

4. See, as an example, the publication of the *liber amicorum* in honour of Judge McDonald: R. May, et al., eds., *Essays on ICTY Procedure and Evidence* (The Hague, Kluwer Law International 2001).

M. LOS; A. ZYBERTOWICZ, *Privatizing the Police-State: The Case of Poland*, St Martin's Press, New York 2000, 270 pp., \$69.95. ISBN 0-312-23150-4.

George Orwell once wrote 'Who controls the past controls the future; who controls the future controls the past'. His apt observation about totalitarian regimes is recalled when reading the present book under review. It is a story about the conversion of former Communist elites (*nomenklatura*) into Polish capitalists. In this context, the book focuses on the role of the secret services in Poland, providing an unsettling account about the manner in which they have maintained control since 1981 through infiltration and surveillance, indicating that the network of crime to have emerged during this time is intricate as it is premeditated and, of course, assisted in the ability of key actors to take advantage of opportunities, as we shall see shortly. The book has an important place in the discussion among, *inter alia*, international lawyers as concerns international criminal justice issues, namely by raising serious questions as to the manner in which newly established democratic regimes should address the wrongdoings and atrocities of their predecessors. It also contributes to the discourse about crime control over transnational financial transactions.

In recent years much literature has focused on the development of crime and criminal networks in the age of globalization and supranational regional transformations. This phenomenon has taken on an added meaning after the collapse of Communism. The European Union (EU) has recognized this and has tried to address the problem of protecting the single market urgently, with somewhat mixed results, as the EU is unable to cope with this problem within its own confines. EU measures, a series of action plans and directives, all aimed at combating organised crime and corruption, attempt to control the westward flow of 'newly liberated organized crime' from Central and Eastern Europe that is viewed as providing new and significant opportunities for transnational criminal actors.¹ Although the book under review does not tackle this problem as such, the transformations to occur under globalization and supranational regional organs form an important part of the authors' thesis, who try to define the nature of the capitalist system in post-Communist Poland and the role of the secret services in its conversion. The result is a provocative analysis of covert actions that were occurring during the 1980s. The authors' work is a significant step in filling the lacuna in this area of research.

Maria Los and Andrzej Zybertowicz's work is based on primary sources in the form of interviews and an impressive selection of secondary materials. Concerning methodology, Los and Zybertowicz were not able to rely on any previous academic research. In examining the existing literature, the authors adopt a 'straight intelligence' approach. In other words, they gathered data from diverse sources, ranging from, *inter alia*, official governmental

documents, interviews, leaked and declassified documents, and journalists' reports. This is combined with earlier research carried out by the authors and interviews with well-informed, mostly anonymous sources. The period covered begins in 1980 and ends in 1998. The authors readily admit to having difficulty in fitting their research within a framework of non-existent social science concepts. Their aim, however, is not to put forward one binding theory, but to lend some understanding of the complex process at hand.

The authors depart from a simple question: if the systematic change in Poland is found in the processes of democratization, privatization, and marketization, how have these processes been affected by, and how have they affected, the party/police-state framework in which they have occurred? The authors recognize that the transformation process requires the reassessment of theoretical frameworks of analysis and, in providing a framework for the party/police-state, they adopt a heterogeneous approach by exploring the most significant metaphors in the field: revolution, two-step revolution, transition, (systematic) transformation, path dependency, multiple transformation, negotiated revolution, and conspiracy (pp. 10-14). While some have identified this approach as a possible criticism and evidence of tension,² the present reviewer sees this as lending some authenticity to the complex task that the authors have undertaken. The authors discuss the main aspects of each metaphor in chapter 2 to see how adequately they describe Polish developments. Owing to space considerations, a detailed explanation of each theory is impossible, however, it will suffice to look at them briefly.

To start, the collapse of Communism in Poland is difficult to define as a 'revolution', as this would imply a forceful overthrow of the regime and a clear break with the past. As the authors succinctly point out, the developments in Poland were characterized by caution and careful management, both stressing the need for continuity, not only of the state organs and their structures and personnel, but also of the legal system. Two-step revolution refers to Max Weber's notion of the revolutionary process, which is valid in that it recognizes that there is a gap between the interests that resulted in the fall of the old regime and those of the new one that it promotes. This applies to the Polish case but is not altogether convincing as it fails to take a broader view of the role of all actors involved. Path dependency, a concept emphasizing the role of the past in shaping the process of change, is an invaluable argument, in particular when noting that the new form of social integration is conditioned by mental patterns, habits, strategies, and alliances formed under the previous regime.³ Multiple transformation, a concept that Los has been writing about for some time, refers to a broader context when examining post-Communist transformations together with other major transformation processes, such as supranational regional transformations or global transformations.⁴ Negotiated revolution or 'refolution', attributed to Timothy Garton Ash, appropriately suits the book's purposes.⁵ This notion stresses the active role and dynamic survival of various elements of the old system, as well as their reconstruction in the new institutional framework.

The authors inevitably treat conspiracy theory, which undoubtedly is a delicate area, having been subject both to ridicule and political exploitation. The authors are right in rejecting the conspiracy theory outright, and rather to explore some of the suppositions of clandestine scheming behind the events that are studied. In doing so, the authors adopt a

certain general vision of the changes in Poland, without presupposing any answers but instead affecting the types of questions asked.

The fact that the leadership in Poland during the 1980s was a highly centralized, military rule, is an important theme in the book. In chapter 3, the authors begin the journey of taking the reader through the anatomy of the police state. Concerning the echelon of power, many former high-ranking figures in the *nomenklatura* have survived politically until present day, despite their so-called activity and dedication in the former system. Catherine Epstein, in her essay on biographies, wrote that a biography is similar to a text, in that it can be read in many different ways, thus manipulated and revised.⁶ The 20th century has seen a particularly widespread (re)interpretation of past biography for political purposes (p. 2) and Poland is certainly no exception.

In this respect, the issue of biographies is an interesting theme in the Polish context, and in other post-Communist countries. Perhaps more unknown is the fate of former secret service agents after the collapse of Communism. In chapter 8, Los and Zybortowicz detail how many former secret service personnel and militia officers set up private detective and security companies further to a 1988 Act on Economic Activity. The private security industry expanded in the 1990s, with some 7177 registered private protection and detective agencies; it is estimated that many are operating illegally (p. 159). Based on available data, it is estimated that between 47,000 and 250,000 is the size of the workforce, a large portion of which are former and post-Communist secret service operatives, police and military personnel, anti-terrorist experts, correctional service officials, and from related professions (*ibid.*). Most of the security companies have been involved in debt collection and conflict resolution as a means to assist the lower courts, which suffer from poor resources. This also means at times the line between criminal and protection practices has been blurred. The escalation of activity prompted the Supreme Control Chamber (NIK) to embark on an eight-month investigation of the private security industry in 1996, exposing many unlawful practices. The industry was not regulated at the time and the 1997 Law that was passed, further to NIK's findings, has proven inadequate. This is not the most alarming aspect, however, as many of the top companies have been linked to the most serious financial scandals in Polish history. Case Study 3 (there are five in total) provides an overview of the FOZZ (Foreign Debt Servicing) scandal which remains unresolved until today. Indeed the reverberations can be felt present day, as evidenced in the holding of the third Falzmann-Symposium, in 2001, ten years after this NIK inspector in charge of handling the FOZZ affair died under mysterious circumstances.

In sum, the shift towards democracy released into society a formidable number of specialists in the area, as they were no longer needed, owing to reductions made by state officials. This phenomenon is not new, as seen in respect to other professions, such as natural scientists, who fled West in an effort to offer their knowledge to governments that welcomed them. The authors convincingly argue that as regards secret service operatives, they have succeeded in maintaining access to various resources of the previous careers and remain connected, through personal links, to all levels of power in the post-Communist state. These

developments have served as a catalyst in privatizing violence and crime practiced by these networks working for companies that serve as fronts for well-developed criminal schemes and are aimed to exploit and protect major illegal economic ventures. The authors provide various references and sources for their claims.

The path dependency concept noted above is a legitimate argument to make. To reiterate, it argues that Polish society has been conditioned by its police-state past of control through secret surveillance. Studies of totalitarian bureaucracies, such as those operating under Communism, point out that the bureaucracy is subservient and works directly for the ruling elite.⁷ This kind of bureaucracy is characterized by socio-political conditions that do not offer the individual the feeling of protection, but rather he or she is perceived as a threat; it also creates informal devices that surrounds individuals and forces them to conform to the expectations of the system. Interestingly, NIK has released a paper entitled 'Threat of corruption in the light of audit studies carried out by the Supreme Chamber of Control (the NIK) of the Republic of Poland'.⁸ It is worth drawing attention to two points in this March 2000 report. First, NIK identifies the irregularities of police operations as serious, and an issue that requires immediate attention, as it contributes to the *weakening of the state and the law*. Second, the NIK report mentions several corruption mechanisms, namely *excessive competence in the civil servant's hands, excessive freedom in decision-making, ignoring documentation and reporting, weakness in internal control, unequal access to information, lack of accountability, and failure to take specific anti-corruption measures*. These observations indicate a continuity of the most damaging aspects of the totalitarian state.

And the role of law? The implications as regards setting up a rule-of-law state (Art. 2 Polish Constitution) are immense. Recalling Podgorecki, of the three branches of government, the judiciary becomes the most visible victim under totalitarianism.⁹ The Polish judiciary continues to struggle in its new role in the democratic state. From the technical end, it is understaffed, underpaid, and is lacking resources. But establishing its independence is all the more difficult when this is compounded by often-repeated slogans that the courts are under-funded, corrupt, and should not decide in matters better left outside the courts. Indeed, one of the most controversial issues in establishing a rule-of-law state concerns the manner in which to address the wrongdoings and atrocities committed by the former regime, a question which should be dealt with by the courts. Poland is not alone in not knowing how to deal with this question. In fact, when the newly-formed Solidarity-led government assumed power in 1989, it cautioned against calls for vengeance but did promise to seek justice in crimes committed by the former regime. To date, the vast majority of crimes have gone unpunished. Chapter 9 provides a good overview of the lustration and de-communization measures that have been undertaken in Poland. It is interesting to note that Polish public opinion has been inconsistent at best as regards the need for de-communization measures, with 42 per cent surveyed in 1990 supporting such an initiative on the part of the government, to 52 per cent rejecting such a move only a year later.¹⁰

Adam Strzembosz, the highly respected former Supreme Court justice, who supported the view in 1989 that the judiciary will 'cleanse itself' of tainted judges (it should be noted

that no formal verification was carried out of the judiciary) soon found that this was not to be the case. Concerning lustration, he aptly noted in 1994 that '[t]echnical difficulties appear insurmountable [only] when there is no political will [to prosecute]' (p. 187). This way, it becomes clear that the courts have no way in establishing themselves without the means to do so and perhaps it is the way that is more convenient for some. Cases concerning crimes that took place between 1944-1956 have been heard in courts found in smaller towns or cities, where there is little publicity and even less local interest.¹¹ International lawyers that refer to the success of the South African Truth and Reconciliation Commission must recognize that *political will* is a key factor in not only disclosing and clarifying former crimes, but also as identified by the authors 'the mechanisms of ruling that made them possible' (p. 197). For those concerned about setting up a rule-of-law state, the book identifies some issues that are not readily taken as obstacle to this purpose, namely the role of hidden actors which influence political initiatives.

Concerning criticisms, one weakness of the book is that there are no means of corroborating the authors' conclusions. Yet, it is known that there was a systematic destruction of archival materials, a fact the respected Polish historian Andrzej Paczkowski has written about, namely the materials from the archives of the Ministry of Internal Affairs in 1990.¹² However, one need only to examine the authors' analysis in relation to developments in neighbouring countries, such as Russia, where many of the key political position holders are in fact former KGB officers.

One of the most interesting parts of the book is the final chapter (10), where the forces of globalization are addressed. The entire Polish transition is scrutinized in the context of global processes. The authors demonstrate how the foundations of the global economy shifted the need for knowledge-based jobs away from the working class, thus allowing the Polish *nomenklatura* to fill these positions and place themselves in positions of power. More importantly, their agenda was legitimized when it became linked to the notion of Polish independence, thus giving the former Communist elite the chance to separate itself from the past and shield itself behind the cover of statehood and democratic slogans. The skills that they could offer fit well into the post-modern global economy, where boundaries are ambiguous and actors hard to identify.¹³ Some of these former secret service operatives have gone on to participate in an essential part of the global economy, namely international criminal organizations.

In conclusion, Los and Zybortowicz have succeeded in producing a groundbreaking book on an unknown and possibly shunned subject. The book should appeal to criminal justice scholars and assist them in understanding many issues which are related to historical justice, as well as financial crimes. Hopefully this book will serve as a catalyst in the discussion about

the role of secret services and control methods over society in, but not limited to, post-Communist states.

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1. See C. Harding, 'The International and European Control of Crime', in C. Harding and C.L. Lim, eds., *Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (The Hague, Kluwer Law International 1999) pp. 189-219.

2. See A. Sajo, *Law and Politics Book Review*, on <http://www.polsci.wvu.edu/lpbr/subpages/reviews/losmaria.htm>.

3. A. Podgorecki, 'Reappearance of Ex-Communist Structures as a Test for the Integrative Theory of Law', 3 *Polish Sociological Review* (1996) pp. 199-213. See also J. Staniszki, 'In Search of a Paradigm of Transformation', in E. Wnuk-Lipinski, *After Communism* (Warsaw, ISP PAN 1995).

4. See M. Los, 'Virtual Property and Post-Communist Globalization', 6 *Demokratizatsiya* (1998) pp. 77-86.

5. T. Garton Ash, 'Revolution: the Springtime of Two Nations', *The New York Review of Books*, 11 June 1989, pp. 3-9.

6. C. Epstein, 'The Politics of Biography: The Case of East German Old Communists', 128 *Daedalus* (1999) pp. 1-30.

7. See A. Podgorecki, 'Totalitarian Law: Concepts and Issues', in A. Podgorecki and V. Olgiati, eds., *Totalitarian and Post-Totalitarian Law* (Aldershot, Dartmouth 1996) pp. 14-17.

8. An English summary can be found on <http://www.nik.gov.pl/english/corruption.htm>.

9. Podgorecki, loc. cit. n. 8, at p. 18.

10. A. Paczkowski, 'Poznac prawde' [To Discover the Truth], *Rzeczpospolita*, 24 October 1998, at http://www.rzeczpospolita.pl/Pl-iso/dodatki/plus_minus_981024/plus_minus:a:1.html.

11. *Ibid.*

12. See A. Paczkowski, *Pol wieku dziejow Polski* [Half a Century of Polish Events] (Warsaw, Wydawnictwo Naukowe 1995).

13. B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge 1995) p. 253.

P. OKOWA, *State Responsibility for Transboundary Air Pollution in International Law*, Oxford University Press, Oxford 2000, xxxi + 285 pp., UK£ 65. ISBN 0-19-826097-0.

Any legal analysis of state responsibility for pollution with international dimensions is eventually bogged down by the large measure of scientific uncertainty as to cause and effect relationships. This is particularly true for transboundary air pollution. Phoebe Okowa has taken up the challenge to unravel the legal issues involved. The result is a comprehensive