992) AB hat.

In order to understand the social relevance of the Hungarian Constitutional Court's liberal ruling¹³ which made the criminalization of group libel unlikely, and imposed, at least in its first decision on speech, very serious limits upon restricting the spread of Nazi and racist ideologies, one must look to the social consequence of the legal ruling. Animated by the Court's interpretation of the "clear and present danger", the ordinary courts concluded that it remains beyond the reach of the criminal law if one describes Jews as conspiring against the Hungarian nation. Likewise, there is no legal reaction when hundreds chant that "the trains are ready for Auschwitz" at football matches. Given Hungary's troubled past, and given strong racist prejudice among a sizeable minority and repeated incidents – the enactment of Nuremberg type race laws and the involvement of the authorities of the Hungarian government in the deportation of the Jews during World War Two – the acquittals and failure to prosecute causes public outrage among some.

It seems to me that a committed constitutionalist has to concede that there is remarkable liberal strength in the argument of the Hungarian Constitutional Court (notwithstanding serious technical flaws). Once again, however, I take the view that standard constitutionalist arguments should accommodate considerations dictated by shame, and that a very narrow exception could have been granted if the libel is directed against the members of historically persecuted groups (Roma and Jews in Hungary). The Hungarian authorities (as any post-genocide government) should be reminded of what the German Supreme Court wrote about duties which are recognized with the help of shame:

"The historical fact itself, that human beings were singled out according to the criteria of the so-called 'Nuremberg laws' and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship *vis-à-vis* their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination, and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies *vis-à-vis* each individual the personal worth of Jewish persons. For

¹³ The decision was celebrated as a liberal one, and the supporters of the precedent came exclusively from among the hard-core Hungarian liberals who were accused of dogmatism, which does not reflect Hungarian social and historical realities.

the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him."¹⁴

The intellectually, or at least morally troubling problem remains: why are East European countries still reluctant to take the above position?

In the light of the above tradition which refuses to accept this responsibility, it is not surprising that, in most of the former communist states, there has been no serious calling to account for the crimes committed under communism. Informers and spies cannot be held accountable where there are no clear expectations of morality and where it became impossible and irrelevant to differentiate between sinners and victims (although, paradoxically, the perversion did not go as far as to say that good and bad made no difference in the past, or that these are completely meaningless categories.) Handling the problem in this way reinforced the tradition that, even if there have been crimes in the past, they are not to be related to perpetrators. The prevailing attitude suggested that Hungarians had suffered enough for everything, and since individual responsibility was not practiced, there were no patterns for either individual introspection or for collective introspection. The issue of morality was not on the agenda at the time of the transition of power. Clearly, one cannot just blame the lack of a historically conditioned moral sensitivity on the absence of collective soul-searching. Most people made their small immoral bargains with the oppressive regime, at least in Hungary. Bad consciousness did not help moral scrutiny. Once again, this made morality dubious, even frightening, nonsense, as a category of collective consciousness. As there was no genuine self-respect, there was no sense of shame. And the result of this is another round of indifference to the victims of history. The pattern repeated that of 1945. In Romania, some people simply butchered the dictator, and that was all that was done about responsibility for the past. But, contrary to the post-war period, the transition offered genuine democratic opportunities. Discontent with the insufficient treatment of the past was openly voiced, and some people tried to engage in a serious study of the past in order to create some kind of memory. One could no longer blame Soviet oppression for suppressing memory. Once the oppressors left us, we began our first act of liberty by oppressing ourselves.

¹⁴ The opinion of the *Bundesgerichtshof* is quoted in full agreement by the *Bundesverfassungsgerichtshof* in the *Holocaust Denial Case*, 90 *BverfGE* 241 (1994). Quoted after DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2nd ed., 1997).