

## **Transitional Justice: The Polish Example, the Case of Lustration**

Marek Safjan\*

### **I. Dilemmas of transitional justice**

#### **A. Preliminary remarks**

Can we actually justify the qualification of transitional justice as a specific phenomenon existing at a special time in the modern history in Europe,<sup>1</sup> i.e. just after the collapse of the communist system? Is it true that the differences between the regular judicial system in the countries with a stable democratic system, and the post-communist states can justify naming this period as one of ‘transitional justice’? The notion of transitional justice has a negative connotation: we immediately think about something exceptional, different from the normal justice system, something extraordinary or provisional. The adjectives relating to this notion, ‘exceptional’ and ‘extraordinary’, however do not coexist well with the notion of justice per se. Is transitional justice really transitional, ‘condemned’ to be forgotten in the near future, and soon to be exposed as a relic of totalitarianism; as a special object which served to purify the new democracy of its Communist contaminants during this period?

To answer this question we should determine the criterion by which such qualification is made. Theoretically, we can suggest some ‘determinants’ of the transitional jurisprudence.

Firstly, we can draw attention to the cases initiated before the constitutional courts which were indicative of the transformation process. Undoubtedly such cases were of a completely different nature to those confronted by the justice system prior to transformation. They all involved important issues raised by the ‘system in transformation’, above all by the

---

\* Marek Safjan is professor of private law at Warsaw University. He was the president of Polish Constitutional Tribunal between 1997-2006. At present he is Fernand Braudel Fellow at European University Institute.

<sup>1</sup> See, generally, **W. SADURSKI**, *Constitutional Justice. East and West: Democratic Legitimacy and Constitutional Courts in Post-communist Europe in Comparative Perspective*, Kluwer, 2003; **W. SADURSKI**, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Springer 2005; **M. KRYGIER and A. CZARNOTA**, *The Rule of Law after Communism: Problems and Prospects in East- Central Europe*, Dartmouth, Ashgate, 1999.

new legal constitutional and political landscape, dramatic economic reforms and also by the need for a new evaluation of the totalitarian past (the so-called ‘past cases’).

Secondly, we may attempt to distinguish a new methodology applied during the transitional process by the justice system in order to resolve matters brought before the constitutional courts. To be sure, constitutional methodology always differs from that used by ordinary courts. However, at that time there were many elements in the jurisprudence which reflected an altogether new approach to constitutional issues. In the first place, we should note the crucial role played by the general clauses of the constitutional regulations, such as the principle of the democratic state ruled by law, the protection of human dignity, the principle of proportionality, social justice and equal treatment, *etc.* However, we cannot deny that the general clauses play a significant role in all constitutional jurisprudence,<sup>2</sup> and it is insufficient to stress the importance of basic principles to differentiate transitional justice from the regular justice system. Nevertheless, it seems that a deep difference exists in the interpretative method chosen by new constitutional courts at the time. It was directly determined by the first and most important purpose of transitional justice, namely, to boost the emerging democracy in order to enable its development. In short, we can say that the objective was to create a new axiology of the constitutional system.

The legal constitutional culture had to be established in a vacuum; i.e. in the absence of a written constitution,<sup>3</sup> without stable constitutional jurisprudence deeply enrooted in the traditions of the legal system, without clear and precisely formulated principles of the democratic system and, last but not least, without a transparent hierarchy of constitutional values. However, the existence of a vacuum in a ‘volcanic environment’ is not possible. If we compare the scope and depth of reforms adopted by a new democracy to the eruption of a volcano, we can say that this eruption created a new environment and a new atmosphere. Hence, a democratic system after the collapse of a communist system requires a new legal axiology; restoration of the adequate relations between the state and the individual, a dramatic breakthrough in legal thinking, a localisation of the fundamental constitutional rights in the

---

<sup>2</sup> D.P. KOMMERS, “Germany: Balancing Rights and Duties”, in J. GOLDSWORTHY, *Interpreting Constitution: A Comparative Study*, Oxford, Oxford University Press, 2004, pp. 161-215; A. STONE SWEET, *Governing with Judges: Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, pp. 31-60.

<sup>3</sup> Case of Poland, where the new Constitution was adopted in 1997; until that time, during the most important stage of transformation, Poland kept the 1952 Constitution (partially amended), the same one which was imposed on Poland by the Stalinist regime.

centre of the legal system. The search for that new axiology was the dominant factor guiding the evolution of the constitutional system.

It is worth mentioning that an important element of the new methodology was an increase in the significance of the principle of proportionality due to the high degree of conflicting values and principles (being at the same level of the hierarchy) in constitutional matters. At the same time, a great battle between the old concept of law belonging to the former system and the new democratic values forced the establishment of a new hierarchy of the constitutional principles. Transitional justice was similar to Dworkin's experimental laboratory "in the field of constitutional thinking".

### **B. Positivism v. constitutional axiology**

One can say that the establishment of the new methodology of constitutional jurisprudence has been manifested by the permanent clash between the positivistic dogma of legal thinking on the one hand, and on the other hand, a very open, functional, purposive interpretation of the constitution adopted by the constitutional courts.<sup>4</sup>

At the outset of the transformation process there were theoretically two possible way in which a new constitutional jurisprudence could develop:

- A narrow approach, limited to the necessary elements of the settlements based on literal, semantic and logical interpretation of constitutional norms;
- An approach characterised by an openness to active and creative interpretation, which itself became an autonomic (independent) factor of evolution of the legal system in post-communist countries.

The first approach would be directed towards slow evolution of the constitutional system through the legislative initiatives undertaken by the lawmaker (the parliament). The burden and the liability for the quality of new democracy would be located in the political

---

<sup>4</sup> I apply a precise notion, explained fully by **A. BARAK**, *Purposive Interpretation in Law*, Princeton, Princeton University Press, 2005.

bodies having the direct democratic legitimacy to govern. The self-restraint of the justice system could ensure the full predictability of the jurisprudence and even decrease the probability of tensions between the parliament and the justice system.

The second approach would give a real chance for the acceleration and transformation of the new democracy by stimulating the process of the replacement of the former legal communist system axiology with new democratic values.

In the majority of post-communist states the second approach was chosen in jurisprudential practice through constitutional justice.<sup>5</sup> In fact, jurisprudence became the independent source of new normative principles and values (which had not previously existed in the legal system), injected into the system by creative and axiologically directed judgments.<sup>6</sup> To illustrate, such basic principles might include: the right to a fair trial, dignity of each human person, the right to fair legislation (consisting of a number of different elements belonging to the ‘interior morality of law’ conforming to Fuller’s approach,<sup>7</sup> such as the legal security of citizens<sup>8</sup> or the interdiction of the retroactivity of laws), the right to privacy, *etc.*

However, neither of these different approaches was risk-free. Which method was ultimately more effective for the development of future democratic mechanisms? The answer is by no means obvious and surely controversial.

---

<sup>5</sup> P. SELZNICK, “Legal Cultures and the Rule of Law”, in *The Rule of Law after Communism*, *supra* note 1; L. MORAWSKI, “Positivist or Non Positivist Rule of Law: Polish Experience of General Dilemma”, in *id.*, at pp. 39-55.

<sup>6</sup> P. WINCZOREK, “Axiological Foundations of the Polish Constitution”, in M. WYRZYKOWSKI, *Constitutional Essays*, Varsovie, 1999, pp. 59-71.

<sup>7</sup> L.L. FULLER, *The Morality of Law*, New Haven, Yale University Press, 1977.

<sup>8</sup> Since the beginning of 1990, the principle providing that the state has to ensure necessary protection for the legal security of citizens has been elaborated and repeated in many Polish constitutional judgments. That laws created by parliament should be predictable (especially in tax law) has been reiterated many times by the Constitutional tribunal. And the interest of citizens involving their justified expectations on the stability of tax – regulations cannot be threatened by sudden dramatic changes in legislation, especially if they made strategic investment decisions on the basis of existing laws. See, e.g., **Polish Constitutional Tribunal**, *Tax Amnesty and Proprietary Declarations*, 20 Nov. 2002, K 41/02.

### **C. Destructive or constructive? Effects of the new approach**

What are the theoretically possible ‘destructive effects’ of the creative approach of the jurisprudence and activism of the constitutional courts?

The first and most important destructive effect is the existence of a substantial risk of increasing the arbitrariness of judges due to the role played by the both vague and broad categories of normative constitutional notions such as ‘justice’, the ‘rule of law’, ‘human dignity’, *etc.* They can become the autonomous, unpredictable factors of the constitutional jurisprudence subordinated to the subjective interpretation of the judges.<sup>9</sup>

The second possible effect could be theoretically manifested by the erosion of the necessary balance between the justice system and the other segments of state power. The government of the judges could become an increasingly realistic vision and could decrease the importance of the democratically legitimated bodies.<sup>10</sup> The court would replace the lawmaker in the creation of laws and would ultimately be transformed from the ‘negative lawmaker’ into ‘the positive lawmaker’. The possible outcomes of infringements of the basic principle of separation of powers could be easily identified and among them we can mention:

- Inevitable tensions between the court and the parliament;
- The hierarchy and the internal order of the sources of law may be broken;
- The impact of politics becomes stronger and results in a decrease in public confidence in the court.

What are the constructive effects of constitutional activism?

---

<sup>9</sup> See, on the limits of the judicial discretion, the essays published in **D. DYZENHAUS**, *Recrafting the Rule of Law: The Limits of Legal order*, Oxford, Portland; **A. HUTCHINSON**, *The Rule of Law Revisted: Democracy and the Courts*, pp. 196-227; **O. WIKLUND**, *Judicial Discretion in European Perspective*, Kluwer, 2003; **S. B.BURBANK et B. FRIEDMAN**, *Judicial Independence at the Crossroads: An interdisciplinary Approach*, Thousands Oaks, 2002.

<sup>10</sup> **A. STONE SWEET**, *Governing with Judges: Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, pp. 31-60.

Only creative jurisprudence could build a new legal constitutional culture and change the attitudes and the mentality of the people. From a historical perspective it would be difficult to overestimate the significance of that factor for the constitutional environment.

The second positive or constructive element which has to be taken into consideration is linked directly to the very essence of constitutional review. Activism of constitutional jurisprudence would allow faster framing of the arbitrariness of the legislative process and, as a result, restoration of the importance and the sense of the rule of law. It stimulated positively the evolution of the attitudes of people and their respect for the principle of the division of power. After the collapse of communism both ordinary citizens and members of the political elite and lawyers identified democracy as the rule of a democratically elected majority. From this perspective the predomination status among all state institutions belonged to the parliament as the institution 'embodying the will of the nation' and being empowered with unlimited prerogatives. Finally, that characteristic was inscribed into the nature of the system. Hence, the people found it difficult to adhere to the new requirements and were unable to understand the subtlety of the democratic state. The strong impulse coming from the active constitutional jurisprudence was indispensable in challenging those attitudes and aiding in the elimination of the former schema of legal thinking.<sup>11</sup>

Finally, the activism of the constitutional court could raise awareness of the public on some crucial issues and strengthen the pressure on the political structure to speedily reform the new system for the better.

## **II. Lustration or 'vetting' as the most emotive topic of transitional justice**

### **A. Preliminary remarks**

The crucial and the most dramatic cases of transitional justice concerned the communist past.<sup>12</sup> A new democracy needed not only to build a completely new economic

---

<sup>11</sup> A good example is the judgment on *Investigative Committee of Parliament to Examine Decisions Concerning Capital and Ownership Transformation in the Banking Sector*, 22 Sept. 2006, K4/06, *Monitor Polski*, No 66, item 680; this decision is a sort of 'constitutional lesson' on the principle of division of power.

<sup>12</sup> A. CZARNOTA and P. HOFMANSKI, "Can We Do Justice to the Past", in M. KRYGIER and A. CZARNOTA, *The Rule of Law after Communism*, Ashgate, 1999, pp. 197-212; A. KANIOWSKI, "Lustration and Decommunisation: Ethical and Theoretical Debates", in *id.*, pp. 213-248; M.

space and to restore the adequate place of property rights,<sup>13</sup> (by a rational system of re-privatisation<sup>14</sup> or privatisation) and for the market economy which required the establishment of new legal and market instruments, but had also to resolve dramatic conflicts which had their roots in the oppressive totalitarian system of the past. The nature of the conflicts was strongly differentiated: some concerned the responsibility of former functionaries of the communist state<sup>15</sup> (including the judges who issued the oppressive decisions under martial law),<sup>16</sup> others required an answer to the general question of the status and possible liability of the thousands of people who were closely engaged in supporting the communist ideology and the activities of the communist state (such as the academics, administrative public servants, journalists and the members of communist party structure). The crucial issue was whether democratic standards could be applied as adequate instruments in evaluating the reality of the public space subordinated under communism to a completely different philosophy of public life from the one which is typical for a normal democratic country. This issue also had a legal dimension, namely the extremely complex problem of retroactivity. It has to be recalled that the communist state authorised by its legal system the use of oppressive and even criminal means. However, it is not evident, whether (and eventually to what extent) we can apply our democratic legal standards to assess the totalitarian past. To answer the question we should make the difficult choice between two different values. The first of them expresses the consequent respect for the maxim *lex retro non agit* inscribed into rational legal thinking in the European tradition. The second one is based on the general idea of justice requiring

---

**WYRZYKOWSKI**, “Legal Aspects of Settling Accounts with the Past”, in *Constitutional Essays*, Varsovie, 1999, pp. 351-367; **W. SADURSKI**, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*, Springer, 2005, pp. 223-263.

<sup>13</sup> It is interesting that during the communist period no constitutional guarantees were provided by the constitutional act dated 1952. The state promised only the protection of the so-called personal property (that is, only the items serving personal needs and not those for economic-commercial or industrial activity). The legal structure of property was built on the medieval model (hierarchy of the different models of the property as well in the protection and in the substance of the subjective right). At the summit of this specific construction was state ownership, in the following order: so-called ‘social’ ownership belonging to the socialist organisations; personal ownership; individual ownership (individual economic activity-the farmers, the handcrafts, *etc.*); and, in the last place, the property only tolerated by the communist state, the capitalist ownership.

<sup>14</sup> The debates on re-privatisation began in all post-communist countries just after the collapse of communism. In some countries the issues were resolved through the legislative way and the parliaments adopted the regulations establishing the subject and the scale of re-privatisation (*e.g.*, Hungary, Czech Republic, Bulgaria, Slovakia). In other countries, such as Poland, the issue has been left to be resolved by the constitutional justice, but it refused to do it [see, *e.g.*, a famous procedural decision of the **Polish Constitutional Tribunal**, *Inadmissibility to Review the Constitutionality of Rural Land Reform 1944*, 28 Nov. 2001, SK5/01]. Of course, the kind of policy chosen by the post-communist state was not determined by the rational public debate and the conscious choice made by the political elite. They were conditioned by the lack of consensus and endless disputes about it.

<sup>15</sup> **M. ŁOŚ** and **M. ZYBERTOWICZ**, “State Crime in Communist and Post-Communist Poland”, in *The Rule of Law, o.c.*, pp. 261 -277.

<sup>16</sup> Martial law was a great challenge for the judges. The best description of the attitudes of judges in this period presents the book of **A. STRZEMBOSZ** and **M. STANOWSKA**, *Sędziowie czasu próby*, Warsaw, 2005.

consequent elimination and penalisation of the “evident evil” committed by people even by these who committed crimes authorized by the law. These questions directly reflect the famous Gustav Radbruch dilemmas on the legality of the laws formally adopted by state bodies but at the same time violating the minimal necessary axiological standards of the law.<sup>17</sup>

There is no doubt that the essence of the conflicts concerning the totalitarian past has been represented by the so-called lustration cases initiated before the Constitutional Court. For these reasons, it is worth focusing further reflections on this topic and trying to identify where opposing stakes and values were located.

### **B. Contexts and facts**

Many thousands of people cooperated with the security services of the communist state. Mostly threatened were those people who belonged to the different categories of political dissidents. The security service concentrated its activity especially in this milieu, using different methods such as: invigilation and blackmail to induce cooperation of intellectuals, artists and scientists (the culture elite of the countries). Categories of the secret collaborators (TW) were strongly differentiated by the motives and degrees of culpability. Among them the following groups could be identified:

- a) those supporters convinced by the communist regime;
- b) cynical individuals, having only pecuniary interests;
- c) ‘collapsing’ or ‘broken’ dissidents, forced to cooperate through blackmail;
- d) ‘players’ who tried to balance the negative and positive effects of cooperation;<sup>18</sup>

---

<sup>17</sup> R. ALEXY, “A Defence of Radbruch’s Formula”, in *Recrafting the Rule of Law: The limits of Legal Order*, Oxford, Oxford University Press, 1991, pp. 15-40.

<sup>18</sup> They accepted to do something as a ‘lesser evil’ for exchange and to receive something of ‘greater profit’ on the level of personal and professional or even public interest (e.g., a scientist working on an important topic received an offer from the state to be sent to a Western university in exchange for some services for the security service; thanks to such a ‘transaction’, he received the opportunity to complete his important scientific work). Thanks to such ‘transactions’, Polish science never lost its links with the Western scientific milieu and Polish society was better prepared than the other post-communist societies for the contestation of the communist system. Similar situations concerned great artists or famous writers; among them Ryszard Kapuscinski who,



e) ‘apparent’ agents, who formally accepted the cooperation but practically never committed wrongs against others;<sup>19</sup>

f) ‘restored’ dissidents: the persons who changed their minds and, after few or even many years of cooperation, understood the nature of the totalitarian regime, rejected cooperation and sometimes fought against communism;

g) naïve or inexperienced persons who provided a great deal and sometimes important information acquired during their professional activity, but who ignored the identity of their interlocutors and of the final beneficiaries of the delivered information.

There are two additional but essential elements which can complement this description well. First, there is the evident illegality of the activity of the communist state organs, which collected the information on the ordinary citizens and who created great databases comprising thousands of secret files on a large part of civil society. The second factor is the partial disintegration and destruction of the security services files, carried out just after the collapse of communism. As a result, the long and complex procedure of recreating such documents is necessary. It can happen that it will never be possible to uncover the truth about the role and conduct of persons qualified as ‘TW’ in the past.

### **C. Legislative context**

The politicians in all post-communist countries tried to find the solution to this matter by specific regulations.<sup>20</sup> The principle means was a law adopted by the parliament shortly after the collapse of the communist regime (*e.g.*, Germany, Czechoslovakia, Hungary; the

---

according to recently published documents, signed such commitment to cooperation with the security services. Only very few material effects (in the form of reports written by him during his trips round the world) have been presented as the proof of such cooperation. The question is (not coming from a legal perspective but from an ethical, philosophical, political and sociological perspective) whether such choices were subjectively and objectively justified or not? What would be better for the society in this time: small scale cooperation for the sake of creative artistic or scientific development or refusing, on principle, the opportunity for development?

<sup>19</sup> Among them, there were the persons who signed formally the documents promising the cooperation but never actually cooperated.

<sup>20</sup> **W. SADURSKI**, *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*, Dordrecht, Springer, 2005, pp. 223-270.

Polish situation was exceptional because the first law on lustration was adopted in 1997).<sup>21</sup> There were different models of the lustration procedure introduced by such regulations ranging from wide access to secret files, ensured for everyone in Czechoslovakia, through to the balanced model in Germany and to the relatively narrow lustration model adopted in Hungary (limited to the most important public functionaries).

In Poland, we should differentiate between two approaches to the lustration procedures taken by parliament.

The first of them was represented by the bill adopted by parliament in 1997 which adopted a relatively narrow model of lustration involving the most important state employees (deputies, ministers, judges, ambassadors, *etc.*). The law guaranteed judicial review of each accusation (based on the so-called 'lustration lie') introduced by the specific public prosecutor (public interest ombudsman). The law also gave limited access to the files, in practice allowed only to victims, and later -after some amendments in 2001- also to journalists, scientists and finally even to former secret service collaborators (though only to their own personal data). The judicial procedures were lengthy and in many cases the court verified negatively the accusations made on the basis of the documents registered by the communist secret service.

The second approach took place in 2006<sup>22</sup> when the new parliamentary majority created by the right parties (above all, *Law and Justice*), which came to the election as the only 'non-communist party', proclaimed the urgent need of wide and effective lustration. The main element of the procedure was the large scale of lustration which involved not only the superior functionaries of the state, but also the middle level of the administrative public servants and even the private sector employees (academics, journalists, barristers, as well as legal and tax counsellors, members of the boards of state companies). Another characteristic of the new law was the large public access (guaranteed to everyone) to the secret files including data about present and former superior public functionaries. Access to that

---

<sup>21</sup> Ustawa z 11 kwietnia 1997 o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne, Dz.U.1997, No 42, poz. 428 ze zm [**Lustration Act on the Disclosure by Persons Holding Public Office of Work, Service or Cooperation with the State Security Services during the Years 1944-1990**, 11 Apr. 1997].

<sup>22</sup> Ustawa z 18 X 2006 o ujawnieniu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz.U.No 218, poz.1592 ze zm [**Lustration Act on Disclosure of Information on Documents of Security Service Organs Collected during the period 1944-1990 or on the Content of these Documents**, 2006].

information was additionally ensured by the publication made by the state institution (the institute of national remembrance) of official lists with the names of people who have been registered by security services (including the names of people qualified as so called “non-personal sources of information”). The people who did not accept to submit the “lustration declaration” and those who lied (or hid the fact of their cooperation) were threatened with serious administrative penalties including the loss of the occupied posts for 10 years. The result could be the termination of professional activity of journalists (who could lose the right to publish) or of the scientists (who could lose the right to teach and carry out research for a lengthy period of time).

#### **D. Constitutional values: The battle of principles**

No doubt, in such a specific matter as lustration, two opposite sides can present serious arguments based directly on constitutional values and principles. The lustration cases are, for these reasons, useful when studying the constitutional methodology and interpretation. It is also especially encouraging for the analysis of the crucial Dworkinian question of the hierarchy of principles.<sup>23</sup>

##### **1. Constitutional arguments for lustration**

Lustration law is one of the instruments used by the post-communist society to ‘re-conquer’ its past. Having a right to the past; a right to the knowledge of one’s own identity through the historical process is an element of transparency of public space and the essential moral condition for healthy public awareness. Without the truth about the past, even comprising the dramatic and sometimes very uncomfortable ‘stories’ of the conduct of well-known figures, the state and the nation become totally helpless in the face of the real threat of a repetition of that history. One can mention some important constitutional principles which support such a position.

In the first place, we should indicate the principle of transparency of public life and the right of each citizen to access the information on state activity. Both guarantees are provided

---

<sup>23</sup> R.M. DWORKIN, *A Matter of Principles*, Oxford, Oxford University Press, 1986; *id.*, *Taking Rights Seriously*, London, Duckworth, 1977. We can even say that lustration law is the best place for the activity of metaphoric judge Hercules (his reasoning, interpretations and means of argumentation).

by the constitutional regulations (in all post-communist countries)<sup>24</sup> and by the European Convention of Human Rights (especially, Article 10). The documents collected by the communist authorities are part of the public archive and all citizens (not only the victims) should profit from the possibility of having open access to such archives.

In the second place, we can mention the freedom of historical research which should not be limited by restrictions imposed by the law. Freedom of scientific research is directly expressed in the Constitution.<sup>25</sup>

In the third place is state security. No doubt, the former communist agents are potentially dangerous for the security of a new democratic state, especially in some crucial arenas of the state policy. Protection of public order and state security are values indicated directly or at least indirectly in constitutional texts.<sup>26</sup>

The fourth constitutional reason is the requirement of ‘justice’ as a whole.<sup>27</sup> It should be accomplished especially with regard to the victims of communist oppressions. Justice requires and is based on truth.

## **2. Constitutional arguments against lustration**

The right to privacy is protected expressly by all new constitutional regulations and by international treaties.<sup>28</sup> Disclosure of the secret service files violates the privacy which guarantees the individual a right to freely dispose of the information on his past, including that concerning for example family matters, sexual life, alcohol or drug addiction.

---

<sup>24</sup> See, e.g., **Polish Constitution**, Article 61; “A citizen shall have the right to obtain information on the activities of organs of public authority”.

<sup>25</sup> See, e.g., **Polish Constitution**, Article 73; “The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone”.

<sup>26</sup> In Poland, ‘state security’ is applied as one of the criteria and the point of reference for decisions concerning justification of limitation of the fundamental rights; see Article 31 § 3 of the Constitution.

<sup>27</sup> In the Polish Constitution, one of the most important principles consists of Article 2, which provides that “the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”.

<sup>28</sup> See, e.g., **Polish Constitution**, Article 47; “Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decision about his personal life”; see also **M. SAFJAN**, “The Right to Protection of Personal Privacy and Autonomy in the Case Law of the Polish Constitutional Tribunal”, in **L. WILDHABER**, *Human Rights, Democracy and the Rule of Law*, Nomos, 2007, pp. 693-708.

Data banks created by the public authorities can be allowed only if the law permits expressly the collection of such personal data (the so-called right to informational autonomy is inscribed in the modern constitutional regulations).<sup>29</sup> However, the secret service files have been created illegally and violate even the laws which were in force during the communist era. Hence, everyone can ask for the destruction of all files comprising the illegally collected information.

The truth ‘decoded’ from the secret files is not the real truth (the files were frequently falsified, partially destroyed and created with the use of blackmail practices against the victims). Public disclosure of the registers of the secret service can violate the presumption of innocence and can reverse the burden of proof ( everyone who is included in the register has to present proof of his innocence (the European tradition requires that guilt be proven by the accuser).<sup>30</sup>

Compulsory declaration (under serious penalty) on the past activity of every ‘lustrated’ person violates the right to defence which is guaranteed for each individual.<sup>31</sup> Such a declaration is a kind of self-accusation and represents an enormous risk for the people undergoing lustration because of the imprecise, unclear and indefinite terms used for the qualification of different forms of cooperation with the secret services.

The principle of proportionality requires proportional means regarding both the acceptable depth of the state interference in the sphere of individual rights and the severity of penalties.<sup>32</sup>

These two opposite groups of arguments defend two separate and different models related to the communist past settlement.

---

<sup>29</sup> Article 51 of the Polish Constitution expressly provides guarantees for the individual against arbitrariness of the public authorities which would like to collect more information than it is justified in a democratic society.

<sup>30</sup> See, e.g., **Polish Constitution**, Article 42 § 3; “Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court”.

<sup>31</sup> See, e.g., **Polish Constitution**, Article 42 § 2; “Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings”.

<sup>32</sup> In Poland, the problem concerned above all the penalties applied against the journalists and the scientists. Is it imaginable in democratic state ruled by law the injunction to abstain from publishing and from continuation of scientific work?

Simplifying our analysis we can say that one of these models represents a radical, revolutionary approach which tries to impose the extraordinary means adequate to the transitory transformation period, hence stressing the dominance or even the priority of public interest (public security) over individual rights. The exceptional character of applied instruments should find its justification in the extreme authoritarian vocation of the communist state, the permanent 'emergency state'. The oppressive nature of the communist system deeply enrooted in a large part of the society, as well as its length, requires effective legal means to ensure a definitive break with the communist past. The suffering of the society and negative secondary effects of such an operation cannot be avoided. A trauma such as communism requires the finding of an adequate equivalent in the application of such an atypical and exceptional legal infrastructure designed specifically to prevent the revival of the totalitarian system.

The second approach stressed the importance of the new legal democratic space in the post-communist state. It stressed the 'red line' below which the fundamental rights, which can never be transgressed even for such purposes as the protection of state interests, have been placed

It is clear that each theoretically possible solution carries negative effects. The crucial question in the present context is the following: does the choice between the two opposite approaches belong to the judges or, inversely, to politics, i.e. to the representatives of the 'voice of the nation' expressed by the democratic parliament? Is there the necessary and sufficient space for Dworkin's Hercules' reasoning to resolve this dispute between two opposite visions of the past and the future of democracy?

#### **E. Methodology and framework for constitutional reasoning**

The choice made by the Polish Constitutional Court through its jurisprudence had a real and direct impact on politics, but it expressed at the same time a crucial choice of fundamental constitutional importance.

Constitutional justice of the post-communist states and especially the lustration cases reflected the real dispute on the future of democracy. In the short history of the post-

communist system it is no exaggeration to say that each case in this matter was a *constitutional moment*.<sup>33</sup>

The methodology of constitutional reasoning was typical, but also included important new elements. On the one hand, these cases involved classical argumentation based on the mechanism of balancing the opposite principles and the values but, on the other hand, the central issue, 'the core preliminary' disputed question was of the limits of the democratic system ruled by law. Can the objective of protecting democracy justify a temporary use of 'non-democratic means'? Is it acceptable to suspend the constitutional guarantees of fundamental rights to open the perspectives for a better and stronger democratic future? Such questions recall the famous dilemma faced by the democratic system at a crucial moment of history: is freedom also guaranteed for the opponents of freedom? Hence, we can say that the constitutional stakes were situated one level higher than in a typical constitutional dispute. The reasoning referring to the typical 'methodology of balance' (being a component of the principle of proportionality) was possible only at the later stage of the procedure. However, first this preliminary issue should be resolved. If we accept, in principle, that transitional justice can justify all necessary means to break definitively with the communist past in cleaning the democratic space from all the ingredients which have survived after lengthy totalitarian contamination, the 'methodology of balance' is not applicable. And, inversely, if we accept that in principle the effectiveness of 'cleaning' from the totalitarian past is not a sufficient reason for applying all possible means because of the limits imposed by democratic guarantees, we can continue our steps to balance the opposite values and try to find the rational 'medium' solution.

Let us come back to the question concerning the nature of the choice challenged before the constitutional jurisprudence in the lustration cases: is it political or constitutional? The answer is ambiguous and the final assertion depends on the selected criterion. The results of the settlements are always strongly political while the reasons, motives and applied methodology are not necessarily political (and should not be political). Of course, the ultimate outcome (*i.e.*, the choice made by the judges) is not directly determined by the constitution:

---

<sup>33</sup> For lustrations cases, see **Polish Constitutional Tribunal**, *Parliamentary Resolution Concerning the Disclosure of the Secret Services Files*, K6/90, 19 June 1992; **Polish Constitutional Tribunal**, *Lustration Act 1997*, K 39/97, 10 Nov. 1998; **Polish Constitutional Tribunal**, *Amendment of 'cooperation' within Lustration Act*, K 44/02, 28 May 2003; **Polish Constitutional Tribunal**, *Restricting Access to Documents of Communist Security Agencies*, K 31/04, 26 Oct. 2005.

saying the opposite would be pure hypocrisy. Finally, we have seen a large space for free judicial evaluation but such ‘free space’ is not equivalent to the political choices. My personal experiences in such matters lead me to the conviction that the decisive factors are the judges’ own axiology, their constitutional sensibility and, above all, their independence.<sup>34</sup> In my view, this last factor is probably the most important for shaping the constitutional justice in post-communist countries and putting it on the road towards the role of principal player in the new democracy. Real independence of the constitutional courts in these states is conditioned by the quality of the political system. We obtain finally a very complex mechanism, whose elements remain mutually interdependent. A new democratic system of low quality, based only on majority rule, will be marked by a strong tendency to limit the prerogatives of constitutional justice and to subordinate judges to the political will. Hence, in such states the system of appointment of new judges is also not balanced rests on primitive rule (*i.e.*, on the vote of the parliamentary majority). The politically composed and fragile constitutional justice became unable to impose real democratic standards on the system which is increasingly threatened with erosion and digressive evolution toward the authoritarian state.<sup>35</sup>

#### **F. Choice on behalf of democracy: Constitutional justice imposes the limits in the last lustration decision**

Constitutional justice in Poland often interfered, as mentioned above, in the sphere of the legislative freedom in the case of lustration. However the most recent decision taken by the Polish Constitutional Court, on 11 May 2007,<sup>36</sup> on the new rigorous and very broad lustration procedure can be presented as a perfect exemplification of the constitutional methodology described above. It proved the necessity to examine topics such as the lustration law on two levels of constitutional reasoning: the first regarding the nature of democracy as well as the second regarding particular issues contained in the lustration law.

---

<sup>34</sup> Paradoxically such factors should not be related to the personal experiences of the judges during the communist period. It happened frequently that same approach was used by the judges having totally different pasts behind them, some of them being political prisoners while other played an active role as communist party members.

<sup>35</sup> However, there are two important factors which-even in that situation-can positively influence the attitudes of judges: (1) one of them is the subjective factor mentioned above; *e.g.*, the internal independency of judges stimulated by the specific *ethos* of the constitutional justice and personal sentiment of responsibility for the quality of democratic standards; (2) strong, formal guarantees of independency of constitutional judges (in result, the politicians lose all instruments for influencing the decisions making process before the Court).

<sup>36</sup> **Polish Constitutional Tribunal**, *Constitutional Case K2/7, Jurisprudence of the Constitutional Court*, 2007, No 5 A, item 48.



### **1. First level of reasoning**

First of all, the court identified the basic issues and values which reflect the constitution and tried to establish the main points of its further argumentation.

The court explained clearly the whole constitutional axiology which must be respected by all legislative activity concerning the communist and totalitarian past. The court recalled that lustration is not the purpose in itself and it cannot be used by the state as a form of revenge against the people who were involved in the structure of the communist state. Lustration is directed at the protection of evident and direct interests of the public structure of a new democratic state and it must neither stigmatise nor blame the people (including the former agents) who are now engaged in a different sphere of their professional activity.

The court stated:

“While eliminating the communist totalitarian heritage, a democratic state based on the rule of law must use only the formal legal means which could be accepted in the framework of axiology of such a state. No other means can be accepted because such a state would not be better than a typical totalitarian regime, which must be eliminated. A democratic state ruled by law has sufficient legal instruments necessary to guarantee justice and to punish the people who committed crimes. A law which is based on the idea of revenge cannot be accepted in a democratic state.”.

Finally, the court stressed that the need to disclose the totalitarian past can never justify the violation of democratic standards. The fundamental rights of individuals should always be observed, and among them “such human rights and fundamental freedoms as the right to fair process, the right to a hearing [trial] before an independent court and the right to defend oneself”. Such rights must be applied also with regard to those people who violated them when they governed during the communist period. The state based on the rule of law can defend itself against the renewed communist-totalitarian threat. There are instruments at its disposal which are not contrary to human rights and the principle of the rule of law, and which result from the justice system as well as from public administrative law. These instruments could comply with the principle of a democratic state if some necessary requirements are fulfilled. The fault must always be individual rather than collective and should be proved in

each individual. There is a crucial role to be played by the right to a defence and for the presumption of innocence until the fault is proven or to the right to the court.

## **2. Second level of reasoning**

Adopting such a general axiological framework for its decision, the court further developed the reasoning and formulated expressly some indications which are addressed to the lawmaker, namely:

- Lustration procedures cannot involve the people who occupy the post in a private organisation;

- Lustration has to include proportional instruments, and the interdiction (or prohibition) to exercise the determined public function cannot be longer than a rationally defined period;

- The penalties provided by lustration laws (including the above mentioned interdiction) should be addressed only to the people who were in fact engaged in the activity which violated the human rights and ordered such activity;

- Lustration procedures must provide a precise and transparent definition of the cooperation (or collaboration);

- The necessary judicial procedural guarantees must be observed in respect of the people subjected to the lustration;

As a result of the presented argumentation, the main part of the new substantive regulation has been recognised by the court as non-conforming to the constitution and eliminated from the legal system. It is then for the lawmaker to amend the law if he wants to continue the lustration procedure.

It is not possible to develop further the topic. However, one can stress that the position of the constitutional jurisprudence in the case of lustration was not accidental and it can be

perfectly inscribed to the lines consequently developed by earlier judgments. Apart from the lustration cases, we should remember among them the judgments issued by constitutional court in the case of the penal liability of the former functionaries of the communist state in which the limits imposed on the lawmaker by the axiology of the new democratic state were challenged by the court. In one such judgment, the constitutional court examined the issue of whether it would be admissible to apply penal liability if no crimes were expressed by the laws being in force at the time these crimes were committed. In the famous decision issued on 25 of September 1991,<sup>37</sup> the constitutional court stressed the exceptional historical context in which the transformation process is realised. The Tribunal identified clearly the contradictions between the results of the application of the principle *lex retro non agit* toward the perpetrators of crimes and the evident request for restitution of justice. However, the Tribunal said: “all exceptions from the principle *lex retro non agit* which are motivated by the sentiment based on justice require precise definition of all the cases where such exceptions could take place; [...] this principle is also inscribed into the fundamental notion of the state ruled by law”. Opening some space for the retroactivity in the penal law, the court set the limits for such legislative practice regarding the fundamental rights of the individual.<sup>38</sup>

### **III. Conclusion**

A new axiology of the legal system means that the exceptional character of the time of transformation does not justify the resignation from the use of minimal standards including with regard to the people having some form of communist past. Some of the opponents of such an approach assert that it expresses the very weakness and naivety of the intellectual elite having the dominant status in the post-communist state. One of the most important Polish politicians used a metaphoric notion to stress the essence of such an approach, ‘impossibilism’.<sup>39</sup>

In my view, only a well balanced attitude manifested by the series of the judgments of the constitutional court allowed a real revolutionary and radical break from the totalitarian past. Another approach, which would allow the violation -at the first stage of the

---

<sup>37</sup> OTK 1991, poz.24, *Jurisprudence of Constitutional Court*, 1991, item 224.

<sup>38</sup> The similar cases were challenged before the German justice system just after the collapse of the Berlin wall. Reference to the famous golden rule of extreme injustice, formulated by Gustav Radbruch in 1946, has been made by the courts; see **R. ALEX**, *The Golden Rule*, pp. 15-40.

<sup>39</sup> The word has the Roman origins ‘*impossibulum*’ and means that ‘nothing is possible’.

transformation- of basic human rights, would have had a 'killer effect' on the new democratic system. It would be a continuation of the methods of the totalitarian regime. I do not think such an approach could be the foundation of a state ruled by law.

The process of transformation and restitution of freedom is closely linked with the shaping of attitudes and the democratic mentality of average people who were almost all touched by the stigma of *homo sovieticus*. For this reason it is more important to observe, at the initial point, the rigorous requirements of democratic standards than to execute the penal responsibilities of the former functionaries.

Finally, we should accept the uncomfortable truth that there are also such harms caused by a totalitarian past which could be never removed from our recent history, unless we want to create a new Orwellian reality.