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TRANSITIONAL JUSTICE AND RULE OF LAW. OBSERVATIONS ON CENTRAL-EASTERN EUROPEAN EXPERIENCES*

Introduction

Transitional justice is nowadays well known term widely used in relation to situation of societies in transition. It has been first used in relation to countries in South America which embarked on the democratization road. Later on it started to be used to post-conflict situations. One of the crucial problems in transitional justice approach is what to do with the difficult past and abuses of human right in order not to further divide but to integrate deeply divided society? Problem of justice to the past, to the victim and also the problem if institutions building are in the centre of this approach. Rule of law is one of these public goods which societies in transition want to see installed. Can we do this by ignoring the past? Or rather by building on normative reservoirs of the existing society?

In this short text I will try to explore these issues from using the empirical examples from post-communist transformation in Central-Eastern European countries.

In the Western legal tradition law was not a tool for dealing with historical justice. It was a well-designed instrument for coping with injustice on smaller scales. At the same time in Western culture another concept of historical justice was present but conceptually separated from normal justice. That distinction was represented by two different goddesses dealing with justice. In ancient Greece these were *Dike* and *Themis*; in ancient Rome *Nemesis* and *Justitia*.

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The first dealt with the historical and/or divine dimensions of justice, quite often referred to as providence or fate. Realisation of that dimension of justice was left in God's hands. It appears that criteria for that type of justice were perceived as different from those applied and developed by human reason. Realisation of that type of justice was left to other times, usually outside human time. It was about the apocalyptic character of total justice. Nemesis was presented as the goddess of justice and revenge, a personification of that goddess's wraths and punishment.

This year we celebrate twenty years since the transfer of power from communist regimes started in Poland's first (semi-free) election of 4th June 1989, which ushered in Europe's first post-communist, non-communist, government. It had snowball effects in other countries. With the exception of Romania the transfer of power was peaceful and based on agreements usually called 'round table talks'.[1] The western liberal world praised this type of transfer of power as a model for a liberal and constitutional state. Twenty years later, the societies in the countries in question are deeply divided in opinion about the present and the future.

There is no doubt that each of these countries has made substantial progress. Apart from the Balkan states, all have become members of the European Union. The standard of living has improved and more importantly some important modernising changes have taken place. Despite all these changes the states do not function as expected by their citizens, basic institutions of administration of justice do not work as they should, the level of corruption is too high and the politics, while passionate operates rather as a façade, with a great deal of real activity happening behind the scenes and elsewhere. Citizens do not believe in their impact on the political processes and plenty of them complain that the institutions of the administration of justice do not act properly.

Why is this? A substantial number of citizens and observers of the affairs of the region claim that remnants of the past, unsatisfactory dealing with legacies from the former regimes, are responsible for the contemporary state of affairs. It is not our aim to confirm or falsify such claims, but in order to consider the contemporary state of affairs in the democratic law-governed states, as the post-communist regimes call themselves, we have to focus our attention on the extremely complicated problem of the relations between legality, the rule of law, institution-building and dealing with the past in the process of transition from communism over these twenty years. In the

[1] See J. Elster (ed.), *Round Table Talks and the Breakdown of communism*, Chicago University Press, Chicago 1996.

paper I will describe legal strategies adopted in particular countries in their attempt to deal with one only, but the most controversial, element of dealing with the past. I will then show the relationship between discourses about these strategies and the discourse and institutional change connected with implementation of legality and the rule of law.

This paper will discuss the overlapping issues of 'lustration' and 'decommunisation' (the meaning of which will be explained below), often lumped together under the first of these terms, lustration. The first post-communist country which adopted the law of lustration was the Czechoslovak Republic on 4 October 1991. In Hungary the Parliament adopted a lustration law on 8 March 1994 with changes adopted in 1996 (Law XXIII from 1994 and Law LXVII from 1996 on lustration of persons holding some important positions). Poland adopted its lustration law on 11 April 1997 with subsequent amendments. In Bulgaria elements of lustration law are in the Statute on Administration adopted by the Bulgarian parliament in May 1998. In Lithuania two statutes were passed, one adopted in July 1998 regulating participation in public life of the KGB officers and the second adopted in November of that year in relation to secret collaborators with the secret services. The Romanian Parliament as the latest in 1999 adopted the so-called Dumitrescu's law which regulates the question of lustration in that country.

In empirical presentation of the introduction of lustration and decommunisation, I do not cover all countries but choose case studies since the shape and the scope of what is involved differs in particular countries. Nevertheless, it seems to me that the chosen case studies are representative for presentation of the lustration issue in the entire region. What is missing is comparison with the situation in countries such as Ukraine which did not introduce any attempt at lustration.

Lustration and decommunisation

The last twenty years changed the evaluation and approaches to the problem of the past in the former communist states of Central-Eastern Europe. At the very beginning of the change not many participants stressed the need for:

- doing justice to the victims and family of victims of crimes committed by the institutions and officials of the communist regimes,
- addressing the problem of participation by functionaries of former communist regimes and secret collaborators in public life after the transfer of power,

- access to the files of the secret services of the former communist regimes,
- restitution of and/or recompensation for property nationalised by communists after 1944,
- general historical evaluation of the communist regime.

Generally those who wanted some sort of transitional justice measures applied immediately come from the right of the political spectrum, and at the time they did not have a big presence in the media and especially public media. That was a time of euphoria about the negotiated transition and change of the regimes. Later, after the initial euphoria was over, the discussion and demands for justice gained momentum.

The most controversial of these issues was and is the problem of lustration. The term lustration became an integral part of the post-communist discourses. The term comes from the Latin *lustratio* which means ritual cleaning through sacrifice, and related terms, *lustrare* – cleansing, sacrifice, review of the army, and *lustrum* – the cleansing sacrifice performed every five years in ancient Rome. The etymological meaning has a positive connotation, as cleaning from accusations. Some would suggest that it also has a negative one understood as requiring cleansing. In discussion about lustration there are in fact two expressions: negative lustration – which means that the person is freed from accusation and 'positive' lustration – meaning that the person indeed cannot occupy some positions due to their past collaboration with the secret services.

It is impossible to reconstruct one universal meaning of the term lustration, present in all countries. Each country possesses its own specific meaning due to the multiplicity of solutions to the problems of dealing with the communist past. This problem of uniform meaning cannot be restricted only to semantics but is also connected with the ways in which issues of lustration and decommunisation are interwoven.

Generally, by lustration we mean:

1. The procedure conducted by authorised institutions of checking the candidates for some position in the state, from the point of view of their security credential broadly conceived – this is classical *vetting*;
2. Lustration proper is the process of making public the names of people who consciously and secretly collaborated with the organs of the secret services
3. The procedure making possible elimination for some time from public life of groups of people who in the past occupied some position in the state and/or communist party apparatus.

In the specific context of post-communist Central-Eastern Europe lustration is just a small, but the most important and at the same time con-

troversial, part of all strategies of dealing with the communist past in the process of re-building social and state institutions, in order to establish the institutional and social bases for democracy and the rule of law.

The terms 'lustration' and 'decommunisation' are often confused with each other and confusing for everyone. At its broadest, decommunisation can refer to all political and legal strategies the aim of which is eradication of the legacies of communism in a social and political system. This would include both a narrower conception of decommunisation (focussing on elimination of personnel), and lustration (focussing on informers). But these terms are often used interchangeably. Wojciech Sadurski injects some clarity on these matters, by reconstructing the meaning of these categories in political discourse in Central-Eastern European post-communist countries:

> 'lustration' applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), while 'decommunisation' refers to the exclusion of certain categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together.[2]

Even this does not get us all the way, for the question formulated broadly as 'lustration' usually includes three problems, namely lustration proper (screening of former collaborators and members of secret services), access to secret service files, and decommunisation. Quite often it is very difficult to separate them even analytically, especially lustration from decommunisation. Quite often lustration is presented wrongly in the literature in the West as a process of 'vetting'. It does have some elements of vetting but it goes further, because it is connected with the process of decommunisation which means a conscious attempt at removal of the remnants of communism from the public life of the societies and states embarked on the process of democratisation and creation of a law-governed state.

In some countries, such as the Czech Republic, the term 'lustration' actually includes also decommunisation while in others as in Hungary it is merely 'soft' lustration: no sanctions are applied apart from making the lustrated persons' past service known to the public.

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[2] Wojciech Sadurski, *Rights before Courts. A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Springer, Dodrecht 2005, p. 245.

Lustration from the very beginning was a controversial issue and quite often in the public discourse the opponents of lustration claim that it is in principle contrary to the very concept of a democratic law-governed state. They argued that lustration is based on collective guilt, contrary to the presumption of innocence and the principle of non-retroactivity of law – to mention only the most important accusations.

The supporters of lustration and decommunisation did not deny that it involved some retroactivity of law and departure from strict formalistic legalism. However they claim that lustration is necessary for a substantive and robust rule of law, and for the legitimacy of the new legal system. In order to understand the controversy one central element of the character of the regimes before the transfer of power took place needs to be understood.

Law and dealing with the past

As mentioned at the start of this chapter, *Themis* and *Justitia* were goddesses of the human dimension of justice. In their administration of justice, they were more understanding of or softer to human errors. They are usually presented as blind in the application of justice, which shows on the one hand commitment to principles of human justice, impartial application of law. At the same time that blindness shows the limitation of justice embodied in human legal systems. Those limitations of human legal systems are due to limitations of human knowledge. How can we do justice when our knowledge about events and especially past events is limited? That is why human legal systems contain so many principles which limit the ways we may seek to do justice to the past, such as statutes of limitations, the presumption of innocence etc. But that is only part of the issue. Another is the apocalyptic character of the *Nemesis* and *Dike* type of justice. Until our contemporary time there was no attempt to resolve legally questions that were formerly only subjects of the *ethics* of memory, if they were subjects at all; not of law. That was a matter of fate and divine justice. The demand for legal redress for the communist past is based on a refusal to accept blind fate.

It seems to me that in discussions of the extremely complicated problem of dealing with the past the line is still, as it used to be, between those who have a limited concept of human justice – as represented by *Justitia* and *Themis* – and those who look from the point of view of historical justice, Justice with a capital J based on principles considered universal in time and space, which have to be implemented regardless of social costs.

I argue that 'dealing with the past' is based on a combination of two perspectives and that the process of building bridges between these two perspectives requires a new approach in legal thinking and institution-building. A combination of two very different strategies and institutions is needed in order to deal with the wrongs of the past. The traditional legal approach focused on individual allocation of guilt and responsibility based on law's limited internal epistemology is not satisfactory, and we can observe the creation of new types of quasi-judicial institutions designed to deal with the past, such as truth commissions, institutes of national memory, special international tribunals such as the International Tribunal for Former Yugoslavia or for Rwanda in Arushia, Tanzanina, the International Criminal Court or mixed national/international tribunals.

For "transitional justice" or "dealing with the past" is not for itself only. It is about the future of those societies. The problem of coming to terms with the communist past in post-communist societies is constitutive for these societies. It is a constitutional problem for the new post-communist system. The different approaches to the problem have had an impact on the form and structure of new regimes in the region.

It appears that difficulties, and in some substantive circles of society unwillingness, not only to adopt a strategy of dealing with the past but even to opening up public debate on dealing with the past in post-communist societies is caused, one the one hand, by the contemporary political struggle and composition of the political forces, and on the other hand by the character of communist society in the past. The communist system was characterised by moral compromise, changes of role from perpetrators to victims and again to perpetrators. A lack of morally clear borders, change of roles, moral compromises engaged in by all but a few righteous ones, all create a situation in which dealing with the past in the form of public cleansing cannot be done by the generation which grew up during communist times.

That does not mean that it cannot be tried in the form of creation of a new type of legal institution which will accommodate elements from both *Justitia* and *Nemesis* – only in such a way is dealing with the past as a constitutional process possible. Restriction of dealing with the past only to traditional legal mechanisms, based mainly on criminal law and retributive justice: these are not good tools. There is a need for a new type of quasi-judicial institution which will be able to take into account the operation of the quasi-totalitarian communist regimes; new institutions and procedures which will be able to overcome epistemological limitations inherent in the contemporary legal systems; institutions which will preserve the authority of

courts and will be able to overcome their limitations in dealing with different shades of guilt and involvement in operation of the communist system.

Rule of law – some more universal lessons

Lustration usually has been criticised as based on the concept of collective guilt, and not on the presumption of innocence but on the presumption of guilt, that it is over inclusive and does not take into account the individual circumstances of a particular case, that files of the secret services are incomplete and inaccurate, that lustration is used and abused for political motives and leads to witch hunts. And indeed it is possible to show plenty of deficiencies in particular pieces of legislation regarding the lustration issue in particular countries. However I would like to defend the process and claim that generally lustration plays a positive role in laying down foundations for a cleaner public sphere and rule of law and democracy, and also that debates which lustration stimulated have played a very positive role in building rule of law cultures in the countries in question.

Somebody, and especially lawyers, might ask what is the point in discussing all these problems of dealing with the past, especially lustration? What do they have to do with the rule of law? That is quite an important question. The problem with transformation of political and social regimes in Central-eastern Europe has shed a new light on the rule of law question. The experiences of all post-communist countries 20 years after the transfer of power from communist to non-communist forces have shown that though legal institutions are important, even very important, legal institutions consist of both rules and personnel, and it is much easier to declare new rules than to change people. The lustration procedure focuses on eliminating some groups of people who potentially could harm the new democracy and rule of law.

The experiences of almost 20 years in this part of the world show that the rule of law is a substantive, not merely a formalistic concept. The rule of law includes values, and to talk about a formalistic or thin concept of rule of law it is necessary first to have a thick concept of the rule of law. On the normative desert of communist regimes it is impossible to build even a minimum of trust for the institutions of law unless this law expresses popular concepts of justice. What citizens learned during the former regimes is cynicism and distrust of legal institutions, how to abuse them and avoid them. A formal concept of rule of law, a thin one, would become the object of manipulation and abuse in practice. Citizens have to see and experience that law is not only for the powerful and those with financial or other resources

such as personal connections or status, but that law is also an institution which protects their rights, can return dignity to them, provide tools not only to complain but defend their rights.[3]

We can also learn from 20 years of experience that the rule of law is not simply a legal transplant but requires development of a social and normative structure in society and that is a necessary but of course not sufficient precondition for its existence. Mature societies which craved for democracy, liberty and rule of law require and deserve truth about their difficult past not because the 'truth will set you free' but because it is necessary for normal public life. Open discussion about the substance of the secret services archives, knowledge about the names of collaborators and justice done to former perpetrators are necessary for a normative switch in these societies.

Legal scholars could learn from observation and studying the process of transformation in former communist states in Central-Eastern Europe, that implementation of rule of law requires a peculiar social base or social and normative ontology. That means a peculiar type of social relations and a peculiar type of public morality. It is difficult to advance rule of law in societies based on secrecy and societies in which patronage, not equality of citizens, is the norm. We do not know how to bring public morality into society even if is it possible to do this – but certainly we know that some institutional and procedural strategies could at least help a bit. This means that rule of law is not only a lawyer's matter but requires socio-legal specialists. In this way we can argue that careful observation of the eastern European experiences can provide socio-legal scholars with material of universal significance from the point of view of building rule of law and democracy.

The problem of the relation between rule of law and lustration was addressed by the decisions of the Czech Constitutional Court, which expressed a substantive concept of law-governed state or *Rechtsstaat*. At stake was interpretation of the principle of legal certainty. Should it be interpreted in a formalistic or more substantive way? The Czech court made a departure from a narrow formalistic and positivistic way of understanding the principle of rule of law and underlying it the principle of legal certainty, and formulated it in a substantive way which actually provided ammunition and arguments for these who defend lustration. The court took into account the

[3] For problems in communist and post-communist societies with law, rights and rule of law see Jacek Kurczewski, *The Resurrection of Rights in Poland*, Clarendon Press, Oxford 1993, and Brian Galligan and Marina Kurkchiyan (eds.), *Law and Informal Practices. The Post-Communist Experience*, Oxford University Press, Oxford 2003.

peculiarity of the post-communist transition and expressed directly the social needs for the rule of law in post-totalitarian society.

The Court stated that 'In contrast to the totalitarian system, which is founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria ... each state, or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by totalitarian regime, has the right to enthrone democratic leadership and to apply such legal measures as are apt to avert the risk to subversion or of a possible relapse into totalitarianism, or at least to limit those risks. ... As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist of certainty with regard to its substantive values. Thus the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt ... criteria of formal-legal and material-legal continuity which are based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken'.[4] The court made a reference to the concept of democracy which has to defend itself.

This is even more evident in the Lustration case II. The Court wrote that it 'considers it necessary to add to these data that determination of the degree of development of democracy into a particular state is a social and political question, not a constitutional law question'.[5] What we can add is that not only does democracy have a right to defend itself, in accordance with the German concept of *werhafte* or *streitbare Democratie*, but that in the Lustration I case the Czech Constitutional court formulated a concept of rule of law which is able to defend itself and this is based on non-continuity and a material concept of rule of law. It seems to me that the jurisprudence of the European Court of Human Rights in lustration cases also confirms this principle of rule of law able to defend itself. All these statements are very important because they go against the arguments of critics of lustration

[4] http://angl.concourt.cz/angl_verze/cases.php.

[5] Pl.09/01 Lustration II, unofficial translation at http://angl.concourt.cz/angl_Verze/cases/php.

that in its nature it is based on violation of the principles of rule of law and democracy. These Courts adopted the more reasonable position that democracy and rule of law need some extraordinary measures in order to be established. This cannot be done by routine imitation of the institutions and procedures from countries with long democratic and rule of law traditions.

Not all lawyers, commentators and actors who actively participated in the process of transformation support the idea of retroactive legislation and connected with it lustration. Among the strongest opponents of lustration have been Adam Michnik[6] and Vaclav Havel. In a public lecture delivered at the London School of Economics on 20 October 1999, for example, Adam Michnik said "The principle of de-communising ... is that a certain number of Communist functionaries of the Communist regime, or of the Communist Party, would be stripped of their constitutional rights en bloc, only for [the] reason that they held certain positions in the Communist Party. The lustration idea is that using the materials of the political secret police, the past of various personalities active in public life would be examined... This philosophy of de-communizing was drawing directly on the Bolshevik principle according to which so-called representatives of the bourgeois order and the Tsarist regime would be deprived of citizens' rights. In other words, the only ones entitled to run for a seat in parliament were those permitted to do so by the new rulers".[7]

On the legal ground opposition is expressed by the former and first Polish Ombudsman, Professor Ewa Letowska, who claims that it would be unjust and will contradict existing already rule of law if retroactive legislation is to be adopted.[8] This legal position, which defends a total ban on retroactivity of law, is based on naivety in my view and ignores the situation where crimes were committed under the umbrella of legality. I agree with the Czech-British socio-legal scholar Jiri Priban who wrote that 'Lustration has to be treated rather as a controversial element of the emerging rule of law and not as its mere denial due to the retrospective character".[9]

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[6] See A. Michnik, *Letters from Freedom: Post-Cold War Realities and Perspectives*, edited by I. Grudzinska-Gross, Berkeley, London, Los Angeles: University of California Press 1998.

[7] Adam Michnik, The Rebirth of Civil Society, public lecture presented by Adam Michnik at the London School of Economics on 20 October 1999 as part of the 'Ideas of 1989' Public lecture Series; available at: http://www.lse.uk/Depts/global/Publications/PublicLectures/PL10_TheRebirthOfCivil Society.pdf.

[8] See E. Letowska and J. Letowski, *Poland: Towards the Rule of Law*, Warsaw, Scholar, 1996 see also M. Safjan, *Transitional Justice: The Polish Example, the Case of Lustration*, 1 European Journal of Legal Studies, No. 2 pp.

[9] J. Priban, *Oppressors and Their Victims; The Czech Lustration Law, Decommunisation and the Rule of Law*, in: A. Mayer-Rieckh and P. de Grieff, op. cit.

Lustration is strictly connected with the issue of human rights. Democratisation, rule of law and the practice of lustration are inseparable.[10] Exit from, and restructuring of, the peculiar matrix of communist state required extraordinary strategies in order to block the communist networks of power to start to control crucial areas of public institutions and public life. Crucial it seems to me is the positive evaluation of lustration by the European Court of Human Rights especially if we take into account that the European standards of human rights are very high in comparison to other regional standards in the world. The European Court of Human Rights, in its several judgments mentioned below, though it criticised extension of lustration to the private sphere, never declared lustration illegitimate from the point of view of the standards of the European Convention of Human Rights and jurisprudence of the Court.

In the Grand Chamber of the European Court of Human Rights' judgement in Zdanoka v. Latvia, the court confirms the legitimacy of lustration and of a 'democracy capable of defending itself'.[11] In two cases from Lithuania the court stated that too far-reaching lustration, barring employment in some jobs in the private sector, is violation of human rights. The European Court of Human Rights gave its first ruling in the lustration case in 2004. It was a case against Lithuania. In *Sidbras and Dziautas v. Lithuania*,[12] the court found that the Lithuanian lustration law had affected the private life of the claimants as well as also violating the prohibition against discrimination. Similarly in the next case from Lithuania, *Rainys and Gasparevicius*,[13] the Court stressed again that limitation imposed in private sector, in private life, is in violation of Articles 14 and 8 of the European Convention on Human Rights. This view has been confirmed in *Matyjek v. Poland*[14] and *Turek v. Slovakia*.[15] The Court stated that 'the State-imposed restrictions on a person's opportunity to exercise employment in the private sector for reasons of lack of loyalty to the State in the past could not be justified from

[10] Magdalena Zolkos, *The Conceptual Nexus of Human Rights and Democracy in the Polish Lustration Debates 1989–1997'*, "Journal of Communist and Transitional Politics", vol. 22, No. 2, June 2006, p. 238.

[11] ECtHR Case No. 58278/0016 March 2006, *Zdanoka v.Latvia* [GC].

[12] ECtHR, Cases Nos. 55480/00 and 59330/00, EHCR 2004–VIII *Sidbras and Dziautas v. Lithuania.*

[13] ECtHR, Cases Nos. 70665/01 and 74345/01, 7 April 2005 *Rainys and Gasparavicius v. Lithuania.*

[14] ECtHR 24 April 2007, Case No. 38184/03, *Matyjek v. Poland.*

[15] ECtHR 14 February 2006, Case No. 57986/00, *Turek v. Slovakia.*

the Convention perspective.'[16] Generally the European Court on Human Rights confirmed the rights to defend the public sphere but also stated that lustration should be limited in the private sphere.

Difficulties in dealing with the past in transformation from communism shows that the thin concept of rule of law is adequate when we talk about well established systems of rule of law and when we operate on the taken for granted social and normative background. Because of the argument enumerated several times above, I claim that in transformation only a thick concept which includes some hard substantive values is adequate.

Dealing with the past and quite specific measures quite often contradictory to the established view on the underlying principles of the rule of law, such as legal certainty or non-retroactivity of law, are necessary to clean up the ground for the rule of law. What is worth remembering is that it is only part of 'transitional justice' and as such represents two very important features:

- Operation of such law is limited in time and,
- It is not limited to a narrow view of law but includes its social and political dimensions.

It is necessary also to touch at least the issue of the impact of lustration law in the countries in question. The aim of dealing with the past in post-communist societies and especially its lustration laws, which constitute an original post-communist institutional design to deal with the past of communist regimes, was not only truth-telling and reconciliation as in the cases of transitional justice in other post-conflict societies but also about building a solid social background for democracy, rule of law and observance of human rights. In the transitional period law shows its Janus double face. It is on the one hand an instrument of change and also is used as a source for rule of law regimes. It is quite interesting that lustration in all the post-communist countries mentioned stimulated more serious treatment of law as a source of basic rights and freedoms of citizens, as a source of the duties of the states and also as a source of restraint imposed on excessively discretionary powers or arbitrary acts of governments. Both procedural and substantive dimensions of the rule of law have been increasingly invoked in discussions around lustration and in constitutional adjudication regarding the issues of constitutionality of lustration law. Even if the law had the limited impact of cleaning up the public sphere from former collaborators of communist apparatchiks it would be difficult to exaggerate its impact on

[16] ECtHr 17 July 2007, Case No. 68761/01, *Bobek v. Poland*, paragraph 63.

public opinion and building of a rule of law focused culture. Paradoxically lustration law and the debates this legislation created became substantial sources for a rule of law culture in post-communist societies.

Lustration is an example that in order to establish rule of law it can be necessary, not merely to rely upon established principles but to swim in uncharted waters. The construction of new moralities, new institutions and the rule of law itself are not separable from the process of the construction of the past. The lustration law plays a very important role in this process of constructing a new identity.[17] Without lustration law, one has the situation observed by Lavinia Stan that "it is insulting and improper to bunch together Jaruzelski and Jacek Kuroń, Gustav Husak and Vaclav Havel... and deny the many shades of guilt and innocence separating them".[18] I would conclude with Vojtech Cepel's expression that the aim of dealing with the communist past was 'transformation of hearts and minds in Eastern Europe'.[19] But such a transformation cannot happen by itself. Law is on the one hand an instrument in transformation and on the other has to act as stable base opening up some closed doors. Law as a mechanism for systematic remembering and forgetting in dealing with the past, paraphrasing Friedrich Nietzsche, should always act in the service of life – for a better present and future. The best way is to deal with the past as part of a constitutional process.

As the moral and political philosopher, Hanna Fenichel Pitkin says, constitutions are not only something that we *have* but they are also what we *are* and more importantly something that we *do*. By *do* she made reference to 'the action or activity of constituting – that is, of founding, framing and shaping something anew'.[20] Legal facing and dealing with a difficult past is part of 'what we do' – reshaping ourselves and our societies. Rule of law in countries where it exists is a product of rather unconventional reshaping themselves by these societies.

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[17] For what can happen with self identity when there is no attempt even to face a difficult past, see Nanci Adler, 'The Future of the Soviet Past Remains Unpredictable: The Resurrection of Stalinist Symbols Admits the Exhumation of Mass Graves', EUROPE-ASIA STUDIES, Vol. 57, No. 8, December 2005, pp. 1093–1119.

[18] L. Stan, *The Vanishing Truth? Politics and memory in Post-Communist Europe'*, East European Quarterly, XL, No 4. December 2006, p. 396.

[19] V. Cepl, *The Transformation of Hearts and Minds in eastern Europe*, "CATO Journal", 17, 2, 1997.

[20] Pitkin, H. F., *The Idea of a Constitution*, "Journal of Legal Education" 37 (1987), p. 168.