

## **Memories that Shape the Judicial Identity\***

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### **Abstract**

It is argued that ‘history matters in Central and Eastern Europe’, forming an integral part of coming to terms with the past, where the law and, more specifically, the judiciary is greatly affected. My discussion focuses on Polish developments, analysing case studies from the Stalinist era (1944–1956) and martial law (1981–1983) and the manner in which the misadministration of justice is treated post-1989. Using archival material, the paper examines the complexities underpinning the judicial ‘identity’. While judicial independence is a complex and ambiguous concept, the problems are very real.

**Key words:** Central and Eastern Europe, judicial independence, Poland, Communism, misadministration of justice, Stalinism, martial law, post-transitional justice

### **Introduction**

Research shows that two key periods (1944–1956 and 1981–1983) continually re-emerge in present day examinations (1989–present) of the judiciary in the context of de-communisation measures and in the wider framework of post-transitional justice, and it is in this vein that I will consider these periods.<sup>1</sup> I begin with a brief overview of pre-war developments significant to the discussion about the purges of certain segments

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<sup>1</sup> Transitional justice is a rich area. Post-transitional justice, in this paper, takes the approach that the state’s, in this case Poland’s, legal treatment of the past is ongoing. For a discussion of transitional justice in post-Communist Europe, see A. Czarnota et al., eds. *Rethinking the Rule of Law after Communism*, (Budapest: CEU Press, 2005). For general discussions on transitional justice and its genealogy, see Ruti Teitel, “Transitional Justice Genealogy”, *Harvard Human Rights Journal*, 16 (2003), pp. 69–94.

of society that were set in motion from 1944 onwards. The crimes the paper is concerned with were intentionally defined in vague terms in order to ensure that no one who could be a potential threat to the Communist regime could escape and more often than not cases, such as political crimes, were consigned to specified courts in order to ensure that the sentence could be secured to meet the objective of the law. I argue that the main protagonists – the law and the judges – have had dual roles to play in the guarantee and contravention of judicial independence. With the benefit of archival materials, it will be shown how the Polish experience sustains these assertions.<sup>2</sup> Moreover, the extent of the protections afforded judicial independence and later transgressions against it comprise the judicial identity; which memories the judges and judiciary retain will have future repercussions for the judges and the profession. The concluding remarks critically examine selected reforms to demonstrate that these challenges to judicial independence are ongoing and of great consequence not only for Poland, but for all post-totalitarian states.<sup>3</sup> The discussion shows that where there is damage to the prestige of the judiciary, the consequences are grave and, moreover, bad practice is not unlearned overnight, making it imperative to identify and dismantle the continued practice of controlling the judiciary that characterised Communist rule. Yet, while the paper supports the guarantee of judicial independence, it carries the warning that in order to understand the principle we need to appreciate that it is an ambiguous concept, which poses certain difficulties when faced by real problems and hard cases that a post-Communist judiciary inevitably will have to address. My analysis critically contextualises these questions when discussing the Polish experience. The issues identified in this paper are reflected in the Central and Eastern European region to varying degrees.

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<sup>2</sup> The archival material used in this article comes from the Polish Institute for National Remembrance (*Instytut Pamięci Narodowej*, hereafter: IPN), Warsaw, Poland. The IPN file referred to in this paper is from the archival material related to the Fieldorf trial, as well as the documentation amassed by the Polish prosecution in the post-1989 period. The file is entitled: IPN BU 1769/8 *Akta Głównie Prokuratora w sprawie zbrodni popełnionych na szkodę Augusta Emila Fieldorfa* (Main Files in the Case Concerning Crimes Committed against August Emil Fieldorf, hereafter IPN file 1796).

<sup>3</sup> And stable democracies, as discussed by David Dyzenhaus, in “Judicial Independence, Transitional Justice and the Rule of Law”, *Otago Law Review* (2003), pp. 345–370.

To facilitate the discussion, a definition of the key terms is needed. It is important to note that this paper is part of a larger project that examines the misadministration of justice. The misadministration of justice is also referred to as judicial murder or court crime and can be understood as judges intentionally rendering a verdict that misapplies the law and results in serious human rights violations. Situations leading to the commission of judicial murder are accompanied by an assessment of the judiciary that is undertaken by the relevant state officials, not to mention civil society and the populace.<sup>4</sup> Most examples of court crimes are found in totalitarian regimes where the judiciary is subservient to the executive will. The complicity of the judiciary gives rise to questions about judicial independence, the cornerstone of the judge's work and a key component of the rule of law. The significance is further reinforced in a post-totalitarian period when the nature of reforms can overlook and often ignore the fact that the history of judicial murder can continue to affect the work of the judge and sustained manipulation by the executive.

There is of course a debate as to whether the post-Stalinist period in Poland can be described as totalitarian, a distinction resting with the aims and degree of control that was exerted by the state, with the assistance of the secret police, over the populace. It is not this paper's intention to enter this debate but to point out that, while it could be argued that the post-Stalinist period was characterised by a move away from the use of terror to maintain total control towards holding and maintaining power,<sup>5</sup> totalitarian rule has various dimensions; where law and post-totalitarianism meet its contours show the practice and tendencies are just as insidious as Stalinist terror in its consequences for individuals and wider society. Such a practice does not disappear overnight; instead, it is in this post-totalitarian period that one must be

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<sup>4</sup> See A. Barahona De Brito, C. González-Enriquez and P. Aguilar, eds., *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001); K. McEvoy and L. McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart, 2008), and L. Stan, ed., *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, BASEES/Routledge Series on Russian and East European Studies (London: Routledge, 2009).

<sup>5</sup> See Andrzej Walicki, *Marxism and the Leap into the Kingdom of Freedom: The Rise and Fall of the Communist Utopia* (Stanford, CA: Stanford University Press, 1995).

most vigilant; the technologies employed were such that people learned to police themselves with the memory of the Stalinist regime never far away.<sup>6</sup>

An oft-debated concept, judicial independence is the “degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of the judicial role”.<sup>7</sup> It is a salient aspect of the judicial identity following totalitarian rule, such as in Poland. The judge’s position is not only dependent upon assurances in the law (that can include constitutional and statutory guarantees), but also an institutional framework that provides for the separation of powers as an essential part of a democratic rule-of-law state. The second dimension of the judge’s work, the substantive, comprises interpretation of the law. It is in the interests of the citizen to make sure the judicial identity is based upon such solid foundations and to do otherwise has long-term, negative repercussions.

### **Interlude**

“In the beginning there was corned beef. More accurately, in the beginning, there was war”.<sup>8</sup>

If we briefly journey in time to the pre-war period, we can identify two key factors that would become relevant to the modern judiciary: independence and tradition. The Polish judiciary came into existence in 1918, when an independent Poland re-emerged on the map. While the Polish judiciary was under the watchful eye of the executive even then, there is no reason to assume that the Polish pre-war judiciary was not independent. In fact, the judge of the pre-war period (1918–1939) was bolstered by the innovation of the period that concerned the creation of new codes and a constitution. It was a glorious but short-lived period within which the constitution and relevant statutes were guarantees of judicial independence.<sup>9</sup> This

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<sup>6</sup> See Adam Podgorecki and Vittorio Olgiati, eds., *Totalitarian and Post-Totalitarian Law* (Aldershot: Dartmouth, 1996).

<sup>7</sup> Keith S. Rosenn, “The Protection of Judicial Independence in Latin America”, *Inter-American Law Review*, 19 (1987), p. 3.

<sup>8</sup> Joseph Brodsky, *On Grief and Reason: Essays* (New York: Penguin, 1995), p. 3.

<sup>9</sup> Section 4 of the 1921 Constitution outlined the position of the courts and the judiciary. The constitutional provisions, which conformed to the 1791 document, guaranteed judicial independence (Article 77). Judges

is the ‘engine’ of the judge’s work, of which judicial reasoning is an integral part. Despite pressures placed on the judiciary under an increasingly authoritarian regime, the judiciary enjoyed independence institutionally and substantively, as a profession and individually, albeit for a brief period.<sup>10</sup>

### **Stalinist period (1944–1956)**

The pre-war interlude was ruptured by war, a discussion of which is outside the scope of this paper. What is of interest are efforts made, beginning in 1944, to systematically dismantle the Polish judiciary. The eastern territories of Poland that were occupied by the Committee for National Poland (*Polski Komitet Wyzwolenia Narodowy*, hereafter PKWN) became their focal point. The PKWN turned its attention to setting up a state framework which included an administration of justice.<sup>11</sup> This framework had an ideological underpinning (Marxism-Leninism-Stalinism) and a legal model that was ready to be imposed by the authorities. This

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could not be removed from office, transferred to a different place of office, suspended from office, or retired against their own will (Article 78) and judges were guaranteed judicial immunity (Article 79). The President of the Republic appointed judges (Article 76), while justices of the peace were elected by the populace. In political cases, or in cases entailing more serious punishment, the Constitution foresaw a jury trial (Article 83). According to Article 81, “the courts of justice shall not have the right to challenge the validity of statutes legally promulgated”. Since no form of judicial review was created, the power of the parliament (*Sejm*) was further strengthened.

<sup>10</sup> See Norman Davies, *God’s Playground: A History of Poland, Volume II: 1795 to the Present* (New York: Columbia University Press, 1982). Judicial independence in the pre-war period in Poland is elaborated in Agata Fijalkowski, *From Old Times to New Europe* (Aldershot: Ashgate 2010), Chapter 2.

<sup>11</sup> The PKWN was established as a temporary executive organ in July 1944 by decree of the Committee for National Poland (*Polski Komitet Narodowy*). Under Leon Chajm, the Committee laid the plan to destroy any remaining evidence of the pre-war structure of the judiciary. The Committee worked hard to replace it with a politically disposed cadre of judicial personnel. Definitions of the PKWN and related organs are in *Słownik historii Polski*, Wydanie III (The Dictionary of Polish History, 3rd edn.) (Warszawa: Wiedza Powszechna, 1964), pp. 264–65.

model was created and perfected by Stalin's top jurist, Prosecutor General Andrei Vyshinsky.<sup>12</sup> Vyshinsky justified the use of terror in application of the law as the only true way of ensuring that the criminal law would satisfy revolutionary objectives which, for most of Stalin's rule, meant identifying and eliminating the counterrevolutionary. Thus, underpinning the ideological drive outside of the Soviet Union, and into the territories to fall under Communist control, was a more calculated intent: to identify and eliminate potential threats to the Communist regime. The net would be cast wide to include all those who fought in the underground against the Nazi occupation, and extend to members of the *intelligentsia*: lawyers, doctors, journalists, writers, priests.<sup>13</sup>

The implications for the judiciary were serious because they were not only a target, but also part of the drive. As will be shown, this concerned a special type of judge who underwent a screening process before they went on to legal education. The screening process was undertaken at different times during the Stalinist period, and was conducted in a climate of great uncertainty within the administration of justice. Any semblance of stability was quickly replaced, with constant reminders, by the authorities, about the importance of the revolution. Implicating the judge in such an ideologically-driven plan inevitably affects the internal ethos of the judiciary to the detriment of the profession. It is not an exaggeration to contend that the nature of the plan created behaviour that demonstrated very little, if any, respect for human dignity; the individuals involved were most likely terrified and when they were not they often became the terrorisers. It was extremely difficult to refer to an administration of justice. The 'capricious arbitrariness' that characterised the regime<sup>14</sup> is summarised by Scammel:

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<sup>12</sup> See Andrei Vyshinsky, *The Law of the Soviet State*, trans. H. Babb (New York: Macmillan, 1950).

<sup>13</sup> Katyn is but one tragic example of this wider policy. The massacre, which was carried out by the Soviet secret police and resulted in the death of some 22,000 victims, has been acknowledged by the Russian parliament, and as Poland continues to struggle to achieve the balance between past abuses and justice. See "Russian Parliament: Stalin Ordered Katyn Massacres", Radio Free Europe/Radio Liberty, 26 November 2010 at [http://www.rferl.org/content/russia\\_duma\\_stalin\\_katyn/2231400.html](http://www.rferl.org/content/russia_duma_stalin_katyn/2231400.html) (last accessed 22 June 2011).

<sup>14</sup> Fyodor Vasilevich Mochulsky, *The Gulag Boss: A Soviet Memoir*, trans. Deborah Kaple (Oxford: Oxford University Press, 2011).

Worst of all was the terrifying fear and insecurity felt viscerally at all levels of society. Whether an illiterate peasant, cultivated artists or scientist, high Party official, or general, you sensed an invisible trapdoor beneath your feet that might yawn open at any moment and drop you into an inferno from which there was usually no escape.<sup>15</sup>

The Stalinist period was well underway by 1944 and although his rule would last another nine years, it is significant to note the speed with which the specific initiatives were undertaken to build an administration of justice in Poland. The miscarriages of justice that would occur from 1944 onwards could not have been committed without the complicity of key actors that included representatives of all three branches of government. It would be a mistake, however, to treat the executive, legislative and judicial branches as having an equal footing at this time. If anything, what the paper demonstrates is the *fragility* of the judiciary. It would be correct to contend that the legislature was in a no better position.

The new legal framework had certain features crucial to our discussion.

#### *Secret sections*

The use of secret trials is not a novel idea.<sup>16</sup> In the 20<sup>th</sup> century, secret trials came to be associated with certain measures that made a mockery of justice and were mainly used to eliminate political opposition in the Communist world. Collective targets were identified as ‘politically suspect’ by authorities from amongst the respective Communist societies. The architects of the legal framework introduced secret sections within the common courts. The work of these secret sections was based on the secret trials and show trials that had been perfected in the Soviet Union, in terms of nature and style of the trial proceedings that were based on a ‘script’ of charges and the involvement of carefully selected judicial officials (judge, prosecutor, defence counsel), all of whom ensured that the pre-determined outcome of the trial would be realised. In Poland the secret trial was transformed into secret sections that were introduced in the regional

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<sup>15</sup> Michael Scammell, “Circles of Hell”, *The New York Review of Books*, 28 April 2011.

<sup>16</sup> See George Hodos, *Show Trials: Stalinist Purges in Eastern Europe* (New York: Praeger, 1987).

courts and the Supreme Court. Within these sections, intense pressure was placed on judges by high-ranking political officials, as well as the secret police.

#### *Disrespect for due process*

Communication between counsel and the defendant was controlled and limited in trials, as was the questioning of witnesses. The 1950 secret trial of August Emil Fieldorf is an excellent example. Brigadier General Fieldorf was sentenced to death in 1950 for carrying out killings of, *inter alia*, Soviet partisans and members of the Red Army, in collaboration with the German forces. This was a crime defined by a 1944 decree (see the next section). The Fieldorf case, as with others of that time, represents the fate of the majority of Poles who were members of the Polish underground. This part of the Polish experience was mimicked throughout the region. Cases were built on the fabrication of facts, falsified evidence and evidence obtained under torture during brutal interrogation. Archival material shows that the secret trials were adjudicated by carefully chosen judges to reach the desired result, which in most instances meant a capital sentence.<sup>17</sup>

#### *Relevant law*

Fabricated charges were based on vague provisions found in one of the series of decrees passed by the PKWN between 1944 and 1946 while the Polish Criminal Code of 1932 remained in force, with some revisions made to keep up with the Communist ideology. Fieldorf and his counterparts were charged under Article 1(1) of a decree from 31 August 1944 on punishment for fascist-Hitlerite crimes and traitors of the Polish nation. The term ‘fascist-Hitlerite’ was vague enough to use against persons deemed to be a political threat. The Decree on State Security of 30 October 1944 was another example of a repressive piece of legislation which addressed attempts to overthrow the Polish state and terrorist attacks, subversive activity, and sabotage. The Criminal Code of 1932 was *de facto* suspended by with the creation of the Military

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<sup>17</sup> IPN, *supra* note 2, file 1796. For secondary sources see, for example, S. Marat and J. Snopkiewicz, *Zbrodnia, sprawa generala Fieldorfa – “Nila”* (A Crime, The Case of General Fieldorf – “Nil”) (Warsaw, 1989) or M. Fieldorf and L. Zachuta, *General Fieldorf “Nil”: fakty, dokumenty, relacje* (General Fieldorf “Nil”: facts, documents, relations (Warsaw: Biblioteka “Niepodleglosci”, 2006), two volumes.



Criminal Code. The draconian decree from 13 June 1946 also expanded the competence of the military courts, over civilians.<sup>18</sup> Subsequent decrees ensured that each of the crimes carried the penalty of a capital sentence.

### *Legal education*

In a democracy, judges occupy “a unique position. [The judiciary] is called upon to decide disputes that cannot or should not be left to the political branches or private individuals”.<sup>19</sup> In other words, the judiciary enjoys equal standing to the executive and legislative branches of government. All three form part of the checks and balances system and all three operate under the principle of the separation of powers. This is a simplified view, of course, but the main point is that the judiciary exercises its powers independently. In a transition, which is characterised by a “shift in political orders”,<sup>20</sup> the relationship becomes more acute because the law is “caught between past and future”.<sup>21</sup> As the Polish judiciary entered the post-World War II era, the authorities exploited this gap and used legal education as a guise. It became a key part of a screening process that comprised several critical stages.

#### Stage 1

The first stage of verifying judges occurred in different periods until 1950. Procedures were created by the authorities to examine the backgrounds of the judiciary. According to Rzeplinski, the new leadership was

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<sup>18</sup> This is only a selection of decrees from the period. For further information see Fijalkowski, *supra* note 10, p. 96.

<sup>19</sup> Peter Hack, “Introduction: Judicial Integrity”, in *Judicial Integrity*, ed. A. Sajo (Leiden: Martinus Nijhoff, 2004), p. 5.

<sup>20</sup> Ruti Teitel, “Transitional Rule of Law”, in *Rethinking the Rule of Law after Communism*, A. Czarnota et al., eds. (Budapest: CEU Press, 2005), p. 279.

<sup>21</sup> *Ibid.*, p. 279.

stuck<sup>22</sup> as courts only took on university law graduates and an unknown number of pre-war lawyers and, increasingly, graduates from the Soviet Union. In the eyes of the authorities, the weakest group came in the form of university law graduates from pre-war Poland as these candidates wanted to learn law and not ideology. This was seen to affect criminal law judgments, which the authorities found too liberal.<sup>23</sup> In response, new schools were quickly created to examine judges and test for political disposability. Their removal was approved by the Minister of Justice. Decrees from 22 January 1946 and April 1946 facilitated the creation of a new school for judges and prosecutors; deanships were held by judges who worked in the secret sections.<sup>24</sup> The curricula of the law schools set up between 1948 and 1954 were meant to complement the decrees passed during this time. The education was brief and graduates could find themselves adjudicating or prosecuting cases within a year of completing their studies. In other words, clear moves were made to control judicial officials, as well as to demote the status of a judge both professionally and morally.

## Stage 2

The second phase involved indoctrination in ideology.<sup>25</sup> In this fashion, judicial decision making lost its inherent feature of independence and impartiality. Certainly, the period 1944–1945 critically exposed the vulnerability of the judiciary in the Polish territories. The Soviet-led authorities gained political control over the courts by changing their jurisdiction so as to minimise forms of external control over the executive that underpins the separation of powers. In his sobering study, Kurczewski relates the manner in which the

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<sup>22</sup> Andrzej Rzeplinski, *Sadownictwo w Polsce Ludowej: między dypozycyjnością, a niezawisłością* (The Judiciary in People's Poland: Between Disposability and Independence) (Warsaw: Oficyna Wydawnicza Pokolenie, 1989). Also IPN, supra note 2, file 1769, p. 1399.

<sup>23</sup> Ibid., p. 1399.

<sup>24</sup> Ibid.

<sup>25</sup> See Rzeplinski, supra note 22.

appointments to the judiciary and secret police were dictated by Soviet functionaries and manuals.<sup>26</sup>

#### Final stage

The final phase concerned reform of the prosecution to conform to Soviet lines, although this institution never attained the status of the Soviet counterpart.<sup>27</sup> No social need could be satisfied unless defined through the lens of the politically disposed judge acting, in his or her view, on behalf of what they or the authorities perceived as good for society.

It is important to consider the wider context in which limited opportunities were offered to pre-war judges who wanted to enter the judiciary. Any hope of maintaining independence was lost without this group participating in the profession. Clearly, the value was placed on politically disposed judges. Although limited standards of law applied so as satisfy minimum expectations, eventually the gradual isolation and marginalisation of political opposition allowed for complete control by the authorities, i.e. the Communist Party. Not surprisingly, legal knowledge was not a priority.<sup>28</sup> Corruption was encouraged and in some cases the judge approached his superior (i.e. court president) and indicated that each capital sentence rendered had its fee.<sup>29</sup> This was tolerated by the authorities, at least at first. But this toleration was not commonly shared by judicial officials. These concerns related to the absence of legal knowledge, despite showing the necessary political loyalty. This became an increasing concern as secret sections began to render capital sentences, and by the 1950s some officials became anxious. For example, in 1956 Henryk Ciesluk, the Deputy General Prosecutor, wrote to Edward Ochab, First Secretary of the Communist Party,

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<sup>26</sup> See Jacek Kurczewski, *Resurrection of Rights in Poland* (Oxford: Oxford University Press, 1993), pp. 31–66.

<sup>27</sup> Lech Garlicki, “Politics and Political Independence of the Judiciary”, in *Judicial Integrity*, ed. A. Sajo (Leiden: Martinus Nijhoff, 2004), p. 126. Also see William Butler, *Soviet Law*, 2<sup>nd</sup> edn. (London: Butterworths, 1988).

<sup>28</sup> *Ibid.*

<sup>29</sup> IPN, *supra* note 2, file 1769. Also Maria Stanowska and Adam Strzembosz, *Sędziowie Warszawscy w Czasie Proby 1981–1989* (Warsaw Judges at a Time of Trial) (Warsaw: IPN, 2007), p. 25.

about the illegality of the secret sections and the lack of judicial experience on the part of one judge.<sup>30</sup> As noted by Rzeplinski, the identified concern was evidence of knowledge among the legal community that transgressions were taking place. The courts, in particular the secret sections, had ample opportunities to know the facts and ensure that trial proceedings and procedures were being applied correctly. No justification could be presented for not knowing. An ideological drive should not take away from the application of due process principles but, as such, this was not part of Lenin's doctrine of the "unity of power".<sup>31</sup> The judges at this time would undoubtedly also have been aware of the position taken at the Nuremberg Trials of 1946–1947, in particular as concerns the debate going on at that time regarding natural law and positivism, and questions related to morality in the application of law and notions of justice.<sup>32</sup>

In his memoirs, the former Supreme Court judge Waclaw Barcikowski correctly refers to this 1944–1956 period as "rogue".<sup>33</sup> Without doubt, the Polish state of the mid-1940s was heavily influenced and controlled by the Soviets. Even the decrees issued by the PKWN did not respect the amended law on courts that applied the relevant, pre-war statutes.<sup>34</sup> The struggle against 'the enemy' could easily be imported into a country like Poland dealing with the aftermath of occupation by two powers, making the imposition of the Vyshinsky model of justice less problematic.

### **Living in Limbo**

The closing of the Stalinist chapter was not without effect. Research supports the contention that the renunciation of the misadministration of justice associated with the secret courts had a negative effect on

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<sup>30</sup> IPN, supra note 2, file 1769.

<sup>31</sup> Vladimir Lenin, *The State and Revolution*, in *Selected Works in Three Volumes*, Vol. 2, 2nd edn (Moscow: Progress Publishers, 1967).

<sup>32</sup> Stanowska and Strzembosz, supra note 29.

<sup>33</sup> Waclaw Barcikowski, *W kregu prawa i polityki* (Within the Circle of Law and Politics) (Warsaw: KAW, 1988), p. 1402.

<sup>34</sup> The relevant pre-war laws were reactivated on 22 July 1944, but these did not set out minimum criteria. The competence of the PKWN was itself dubious in terms of competence – but the discussion of this lies outside the scope of this paper.

judges and public prosecutors.<sup>35</sup> The party continued to exert control over the judiciary with respect to, *inter alia*, the legislation concerning the judiciary, judicial appointments, legal education, and judicial terms. Certainly for all persons, including judges, the 1950s were permeated with a sense of post-war exhaustion.

In the end, the ‘purge’ undertaken from 1944 to 1954 was short-lived, but effective. The recognition that mistakes were committed under the Stalinist regime affected the Polish judiciary too, although arguably, however, these effects were limited. In 1956 the Wasilkowska Commission was set up to investigate the secret sections.<sup>36</sup> The report focused on the most active secret sections that functioned in Warsaw. The Commission found that the first secret sections were created within the Ministry of Justice. The secret police (which included the Soviet secret police at that time, the NKVD, and the nascent Polish secret police, *Urząd Bezpieczeństwa*, which worked closely with, and at times for, its Soviet counterpart) and Prosecutor General appointed judges nominally, as none of the officials selected were affiliated with a court. Secret sections within the courts themselves would follow shortly thereafter. Not surprisingly, the same names would appear. The reliance and political disposability of this small group of judges ensured the objectives of the secret sections were fulfilled. The Commission went on to identify cases in which the proceedings were illegal, in which the reasoning for the sentence rendered was simply unjustified. Concerning especially egregious cases, judges were named. As far as penal measures were concerned, only one judge was disciplined and forced to retire, but he was still able to collect his pension.<sup>37</sup> Other judges were delegated to the Ministry of Justice and many of them filtered into the common courts, including the Supreme Court. This was important as the authorities knew who they could rely on in the event of political crises. This would come to fruition in the 1960s and later during martial law. Corruption and opportunism were strong messages sent to newer colleagues. In sum, the 1956 admissions did not provide any real, meaningful reform of the judiciary. This culminated in a legal system that would in some ways become stagnant as from 1956. It also sent a clear message to the judges: they were very much under the eye of the authorities.

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<sup>35</sup> See Stanowska and Strzembosz, *supra* note 29.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

### **Martial law and beyond (1981–1983)**

As a consequence of all this, between 1956 and 1981 the judiciary did not operate independently. Political pressure placed on judges continued, notably with the introduction of the Law on the Supreme Court from 1962 concerning appointments to the Supreme Court for five-year terms, one of the most criticised features of the Communist judicial system seen as blatant disregard for judicial independence.<sup>38</sup> Further, the 1960s had seen a wave of political crimes related to economic offences – this meant pressure and reliance on judges to ensure severe sentencing in order to meet the objectives of the campaign against such economic exploitation, in particular by individuals gaining a profit.<sup>39</sup>

### *Legal education*

Legal education also underwent another reform in the 1950s. Having an education became important for the authorities, and class became a non-issue in state eyes. Thus, a certain cohort of law graduates began to emerge in the 1970s which had master's level law degrees they had achieved after five years. Most, but not all, law students who had selected criminal law as their specialisation in the judicial route became Party members. In sum, the judges who had been educated from the 1970s onwards not only possessed the skills and energy to participate in the reforms that would eventually be set out by Solidarity, but they did not face the internal pressure colleagues from previous years had experienced as the judges involved in the secret sections began to retire.

### *Civil society*

The surprise in the story is what the years 1980 and 1981 held in store for the judiciary. This came in the form of a vibrant, vital space important for the development of civil society. Although this was a slow process and occurred informally at first, the discussion played an extremely valuable role in the promulgation of human rights.

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<sup>38</sup> See Rzeplinski, *supra* note 22.

<sup>39</sup> *Ibid.*

The evolution of support for the Solidarity opposition movement (*Solidarnosc*) within judicial ranks is not well documented. Studies conducted in the area rely on the best known developments to be found at the Supreme Court at that time. Suffice it to say, the new breed of judge allowed for the reception of the movement and became a logical part of its momentum.<sup>40</sup> This is because Solidarity had already attracted membership within the ranks of the regional civil courts in 1980. The choice of civil courts was no accident. It was clear though that the criminal courts would be staffed by Party members or those loyal to the Party and Party line. Membership in Solidarity grew very quickly and research shows that the judges were well aware of and attracted to the programme of ‘socialism with a human face’. Likewise, judges would not have been isolated from regional developments in human rights protection as the abolition of the death penalty movement in Poland indicates, for example.<sup>41</sup> While there are debates about specific numbers of members among the judiciary, the fact remains that the movement had strength in numbers in Warsaw. Rzeplinski cites 10,000 members in the Administration of Justice that employed 24,000: about 1,000 judges (in courts) or 30 percent belonged to Solidarity.<sup>42</sup> Others report that in 1981 there were 3,096 judges, 867 of whom were judges who belonged to Solidarity.<sup>43</sup> The most active judges were younger regional court judges as opposed to judges within the higher courts. Almost everyone working in this field concurs that support for Solidarity was much higher than the figures suggest.

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<sup>40</sup> A connection was made between the *intelligentsia* and working class in the 1970s; after March 1968 it was extremely important, if not symbolic. There were student riots after Adam Mickiewicz’s play *Dziady* (Forefathers’ Eve) had been banned under Soviet pressure for its anti-Soviet flavour. The state used this to create conflict between students and the working class, and there was an ugly anti-Semitic bent whereby propaganda claimed that the main instigators of the riots were members of the Jewish *intelligentsia*.

Zbigniew Gostynski and Alan Garfield, “Taking the Other Road: Polish Legal Education During the Past Thirty Years”, *Temple International and Comparative Law Journal*, 7 (1993), pp. 243–286.

<sup>41</sup> Ibid. Also see Jerzy Jasinski, “Kosciol wobec kary smierci” (The Church with Respect to the Death Penalty), *Panstwo i Prawo*, 7 (1995), p. 56 and Agata Fijalkowski, “Abolition of the Death Penalty in Central and Eastern Europe”, *Tilburg Foreign Law Review*, 7 (2001), pp. 62–83.

<sup>42</sup> Rzeplinski, *supra* note 22.

<sup>43</sup> Ibid.

In addition to commenting on draft legislation, the centre of its work was ensuring guarantees of judicial independence. The memory of Stalinist crimes committed by the courts was strong, and it permeated discussions.<sup>44</sup> While this topic was generally restricted under the regimes of Wladyslaw Gomulka (1956–1970) and Edward Gierek (1970–1980), the new cohort placed this period on the agenda for discussion, and made efforts to secure more autonomy and an enhanced role in the selection and appointment of court presidents and vice-presidents. This work carried on until martial law was declared.

### *Martial law*

Martial law was imposed on 13 December 1981. It was declared by the Communist Party of the Polish People's Republic. The Council of State (*Rada Państwa*) issued three decrees significant to the operation of a state of emergency:

- (1) martial law;
- (2) specific crimes under martial law; and
- (3) the transfer of certain crimes to military courts, which meant amending the way that the relevant military courts functioned during martial law.

The promulgation of the decrees was in itself unconstitutional (under the then Article 31). Although a detailed discussion of this lies outside the scope of this paper, in 1992 the Polish parliament found that the decision to impose martial law was illegal.<sup>45</sup> All three decrees were published in the *Dziennik Ustaw* (Daily Laws) on 14 December 1981, leading to further ambiguity as to when the decrees actually came into force.

It is important to note that the catalogue of offences introduced under martial law was vast. The competence of the military courts was expanded to the decrees. The jurisdiction extended to two crimes in particular, found in the then 1969 Criminal Code, namely against political and economic interests of the state (the People's Republic) and public order, as well as crimes listed under Articles 47 and 48 in the

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<sup>44</sup> Stankowska and Strzembosz, *supra* note 29.

<sup>45</sup> This resulted in the cases brought before the Tribunal of State.



decrees previously mentioned. It is worthwhile recalling that the 1969 Polish Criminal Code was a repressive piece of legislation.<sup>46</sup> The punitive character of criminal law was even further compounded by the decrees. Under martial law, the jurisdiction of the military courts was extended to include crimes that were usually dealt with by the common courts, which were already sentencing people to longer periods of deprivation of liberty in a climate of an increasing punitive nature. Judges were forced, under threat, to preside over the military courts.<sup>47</sup> The decree stated that once martial law was lifted, these cases would return to the common courts. The reality was otherwise. According to Article 23(2) of the Law Concerning Certain Legal Regulations during Socio-Economic Crises and Other Legal Changes, these cases remained in the military courts' jurisdiction.<sup>48</sup>

Soon after martial law was imposed, some judicial officials took the opportunity to voluntarily hand in their resignations. Solidarity became a proscribed organisation in 1981, which led the Council of State to force the resignation of two Supreme Court judges on the basis that they had declared loyalty to the organisation. Some 40 judges were dismissed for their unreliability.<sup>49</sup> At this time, the military authorities advised the judges in the Warsaw courts to submit the names of colleagues who were politically unreliable.<sup>50</sup> Several judges and prosecutors were interned for crimes that carried a four-year penalty and anyone suspected of sympathising with Solidarity was harassed and required to justify their decisions that led to the acquittal of well-known activists. The usual purge of unreliable judges was underway, as was a climate of uncertainty and fear.

As the purge extended to society, draconian measures were accompanied by severe sentencing, resulting in serious consequences for the defendant. During the period in question (1981–1983), the cases that dominated the courts' workload were political crimes. For example, 62.8 percent of convictions were for political crimes; in 119 cases against 164 persons, defendants were found guilty of contributing in some

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<sup>46</sup> See Maria Los, *Communist Ideology, Law and Crime* (New York: St Martin's, 1988).

<sup>47</sup> *Ibid.*, p. 45.

<sup>48</sup> See Stankowska and Strzembosz, *supra* note 29. Note that Poland ratified the International Covenant on Civil and Political Rights (ICCPR) in 1977.

<sup>49</sup> See Los, *Communist Ideology*, *supra* note 46.

<sup>50</sup> *Ibid.*, p. 45.

fashion to Solidarity-related activities or engaging in peaceful protest. In a 1983 speech to parliament, the Minister of the Interior reported that 2,580 people had been sentenced for offences against the state and 1,462 people for violating the martial law decree.<sup>51</sup> Due to space limits, this section only considers a short selection of offences under the decree to illustrate their character.

Crimes included under Article 48 of the decree included crimes of enemy propaganda. This comprised several elements, namely the dissemination of information harmful to the state's interests, public order offences, and disrespect towards state symbols. The category of enemy propaganda was intentionally wide. Usually those charged under this provision were found guilty of possessing leaflets or other material that spoke out against martial law or for the freedom of political prisoners. In most cases, the prosecution asked for the four-year sentence, much harsher than what would have been proposed in normal circumstances related to public order offences which, as noted above, was already severe. An indication of the arbitrary and unforgiving character of these measures was revealed more recently in case reviews undertaken by the Supreme Court. As reported by Stanowska and Strzembosz, all those convicted under Article 48 who had been involved in the dissemination of material defined as enemy propaganda were later rehabilitated.<sup>52</sup> There were 302 Article 48 cases, involving 563 people. When it carried out a review in 1996 on cases concerning the dissemination of material, the Supreme Court rehabilitated all the defendants on the grounds that it was impossible for such activities to lead to public disorder. In the Court's view, the protest materials that were viewed as subversive by the Communist regime were regarded as socio-political commentaries and critiques essential to a democracy.

Martial law was lifted in 1983, but it was clear that any forms of dissent would need to be tempered. While judges continued to be pressured until the fall of the regime, their operation can underpin a reflection about the nature of judicial subjugation and resistance. As noted, the military courts' jurisdiction was extended to hear certain crimes. While the common courts retained control over some criminal cases, it was apparent that political crimes were consigned to military courts, for the most part. For example, for the 1981–1983 period, the Warsaw military court convicted 453 people in political cases,

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<sup>51</sup> Ibid.

<sup>52</sup> Stanowska and Strzembosz, *supra* note 29.

compared to 192 by the common courts.<sup>53</sup> Although the lifting of martial law was accompanied by an amnesty for political prisoners detained under the martial law decrees, it was supplemented by the government's warning that any anti-state activities would not be tolerated, leaving room for harsher measures to be applied to the recidivists.

In terms of numbers of judges, it is important to note that 226 judges adjudicated in the cases in question nationwide. In Warsaw, this concerned 105 judges in the common courts and 72 judges in the Warsaw military court. In the Supreme Court, 51 judges dealt with political cases, with 26 in the criminal division. A number of political crimes were appealed to the Supreme Court's criminal division in the 1982–1984 period. These cases concerned political crimes that were heard in courts throughout the country. By and large, when dealing with political crimes most judges in the common courts sought to read all files and evidence closely, and render a decision that was in favour of the defendant. In several instances, the court acquitted the defendant or found the defendant not guilty of the crimes – in this period there were more findings of not guilty in political than in ordinary crimes. Prior to martial law, a finding of not guilty accounted for 2 percent of criminal cases; this increased to just over 20 percent in cases related to political crimes.<sup>54</sup> What motivated the judge is hard to say – for Rzeplinski, for example, regardless of the nature of the regime some judges carried out their work according to procedure and found in favour of the weaker party.<sup>55</sup> In any event, it is fair to say that judges felt frustrated about the general view that seemed to be held relative to their alleged disposability to the regime under martial law. There were voices that strongly spoke out against this; the Deputy Minister of Justice, Adam Strzembosz, along with other judges who were also members of Solidarity, tried hard to refute this image.<sup>56</sup>

Another important point relates to the younger judges in this period, for whom the Stalinist crimes committed by the judiciary were a memory. Of course, memory can also be direct experience, but the authorities wanted to be sure. To reactivate judicial subjugation, the authorities had to exert control by

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<sup>53</sup> IPN, *supra* note 2, file 1769.

<sup>54</sup> Stanowska and Strzembosz, *supra* note 29.

<sup>55</sup> Rzeplinski, *supra* note 22.

<sup>56</sup> Maria Los, "In the Shadow of Totalitarian Law: The Law-Making in Post-Communist Poland", Working Paper 9301C (February 1993).

threat and the new cohort of young judges was a good target. “They realized that Solidarity emerged only because they [the authorities] had overlooked the ‘dangerous’ moment of the dissipation of fear and the unprecedented rise of hope”.<sup>57</sup>

In contrast, a review of the Supreme Court paints a less rosy picture than initially perceived. The few scholars working in this area have confirmed that the Supreme Court seemed to support the severe approach taken as regards political crimes. For example, 45.4 percent of the cases confirmed the original sentence. At times the sentence was increased. All extraordinary reviews went against the defendant. Note that 45 judges were adjudicating these cases; 35 would hear the extraordinary reviews. Certain judges’ names would appear more frequently, as noted in their average workload which was much heavier (an allocation of 53 cases) than their colleagues (an allocation of 18 cases). The picture that emerges indicates a pattern of pressure exerted by the authorities, as observed by one scholar, from 1982–1984 on an informal secret section to hear political cases operated in the Supreme Court.<sup>58</sup>

Not surprisingly, under martial law political crimes went hand in hand with severe punishment. Human rights bodies are unforgiving where the state subjects civilians to military courts; this reproof is justified where such courts displace the common courts within the jurisdiction. According to Dyzenhaus, martial law represents a puzzle because “it is an absence of law prescribed by law under the concept of necessity – a legal blackhole, but one created perhaps even in some sense bounded, by law”.<sup>59</sup> The significance of the question as to whether officials can be authorised to act outside of the rule of law, based on a constitutionally valid suspension is a political question, as indicated above, and as seen in this section one that involved serious transgressions of judicial independence.

In conclusion, the new cohort of graduates with a more advanced law degree who had graduated in the 1970s were now becoming judges who possessed the skills and energy to participate in the reforms that would eventually be set out by Solidarity. The space was provided for by the retirement of those judges who, despite being involved in the secret sections, had been permitted to adjudicate until retirement, which

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<sup>57</sup> Los, *Communist Ideology*, supra note 46, p. 44.

<sup>58</sup> Stanowska and Strzembosz, supra note 29. Also see Krzysztof Kauba, “Orzecznictwo stanu wojennego” (Case Law during Martial Law), *Przegląd Sądowy*, 5–6 (1992), pp. 25–37.

<sup>59</sup> David Dyzenhaus, “The Puzzle of Martial Law”, *University of Toronto Law Journal*, 59 (2009), p. 2.

did not go unnoticed. However, the pressure, the threat of redeployment, and disciplinary hearings applied to break the cadre resulted in general demoralisation. Likewise, the most repressive period showed the greatest leniency on the part of the common courts and illustrates that arguably a degree of judicial independence can exist in such a regime, where cases were consigned to another less independent space and where the regime continued to resort to instilling fear in new generations of judges to ensure its will is followed to the detriment of the profession and contravention of civil liberties and tenets of judicial independence. In this way, the memory of Stalinism was perpetuated.

Interestingly, this period saw the establishment of the Constitutional Tribunal in 1982 and the Commissioner for the Protection of Citizens' Rights (Ombudsman) in 1988. Here there is no intention to discuss these at length but to point out that, as measures, this was arguably an incredibly bold move on the part of General Jaruzelski's regime since both institutions are based on the protection of civil liberties and human rights and adjudicating on the constitutionality of the law, respectively. However, key limitations were placed on these institutions; the Constitutional Tribunal only became operational in 1986, and had no competence to adjudicate on constitutional matters arising prior to that time.<sup>60</sup>

### **Post-1989 Developments**

"A jewelled movement turning in Starling's unnatural calm: For an instant many windows in her mind aligned and she saw far across her own experience".<sup>61</sup>

This reference to Clarice Starling's recollection of her childhood illustrates the power of experience and memory, the significance of which can be extraordinary. The moment the Polish judge's past crystallised and could be articulated came between February and April 1989 when a series of round table talks took place between leaders and representatives of Solidarity and the outgoing government. Concerning the Administration of Justice, the proposals set out at the talks by the opposition showed evidence of a

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<sup>60</sup> Stanislaw Frankowski, "A Comment on Professor Garlicki's Article 'Constitutional Developments in Poland': The Lyrics Sound Familiar, But are They Really Playing Our Song?", *Saint Louis University Law Journal*, 32 (1988), pp. 737–751.

<sup>61</sup> Thomas Harris, *Hannibal* (London: William Heinemann, 1999), p. 477.

commitment to judicial independence, which had been blatantly violated during these two periods considered above, and *inter alia* included:

- the introduction of a constitutional provision which guarantees judicial independence and precludes the removal or transfer of judges save for reasons of ill health or disciplinary charges;
- the abolition of judicial terms for Supreme Court judges;
- the abolition of the oath of office required to be taken by judges before assuming office;
- the constitutional establishment of the National Council for the Judiciary (*Krajowa Rada Sadownictwa*), comprising members of the judicial as well as the executive and legislative branches of government, which would take decisions on future candidates for the judiciary;
- a wider discretion granted to judicial self-government to decide on, *inter alia*, nominations of judicial presidents;
- the selection of members to the district judicial branch from the general pool of judges from all branches;
- the introduction of terms to the office of judicial presidents;
- the modification of the guiding institutions of the administration of justice and the court practice as laid down by the Supreme Court in such a way that they do not violate the principles of the subordination of judges only to the law; and
- the creation of judicial benches which are granted the right to directly petition the Constitutional Tribunal in matters concerning the constitutionality of constitutional acts, normative acts or legislative acts.<sup>62</sup>

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<sup>62</sup> “Sprawozdanie z posiedzen Podzespolu do sprawy reformy prawa i sadow” (Report of the Sessions of the Subtable on Legal and Court Reform), *Porozumienia Okraglego Stolu* (The Round Table Talks), Warsaw, 6 February–5 April 1989, pp. 60–61.

In this fashion 1989 presented judges with the opportunity to form a new cadre, which meant the chance to ‘shake off’ the Communist legacy and forge a viable, independent judiciary. In addition, the Polish judiciary applied the governmental policy of the 1990s of *gruba, czarna kreska* (a thick, black line) to itself. ‘Self-cleansing’ was becoming part of the approach to the past. Judges were aware that not all of them had demonstrated resistance and that subservience to the Party had resulted in damage to individual defendants and the judiciary, leading to the supposition that “[o]nce normal conditions [were] established, the judiciary [would] cleanse itself of the morally depraved, compromised individuals”.<sup>63</sup> Eventually, it was concluded that the approach adopted by the Ministry of Justice was fundamentally flawed. Polish Senators became increasingly frustrated:

The assumption of self-cleansing has not proven correct...it is quite evident in courts...We know that this internal self-cleansing of our courts of law has never happened.<sup>64</sup>

The importance and credibility of these revolutionary changes were undermined by the post-Communist government’s decision not to carry out a ‘verification’ of judges based on their past records. The Deputy Minister of Justice continued to argue that Polish judges had tried very hard to preserve their integrity under tremendous political pressures. It is worth noting that the Supreme Court was the only court post-1989 to have undergone verification and to have implemented life terms of office in lieu of a five-year term.<sup>65</sup> These are important guarantees that can also work as incentives.

Law and politics, however, were to collide. The political elite at that time saw the transition as an exercise in ‘self-cleansing’ resulting in ‘self-dismantling’. There was no scope to construct new institutions so, ultimately, such a policy was doomed to fail. This, in turn, would eventually be interpreted as weak. Yet the alternative of adopting stronger measures ran the risk of being hijacked by political leaders and used to support contentions that the Polish judiciary was politically tainted. The allegation that the judiciary was

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<sup>63</sup> Los, “In the Shadow”, supra note 56, p. 9.

<sup>64</sup> Ibid.

<sup>65</sup> Marek Domagalski, “Sad Najwyzszy zmienil sie przez ostatnie 20 lat”, *Rzeczpospolita*, 11 September 2010.

comprised of judges who were politically tainted then came to haunt the judges in two ways: as part of their way to reform the judiciary in reply to the Stalinist period and martial law, and now externalised as part of the political campaign.<sup>66</sup>

In light of this allegation and the contexts set out above, it is important to revisit the prevalent theme that connects our periods. Judicial independence is a relatively elusive concept. It does not mean that “all judges remain oblivious to political considerations”.<sup>67</sup> As noted, judicial independence can be found in totalitarian regimes where common courts functioned independently, and where politically sensitive cases were diverted to special courts. Judicial independence is the “degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of the judicial role”.<sup>68</sup> This is, of course, not enough as Holmes observes, since judges may have personal attitudes that ignore the law. Moreover, even in a state that is recognised as a democracy, in which the majority of judges act independently, a hidden or ‘latent’ practice might exist which allows for politically sensitive cases to be transferred to the group of reliable judges.<sup>69</sup> As seen above, political leaders, such as Cieslak or the Wasilkowska Commission, expressed concern about the judges in the secret sections, both incidents call for further research. Alongside this, we have seen that secret sections were re-established in the 1980s to deal with political cases in line with political objectives; once again using criminal law as a political weapon.

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<sup>66</sup> This debate began in the early years of post-Communism. Several judges stepped forward to defend their position, claiming to have been following the law. See the debate between the following authors, a lawyer and a judge, respectively: Andrzej Litwak, “Reforma ... bez reform” (Reform ... Without Reform), *Wokanda* (Trial Calendar), 14 July 1991, p. 9; Waldemar Myga, “Protest “komucha” (Protest of a ‘Commie’), *Wokanda* (Trial Calendar), 18 August 1991, p. 4.

<sup>67</sup> Keith S. Rosenn, “The Protection of Judicial Independence in Latin America”, *Inter-American Law Review*, 19 (1987), p. 3.

<sup>68</sup> *Ibid.*

<sup>69</sup> See Stephen Holmes, “Judicial Independence as Ambiguous Reality and Insidious Illusion,” in Ronald Dworkin, ed., *From Liberal Values to Democratic Transition. Essays in Honor of János Kis* (Budapest: CEU Press, 2004), pp. 3–14.



In light of these experiences, one can posit that the post-Communist judge is or should be even more aware of the importance of and need to address the existence or lack of judicial independence. In light of Bobek's comment that the "rich spectrum of transition problems" faced by Central and Eastern European judiciaries needs to be considered against the "issues of societal, personal and mental changes within the judiciaries in the region",<sup>70</sup> then perhaps it is time to critically examine how real these concerns are and whether they can be addressed.<sup>71</sup> This entails a re-assessment of policies that include the question of unfinished business in relation to allegations of a tainted judiciary that shaped the initial response in the form of self-cleansing.<sup>72</sup> In other words, the law might provide an answer. The discussion now focuses on key legal developments rather than legal education, which has also undergone an important reform.

In this vein, it is important to note a 1997 amendment to the law on common courts and other laws that sets out the conditions for retirement.<sup>73</sup> This amendment was inspired by the pre-war period. In fact, it is a return to the pre-war legislation in an effort to bolster judicial prestige and introduce stability into the judiciary. The flaw that was identified in this move was the risk that those judges who had been involved in applying the law in a draconian fashion during the time periods mentioned above would go unpunished and claim state benefits. Related questions were already addressed in the 1990s when moves were made to curtail the generous pensions of Communist officials.<sup>74</sup> The result was Article 7(1) that exempted key categories of judges and prosecutors from these privileges:

1. judges or prosecutors who served in the Soviet secret police (NKVD) or other related organs in the 1939–1956 period;

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<sup>70</sup> Michal Bobek, "The Fortress of Judicial Independence and the Mental Transitions of Central European Judiciaries", *European Public Law*, 14 (2008), pp. 1–20.

<sup>71</sup> Elin Skaar, *Judicial Independence and Human Rights in Latin American: Violations, Politics, and Prosecution* (New York: Palgrave Macmillan, 2011).

<sup>72</sup> See Martin Krygier, "Rethinking the Rule of Law After Communism", in *Rethinking the Rule of Law after Communism*, A. Czarnota et al., eds. (Budapest: CEU Press, 2005), pp. 265–277.

<sup>73</sup> Dz. U [1997] no. 124, item 782.

<sup>74</sup> See Matthew Day, "Poland Punishes Former Communist Leaders by Cutting Pensions", *Daily Telegraph* (5 January 2010).

2. judges or prosecutors who served the Polish secret police (*Urząd Bezpieczeństwa*) and collaborated to eliminate persons engaged in Polish independence in the 1944–1956 period;
3. judges or prosecutors who worked in the military courts in the 1955–1956 period and were involved in the fabrication of criminal cases against members of the Polish independence movement; and
4. judges and prosecutors who served in the secret sections.

As this concerned judges in retirement, the governing body of judges, the National Council for the Judiciary (hereafter, KRS), became involved. The KRS is a constitutionally created organ with the mandate to oversee the judiciary, as noted earlier.<sup>75</sup> Further to the law, some 71 people were identified by the KRS as falling into one of the four categories and proceedings were initiated only to be discontinued, due to a lack of evidence or because several people had passed away. This, of course, concerns those individuals who qualified as judges or prosecutors. In five cases it was proved that there had been collaboration with the NKVD; in six cases it was proved that the persons worked for the Polish secret police in secret sections; in four cases the persons worked in the secret sections of the common courts; and in one in the secret section of the regional and district courts military courts. Significantly, the materials provided by the KRS indicate that the secret sections operated nationally, not only in Warsaw, as was held by scholars up until now.<sup>76</sup>

After a debate about the meaning of violating the principles of judicial independence, a 1998 Law amending the Law on Common Courts, for example, meant that disciplinary measures could be initiated against judges who had rendered unjust rulings. Strzembosz reports that 30 cases concerning 48 judges were heard before the disciplinary court. Almost all the judges were criminal law judges, but only three judges were found to be in violation of the provision. The reports from the disciplinary proceedings show the careful scrutiny that was afforded to each case. It is worth quoting Strzembosz at length:

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<sup>75</sup> See Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (London: St Martin's Press, 1998) and also Fijalkowski, *supra* note 10.

<sup>76</sup> Stanowska and Strzembosz, *supra* note 29, p. 274.

It must be said, that the findings are shocking. In addition to public opinion, which included individuals in high political standing, there was a profound belief that the judiciary was politically disposed...judges themselves knew who amongst them took on such a role.<sup>77</sup>

For Strzembosz, who fought hard to support such a policy, the mistakes of a few cannot justify such generalisations; this is an easy trap to fall into. There is a temptation to fall sway to the powerful feelings that understandably emerge when confronted with miscarriages of justice such as these.<sup>78</sup> Some scholars advocate the position that the criminal trial is the catalyst for self-searching that is connected to the moral limits for the achievement of certain goals.<sup>79</sup> We have seen how judicial identity includes the manner in which the judge gets to grip with the past and how,<sup>80</sup> for Poland, a re-evaluation of the past might even involve a personal or official judicial verification process that can result in criminal prosecution and in a sense freeing the profession from the taint of the past, but equally<sup>81</sup>:

not to release the judiciary from all forms of dependency, but rather to re-organize its dependency, freeing judges from the clandestine and *ad hoc* will of powerful members of the executive and subordinating them to publicly known and general rules promulgated by elected representatives.<sup>82</sup>

This analysis of the Polish post-totalitarian legal landscape, in addition to showing the repressive nature of the laws and the regime, also illustrates the forces that worked for and against the judge and that the manner in which the memory is treated by the law will determine the strength of judicial independence and how we understand it. The discussion shows that the past does matter, but not as a determining factor nor as

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<sup>77</sup> Ibid.

<sup>78</sup> See Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ, USA: Transaction Publishers, 1997).

<sup>79</sup> Ibid.

<sup>80</sup> See H. Patrick Glenn, *Legal Traditions of the World*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2007).

<sup>81</sup> And historical record. See Jiri Priban, *Legal Symbolism: On Law, Time and European Identity* (Aldershot: Ashgate, 2007).

<sup>82</sup> Holmes, *supra* note 69, p. 6.

a deterrent to attempt new and different measures:<sup>83</sup> it demonstrates that generalisations simply cannot be made about the judiciary and how the judge will approach his/her work under totalitarian or democratic rule.

### **Concluding remarks**

In this paper I have considered the manner in which two judicial snapshots of two critical periods resurface in the present day. I have sought to understand the paradoxes that emerge as we try to construct a judicial identity. The judicial identity of the first two snapshots is shaped by a repressive history of violations of judicial independence while the judicial identity of the third snapshot holds the promise of a new future, but it is also held back by the past marred by judicial subjugation. Because the respective judiciaries were not permitted an equal standing alongside the executive and legislative branches of power, one of the main points of reform concerned judicial independence. Once involved in the construction of a judicial identity, the obstacle that re-emerges is politics in which practices from the past continue to dictate to a certain extent the manner in which the judiciary reasserts itself. As shown, efforts made by the judiciary to reassert itself following on from the Stalinist period only occurred when it was provided space through the retirement of the former cadre, the reform of legal education, and the development of civil society. Even during martial law, the courts sought to work around the draconian measures. It cannot be said that orders were followed blindly. But what can be assumed is that as long as these features are allowed to emerge, or to be reactivated, a viable third branch of power will never emerge. In other words, a judiciary needs to be empowered further to institutional guarantees. While relevant laws related to judicial independence have been reintroduced, they have become part of, or work alongside, a policy of self-cleansing, disciplinary measures, the criminal law, and the specific history. As criminal investigations and other related enquiries

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<sup>83</sup> See Jiri Priban et al., eds., *Systems of Justice in Transition. Central European Experiences Since 1989* (Aldershot: Ashgate, 2003) and review by Martin Krygier in *Law and Politics Book Review* 14 (April 2004) at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Priban-Roberts-Yo404.htm> (last accessed 26 August 2011). Also see Martin Krygier, “The Constitution of the Heart”, *Law and Social Inquiry*, 20 (1995), pp. 1033–1066.

continue,<sup>84</sup> the Polish judge continues to be haunted by the ghost of a short-lived, but unforgotten – owing to the sheer terror and repression – period. These injustices, or the haunting, might never be exorcised. And if exorcised, what is the price to pay if not undermining the basic tenet of judicial independence and rule of law itself? Seeking justice needs to be a grounded exercise. Otherwise, like Hannibal Lecter, one might end up consuming the memory itself.

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<sup>84</sup> The critical period is 2005–2007 when the Polish presidency was held by Lech Kaczyński, and his brother Jarosław was Prime Minister. The Constitutional Tribunal’s judgment of 11 May 2007 found six key aspects of the 2006 reform on lustration or screening laws unconstitutional. However, note the case of Justice Wyrzykowski of the Polish Constitutional Tribunal (January 2010) and the role of the international commentary and role. Wyrzykowski was acquitted from charges of collaboration with the Polish secret police. See <http://www.reed-elsevier.com/corporateresponsibility/hottopics/Pages/ObserverfortrialofPolishjudge.aspx> (last accessed 26 August 2011).