Michał Krotoszyński

Polish lustration and the models of transitional justice

After the demise of an authoritarian regime, a newly-established, democratic government faces multiple dilemmas that concern both the uncertain future of its society and its painful, abusive past. Not only must the state undergo a significant political and economic rearrangement, but the new authorities must often deal with what Samuel Huntington calls "the torturer problem": the question of the response to "charges of gross violations of human rights – murder, kidnapping, torture, rape, imprisonment without trial – committed by the officials of the authoritarian regimes"[1]. The answer to this dilemma is far from obvious. Even though the crimes of the past may call for retribution, the government must abide by the requirements of the rule of law and balance the implementation of such measures against the risks of political destabilisation. This unique set of issues, discussed since the early 90's under the name of transitional justice, has been present in the post-authoritarian countries of the Southern Cone, in the post-conflict settings of internal and international armed struggle and in the post-communist societies of Eastern Europe.

For more than forty years the communist regimes of the former Eastern bloc abused civil liberties, suppressed opposition and, when ordinary violence failed, resorted to extraordinary measures such as killings and extrajudicial imprisonment[2]. Nevertheless, in post-communist countries – as Adam Czarnota notes – dealing with the past concentrates mainly on the former secret police and its net of clandestine informants. This is no surprise as "its significance, pervasiveness and scale of operations were unparalleled in any other political formation known, and on some views it has bequeathed legacies of profound, if characteristically hidden, significance to the post-communist present"[3].

1 S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman 1991, p. 211.

2 I use the distinction between ordinary and extraordinary violence following David Dyzenhaus' account of the apartheid. D. Dyzenhaus, *Judging the Judges, Judging Ourselves. Truth, Reconciliation and the Apartheid Legal Order*, Oxford 1998, p. 6.

3 A. Czarnota, *Lustration, Decommunisation and the Rule of Law*, "The Hague Journal on the Rule of Law" no. 2 vol. 1, 2009, p. 312.

Eastern European states have dealt with this situation using a number of distinctive measures, including lustration and the opening of secret service archives.

The field of transitional justice has moved beyond mere documentation or comparison of ways the affected countries deal with their past, and aims at constructing a theoretical framework which could help to articulate those issues in a synthetic manner. In line with this trend, the article presents the development of Polish lustration procedures as part of a broader, international phenomenon. Thus, after defining some basic notions connected with dealing with the past, three general models of transitional justice are described. Next, an account of Polish lustration and public disclosure measures is given with the employed instruments assigned to the models of transitional justice. Finally, the text offers concluding remarks on the evolution of Polish lustration and the actors which have shaped its course.

Basic Notions of Transitional Justice

Transitional justice is bound to a set of moral, political, legal and economic dilemmas related to a situation of regime change. Different levels at which these problems are answered provide for various understandings of the nature of transitional justice itself. Some see it as a concept of justice – either: ordinary[4] or extraordinary[5] – which governs the ethical choices connected with dealing with the past. It can also be described as a set of "political decisions made in the immediate aftermath of the transition and directed towards individuals on the basis of what they did or what was done to them under the earlier regime"[6]. Finally, transitional justice is understood as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses"[7].

The measures aimed at dealing with the past include criminal trials conducted before domestic courts or international or hybrid tribunals. In cases where there is no prospect of penal sanction, truth-seeking initiatives, such as truth commissions or the opening of archives, are often implemented. Institutional reform of the public sector, including vetting of personnel, is also undertaken. The government may also wish to recognise the victims of past abuses by awarding them monetary reparation and/or by offering them symbolic acknowledgement of their suffering. Amnesties can also be seen as a transitional justice measure, especially if they are crafted carefully in order not to infringe the rule of law.

4 *Vid*. E.A. Posner, A. Vermeule, *Transitional Justice as Ordinary Justice*, "Harvard Law Review" 2004, no. 3, vol. 117.

5 *Vid*. R.G. Teitel, *Transitional Justice*, Oxford/New York, 2000.

6 *Cit. per*: W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht 2008, p. 344.

7 *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616)*, United Nations Security Council, 23.08.2004, par. 4.

Each of these instruments can pursue its own goals, such as the establishment of individual criminal responsibility or the creation of the official memory of the past. However, Pablo de Greiff, presenting his normative conception of the goals of transitional justice, argues that these mechanisms, used in a holistic manner, can also achieve two mediate aims: recognition of victims as right-bearers and promotion of civic trust. The existence of civic trust – a joint belief that the government and fellow citizens share the same set of basic norms and therefore will not violate the rights of the individual – equates to reconciliation which, along with democracy, constitute the two final goals of transitional justice[8].

In the authoritarian state, public institutions are often dysfunctional, corrupt and unwilling to protect human rights. During the transition, the aim of institutional reform is to transform these bodies into "institutions that support the transition, sustain peace and preserve the rule of law" and which "protect human rights, prevent abuses and impartially serve the public"[9]. The review of personnel can be a powerful tool in that process. Thus, vetting can be defined as "assessing integrity to determine suitability for public employment" whereas "integrity refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety"[10].

Vetting, which concentrates on individual behaviour, should be distinguished from a purge, which can be described as massive, systematic exclusion from the public sector based on a collective guilt, such as a mere affiliation with a group like a political party[11].

The term "lustration" – which derives from the Latin word *lustrum* denoting "a ceremony of ritual purification"[12] – has at least three modern meanings. It can be understood as an authorized procedure "of checking candidates for some positions in the state, from the point of view of their security credential broadly conceived", as mechanisms used "to eliminate groups of people, who in the past occupied some position in the state and/or communist party apparatus" and finally as "the process of making public the names of people who consciously and secretly collaborated with the organs of the secret services"[13]. In the first meaning, lustration is similar to vetting; in the second one it is akin to decommunisation. Finally, lustration, as it is understood here, can be described as a type of vetting that concentrates both on work in the communist secret service and on clandes-

8 P. de Greiff, *Theorizing Transitional Justice*. In: *Transitional Justice*, ed. M.S. Williams, R. Nagy, J. Elster, New York/London 2012, p. 31–77.

9 *Rule-of-law tools for post-conflict states. Vetting: an operational framework*. Office of the United Nations High Commissioner for Human Rights 2006, www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf.

10 *Ibidem*, p. 4.

11 *Vid.* P. de Greiff, *Vetting and transitional justice*. In: *Justice as Prevention: Vetting Public Employees in Transitional Societies*, A. Mayer-Rieckh, P. de Greiff (ed.), New York 2007, p. 524.

12 J. Korpanty *et. al.*, *Słownik łacińsko-polski*, vol. 2, Warszawa 2003, p. 219.

13 A. Czarnota, *op. cit.*, p. 311.

tine and conscious cooperation with it. The screening can result both in the disclosure of the names of the collaborators (which is covered by the third definition presented above) and in the use of sanctions against those involved in such a collusion[14].

Apart from being a source of information used in the lustration process, the files of the communist secret service can also be subject to public disclosure. In such cases, the individuals whose names appear in the archives are not subject to vetting, as the dubious reliability of the files is not verified[15]. The disclosure can either result directly from the law which governs the control of the archives or from the work of public officials or journalists.

Models of Transitional Justice

Models transitional justice can be described as ideal types of structuring the ways in which transitional societies deal with the past. Three basic models illustrating the paradigms used by states to face the legacy of human rights violations can be identified:

- the retribution model,
- the historical clarification model,
- the thick line model.

The models are based on transitional justice measures concentrating on human rights violations and their perpetrators, such as criminal trials, administrative sanctions, truth-seeking and amnesties. They do not take into account instruments which concentrate on the victims, such as reparation or symbolic recognition[16].

The retribution model can be characterised as a paradigm in which the individuals whose involvement in the previous regime is condemned in a new, democratic reality are subject to sanctions. The sanctions may include criminal punishment, removal from positions in public administration, prohibition from running for certain offices or being promoted and the reduction of pensions or other benefits. The range of individuals affected may vary, yet the choice should not be arbitrary. As Diane Orentlicher notes: "the criteria used to select defendants" should "reflect appropriate distinctions based upon degrees of culpability" and therefore should be "focused on those most responsible for

14 For such a use of the term see: M. Nalepa, *Lustration and Survival of Parliamentary Parties*, „Taiwan Journal of Democracy" vol. 5 no. 2, 2009, p. 45.

15 On the topic of reliability of archives *vid*. S. Rumin, *Gathering and Managing Information in Vetting Processes*, [in:] *Justice as Prevention…*, p. 411–413.

16 For other classifications of the models of transitional justice see: J. Arnold, A. Eser, H. Kreicker, *Criminal Law in Reaction to State Crime. Comparative Insights into Transitional Processes*. Max-Planck-Institut für ausländisches und internationales Strafrecht, 2002, http://www.freidok.uni-freiburg.de/volltexte/6349/; S.A. Garrett, *Models of Transitional Justice – A Comparative Analysis*. Columbia University Press, 2000.

designing and implementing a past system of rights violations or on the most notorious crimes"[17]. Examples of the model include East Germany[18] and Rwanda[19].

In the instance of the historical clarification model, transitional justice mechanisms concentrate on the dissemination of information on society's abusive past and there exist no institutional sanctions other than the disclosure of the links of the individual to previous human rights violations. Instruments typical of this model comprise truth commissions, the creation of official remembrance institutions, the opening of archives and vetting procedures. The lack of sanctions may be incumbent on the involvement of the individual in the process of historical clarification, as was the case in South Africa[20]. In other cases, immunity to prosecution may be unconditional (Chile, until 1998[21]).

The thick line model can be described as one in which no official record of the past abuse is present and the human rights violators are not punished. Stephen A. Garrett defines it as a situation in which, as in post-Francoist Spain, "a newly emergent democracy makes a conscious decision not only to avoid prosecutions of past human rights offenders, but even to shun widespread public discussion about their having taking place in the first place"[22]. Apart from Spain, another example of the model is post-communist Russia[23].

Polish Lustration. Historical Account and Classification

The models listed above can be used as a tool to classify Polish lustration mechanisms, as well as the instruments of public disclosure. The development of Polish lustration, discussed briefly below[24], can be roughly divided into three phases:

---

17 D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, „The Yale Law Journal" vol. 100 no. 8, 1991, p. 2602–2603.

18 *Vid*. C. Wilke, *The Shield, the Sword and the Party: Vetting the East German Public Sector*. In: *Justice as Prevention…* , p. 348–400; J. Zajadło, *Filozofia prawa a prawo karne, Studium tzw. Mauerschützen*, „Ius et Lex", 2003, no. 1, vol. 2, p. 175–202 (in Polish).

19 See e.g.: T. Longman, *Justice at the grassroots? Gacaca trials in Rwanda*. In: *Transitional justice in the Twenty-First Century. Beyond Truth versus Justice*, ed. N. Roht-Arriaza, J. Mariezcurrena, Cambridge 2006, p. 206–228.

20 *Vid*. D. Dyzenhaus, *op. cit.*; P. van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, „Journal of International Affairs" no. 2, vol. 52, 1999 p. 647–667.

21 *Vid*. C. Collins, *Human Rights Trials in Chile during and after the 'Pinochet Years'*, „International Journal of Transitional Justice" vol. 4, 2010 p. 67–86.

22 S.A. Garrett, *op. cit.*, referring to it as an "amnesia model".

23 *Vid*. K. Andrieu, *An Unfinished Business: Transitional Justice and Democratization in Post-Soviet Russia*, „International Journal of Transitional Justice" 2011 vol. 5, p. 198–220.

24 The length of the article makes it impossible to present a more thorough and accurate description of Polish lustration. Other accounts can be found in: A. Czarnota, *The Politics of the Lustration Law in Poland, 1989–2006*. In: *Justice as Prevention…*, p.222–258; P. Grzelak, *Wojna o lustrację*, Warszawa 2005 (in Polish).

- from 1989 to the enactment of the 1997 Lustration Act[25];
- from the enactment of the 1997 Lustration Act to the enactment of the 2007 Amendment[26] of the 2006 Lustration Act[27];
- from the enactment of the 2007 Amendment of the 2006 Lustration Act to the present day.

Phase 1: from 1989 to the enactment of the 1997 Lustration Act

In 1990, the first Polish parliament chosen in partly free elections enacted the Office for State Protection Act[28]. The law dissolved the communist political police and terminated the employment of its officers. Dismissed personnel could, however, be reappointed if certain conditions were met. According to the statute and to delegated legislation, the officer had to be no older than 55, be in good physical and mental condition, have at least secondary school education and represent an "impeccable moral and patriotic attitude". Moral integrity could not be affirmed if a vetted person had a record of infringements of law, violations of dignity and rights of individuals or abuses of the post for private needs. Out of nearly 14.000 officers, over 10.000 passed the screening, yet due to downsizing of the secret service not more than 5.000 were reappointed[29].

Because of the vetting criteria – the appraisal of the work of an individual as a secret service officer – the process can be understood as an example of lustration. Those who acquired a negative opinion from the vetting commission were subject to a sanction, as their dismissal was final and they faced no prospect of employment in the security service. Therefore, the procedure falls within the retribution model.

The 1991 elections led to the creation of a government with the issue of lustration high on its agenda. Even though the administration planned to introduce an act on vetting, no bill was proposed[30]. On the 28th May 1992, the Sejm, the lower chamber of the Polish parliament, passed a resolution which urged the Minister of Internal Affairs to submit a list of secret collaborators of the communist secret service currently holding certain public positions, including members of Parliament and higher state officials[31]. On the 4th of June, the list – which mentioned many members of Parliament and the President – was presented to the Sejm and other State institutions. Both the Minister and the Prime Minister claimed at that time that the document was not a verified list of agents but rather a set of names which appear in the archives and which should be subject to

25 Dz.U. Nr 70, poz. 443.
26 Dz.U. Nr 25, poz. 162.
27 Dz.U. Nr 218, poz. 1592.
28 Dz.U. Nr 30, poz. 180.
29 Constitutional Court Verdict of 24 February 2010 K 6/09..
30 P. Grzelak, *op. cit.* p. 44–50.
31 M.P. Nr 16, poz. 116.

further scrutiny[32]. This being the case, the creation of the list does not meet the definition of lustration. However, it can be regarded as a means of public disclosure of the secret files, which falls within the historical clarification model. This in no way should be read as an assertion of the reliability of the list, as even members of the government called for its further analysis.

The list was leaked to the media and caused uproar, which hastened the fall of the government. The resolution was later found to be unconstitutional, being contrary, *inter alia*, to the principles of the democratic rule of law, the protection of human dignity, the representative democratic system and the principle of legality[33].

Under the next government, six lustration bills were sent to parliament, yet none of them were finally passed. On the other hand, the 1993 Parliamentary Elections Act[34] was enacted, which forced all candidates to present a statement on their work or cooperation with the communist secret service, including military intelligence. The law was *lex imperfecta*, as no sanction for a lie was provided[35].

The first phase of Polish lustration included two significant developments: the 1990 Office for State Protection Act, which included instruments falling within the retribution model, and the case of the 1992 list of alleged collaborators that could be qualified as an element of historical clarification. Nevertheless, during this period there existed no lasting lustration procedure. The regulation provided in the 1993 Parliamentary Elections Act could not be regarded as one, as the lack of sanctions and verification of the declarations made it impossible to enforce the law. Thus, noting the aforesaid exceptions, the first phase of Polish lustration can nevertheless be classed under the thick line model.

Phase 2: from the enactment of the 1997 Lustration Act to the enactment of the 2007 Amendment of the 2006 Lustration Act

In 1995, Prime Minister Józef Oleksy was accused of cooperating with Russian intelligence and stepped down from office. The charges were not proven, yet the case gave a new momentum to the development of Polish lustration[36]. Out of the five submitted bills, the joint proposal filed by the Labour Union (UP), the Freedom Union (UW) and the Polish People's Party (PSL) became the basis of the 1997 Lustration Act, which, after considerable changes, was passed on 11th April and entered into force on 3rd of August 1997.

The law provided for the vetting of the President, members of Parliament, higher public officials appointed by the President, the Prime Minister or parliamentary bodies,

32 P. Grzelak, *op. cit.* p. 62; *Sprawozdanie stenograficzne z 17 posiedzenia Sejmu I kadencji, 04.06.1992*; *Sprawozdanie stenograficzne z 21 posiedzenia Sejmu I kadencji, 23.07.1992*; http://orka2.sejm.gov.pl/Debata1.nsf.

33 Constitutional Court Ruling of 19 June 1992 U 6/92.

34 Dz.U. Nr 45, poz. 205, article 81 section 5 point 4.

35 *Vid*. Constitutional Court Resolution of 14 July 1993 W 5/93.

36 P. Grzelak, *op. cit.,* p. 106.

prosecutors, judges, chief officers in ministries and central or regional offices, and major figures in the public media, provided they were all born no later than 10th of May 1972. The lustration was also compulsory for candidates for these posts. A total of 22.000 citizens were covered by the act[37]. Each of the vetted had to issue a statement on their work, service or cooperation with the communist state security authorities, the list of which was included in the statute. Statements pleading cooperation were to be published. Cooperation was defined as both conscious and secret. In 1998, the Constitutional Court stated that the individual must have provided the secret service, which was acting within its operational duties, with actual information. The mere declaration of cooperation – with no later factual collusion – was not enough to amount to collaboration[38].

The most important feature of the Lustration Act was the fact that service or cooperation with the communist state security authorities was not in fact penalised. What was being punished was the lustration lie: a deliberate submission of a statement that was also objectively false[39]. As possible punishment was provided for the present conduct of an individual, the law could not therefore be regarded as retroactive, which was crucial considering the penal character of the legislation[40].

The lustration was based on a criminal process and all the basic procedural guarantees were provided by the law. The final and binding verdict which found the statement to be false was to be published. The ruling was to result in the loss of a parliamentary seat, a ban on running for presidential elections or in an officially proclaimed loss of moral integrity required for certain posts and professions. The effects of the verdict were to last for 10 years from the day it became final.

As the creation of a special lustration court was unsuccessful, the law was amended in 1998. The statute[41] moved the procedure to the Warsaw Appellate Court. The act widened the scope of the vetted and covered defense counsels and officials appointed by the Speaker of the Sejm or the Senate. The lustration lie was to result in an *ex lege* dismissal from a post or profession; only judges had to be discharged by the verdict of a disciplinary court.

The mechanism introduced by the 1997 Lustration Act falls within the historical clarification model. Even though the law provided for a sanction, the vetted, in principle, may have felt unthreatened by it, given that they were contributing to the historical account with their true statements. Thus, Polish lustration seems to share similarities with the South African measures, as in both cases the sanction was imposed not for past misconduct but for present lack of cooperation with the process of historical clarification.

37 W. Sadurski, *op. cit.*, p. 244.
38 Constitutional Court Verdict of 10 November 1998 K 39/97.
39 *Vid.* Supreme Court Verdict of 5 September 2002 II KK 102/02.
40 *Vid.* Warsaw Appellate Court Ruling of 25 September 2003 V AL 42/01.
41 Dz.U. Nr 131 poz. 860.

In 1998, two verdicts of the Constitutional Court upheld the 1997 Lustration Act, quashing only its minor provisions[42]. In 2002, the Parliament enacted an amendment which included significant procedural changes and involved a redefinition of cooperation[43]. The redefinition was struck down by the Constitutional Court on procedural grounds. The Court also found the termination of court proceedings due to the resignation of the vetted from office to be in violation of the equality principle, as it enabled unfair calculation of the result of process[44]. In September of the same year, the Parliament again redefined cooperation, requiring it to be factual – which implemented previous court interpretations – and without connection to intelligence, counterintelligence and border protection. The second condition was quashed in 2003 by the Constitutional Court as contrary, *inter alia*, to the equality principle and the citizen's right to information[45]. The Court also found the lack of information on the length and the character of service or cooperation in published court verdicts to be a violation of equality and the right of an individual's good name to be protected[46].

In 1999, the Polish Bar Council issued a resolution, in which it claimed past cooperation with the communist secret service to be contrary to the basic norms governing professional conduct and called upon ex-collaborators to resign from the Bar. It also announced that it would take all legally eligible steps in order to remove them from the association and urged local bar councils to do the same[47]. The resolution – which, due to its corporate character, could not be controlled by the Constitutional Court – was enforced by the bodies of the association. The attorneys who admitted to having cooperated with the communist state security authorities, were often subject to removal from the bar. Thus, the factual lustration mechanism was closer to the retribution model, as the counsels could be dismissed on the basis of their pasts and despite their truthful declarations.

In 1998, the Parliament enacted the Institute of National Remembrance Act[48], which regulated access to the archives of the communist secret service. The victims, who were subject to data gathering and who did not cooperate with the secret service, had the right to access their files and to ask the Institute for their rectification or anonymisation; the names of people who informed on them were also available. The officers and collabora-

42 *Vid*. Constitutional Court Verdict of 21 October 1998 K 24/98.

43 *Ustawa z dnia 15 lutego 2002 r. o zmianie ustawy o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944–1990 osób pełniących funkcje publiczne oraz ustawy - Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej (Dz.U. Nr 14, poz. 128).*

44 Constitutional Court Verdict of 19 June 2002 K 11/02.

45 Constitutional Court Verdict of 28 May 2003 K 44/02.

46 Constitutional Court Verdict of 5 March 2003 K 7/01.

47 *Vid. Uchwała nr 9/1999 Naczelnej Rady Adwokackiej z dnia 17 kwietnia 1999 r.* Main provisions quoted in: Constitutional Court Decision of 20 May 2002 SK 28/01.

48 Dz.U. Nr 155, poz. 1016.

tors, provided they admitted their actions, gained access to the files connected to them. The archives were also open for scientific research. The statute created the possibility of a disclosure of the past and can therefore be qualified as falling within the historical qualification model.

In 2005, the Constitutional Court ruled that the restriction of the right to access and rectification of files only to the victims violated the constitutional right to the control of information on individuals gathered in public registers. In its verdict the Court ruled that access to files for groups other than victims can be achieved with a direct use of constitutional provisions. Thus, the ruling gave universal access to the secret service archives[49].

The second phase of Polish lustration was marked by the existence of an ongoing lustration procedure. Its provisions fell within the historical clarification model, with the exception of the lustration of attorneys, which was closer to the retribution model. The public disclosure of the files was introduced in 1998 and became universal in 2005.

Phase 3: from the enactment of the 2007 Amendment of the 2006 Lustration Act to the present day

On the 18th of October 2006, the Parliament enacted the new Lustration Act. The statute replaced the previous lustration mechanism with a new procedure, which encumbered the Institute of National Remembrance (IPN) with an obligation to issue personal certificates, consisting of information gathered in the archives of the communist secret service. As the information would not be verified, the measure should be regarded as an instrument of public disclosure, rather than lustration. This radical change never entered into force, as the Lustration Act was completely amended on the 14th of February 2007.

The 2007 Amendment of the 2006 Lustration Act marked a return to the previous procedure, focused on an appraisal of the validity of lustration statements. However, the law drastically widened the scope of the vetted and also included, *inter alia*, members of local government, all legal professions, diplomats, important posts in state organisations, certain positions in private and public media, schools and universities, and chief positions in banks and public companies. An estimated 350–400.000 people were to be covered by the act[50]. Statements also had to be presented by citizens who had been verified under the previous legislation and a failure to do so was to lead to their dismissal. The law provided for the creation of an online register of lustration declarations. The

49 Constitutional Court Verdict of 26 October 2005 K 31/04.

50 *Vid. Biuletyn nr 2 Komisji Nadzwyczajnej do rozpatrzenia przedstawionego przez Prezydenta RP projektu ustawy o zmianie ustawy o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944–1990 oraz treści tych dokumentów (1511/V), 18.01.2007.* Minutes from the work of the Commission available at: http://orka.sejm.gov.pl/SQL.nsf/poskomprocall?OpenAgent&5&1258.

lustration proceedings were to begin with a motion by the IPN prosecutor. The final and binding verdict which found the statement to be false caused immediate dismissal from a post and a 10 year prohibition from appointment for public positions and the right to be elected.

The law provided universal access to the files of people holding certain public positions. It also confirmed a general right to access one's own file, with the exception of officers and collaborators in regard to the documents they created. The IPN was also to create online registers of victims of communist surveillance, important communist politicians, secret service officers, employees and soldiers, and, finally, of secret collaborators, people who agreed to collude or those who were treated as co-operators.

In its landmark 2007 verdict, the Constitutional Court declared a large part of the 2006 Lustration Act to be unconstitutional. The Court set the limits on the lustration procedure, stating that the scope of vetting cannot include positions with no connection to the public sphere. Thus, it struck down provisions on the lustration of the private sector, including private schools, universities and media. Apart from quashing several other procedural provisions, the Court also stated that a fixed punishment for failure to submit a declaration or for presenting a false one – which, in the case of some professions, reduced the role of disciplinary courts to a mere reiteration of the previous verdict – violated the principle of proportionality and the principle of decent legislation. The online register of statements was said to violate the right to privacy and the limits on the data collected on individuals. The Court found that the catalogue of collaborators infringed the presumption of innocence; the creation of other registers was upheld, given that members of the ruling parties who later joined the opposition were not barred from being treated as victims. As a result of the verdict, the lustration process was halted and the declarations submitted had to be returned to the vetted[51].

The verdict was implemented in the amendment enacted in September 2007[52]. However, the law reintroduced fixed sanctions for a lack of declaration or a false one. With regards to the latter, the provision was again quashed in 2011[53].

In 2007, The Institute of National Remembrance Act was amended again[54]. The statute, *inter alia*, gave full right of access to files concerning an individual, removing the exception of former officers and collaborators of the communist secret police. In principle, the files were to be presented with no anonymisation.

During the third phase of Polish lustration, the case of the 2006 Lustration Act allowed the Constitutional Court to set the limits on the existing lustration procedure. What is more, a new mechanism for the creation of an online register of former secret

51 Constitutional Court Verdict of 11 May 2007 K 2/07.
52 Dz.U. Nr 165, poz. 1171.
53 Constitutional Court Verdict of 19 April 2011 K 19/08.
54 Dz.U Nr 79, poz. 522.

service officers was also introduced. As the catalogue was to be created "on the basis of the official documents", such as "open engagements, employment contracts or other similar documents which certified unambiguous situations, easy to demonstrate or prove using official data"[55], the author argues that the register was to be based on individually verified information – and thus is a method of lustration. According to article 20 section 5 of the 2006 Lustration Act, an entry in the IPN register can be questioned using a general lustration procedure[56] and thus the new mechanism seems to be secondary and subjected to the main process of lustration. Therefore, since 2007, apart from the instruments of public disclosure, Poland applies two alternative lustration mechanisms, both falling within the historical clarification model.

Polish Lustration. Concluding Remarks

The analysis of the historical account of Polish mechanisms of lustration and public disclosure allows for some general remarks on their evolution and the actors involved in their development.

In Poland, the legacy of the communist secret service was countered with a wide variety of lustration and public disclosure mechanisms. In the first phase of their development, there existed no general response to the problem and a number of limited and partial reactions appeared. The experience from this period resulted in the creation of a general vetting procedure in the 1997 Lustration Act and a mechanism of public disclosure in the 1998 Institute of National Remembrance Act. Both mechanisms were tied into the 2006 Lustration Act, which also created a secondary lustration process: the publication of the register of secret service officers.

Some tendencies in the development of the lustration process are easily recognisable. First, the expansion of the scope of vetting is visible. The tendency was slow in the second phase, culminating in the 2006 Lustration Act and was only stopped by the 2007 Constitutional Court Verdict. Secondly, unlike in some other countries, in Poland the lawmakers seem to understand the main lustration procedure as a criminal measure, which results in the use of the rules of a criminal process and emphasis on the non-retroactivity of the lustration lie mechanism. On the other hand, no similar concerns are present in the case of the register of secret service officers, which is created by an administrative body in an informal vetting procedure concentrating on the past conduct of the individual. Whereas due process principles are generally followed in court lustration proceedings, during the creation of the register the alleged secret service officers cannot take action and question the result of the vetting through the main lustration

55 Constitutional Court Verdict of 11 April 2007 K 2/07.

56 *Vid*. Białystok Appellate Court Decision of 7 April 2008 II Akz 63/08.

procedure. When it comes to public disclosure of the archives of the secret service, the process was characterised by a growing number of people being eligible to access the files and a growth in the amount of data available to them.

Polish lustration is a result of the cooperation and struggles of the Parliament and the Constitutional Court. The role of the Parliament was heavily influenced by the then-current political situation, as was visible in the case of the enactment of the 1997 Lustration Act. The Constitutional Court, on the other hand, created limits in the form of substantive requirements for the procedural provisions of the law, which resulted in a unique *acquis constitutionnel*. One should also note that both the Constitutional and the Supreme Court played essential roles in the interpretation of some of the most important parts of the acts, including the definition of cooperation. Their verdicts were often the basis of the new legislative provisions.

The input of civic society was also important. The resolution of the Polish Bar Council changing the lustration model in regard to attorneys and the role of the media – although outside the scope of this article – was also significant.

Both of the presented lustration procedures can be regarded as instruments of historical clarification. On the other hand, due to the doubtful accuracy of the files, their public disclosure can be understood only as a supplementary source of such knowledge. However, it is difficult to assess what influences the general public more: slow but steady lustration procedures or spectacular excerpts form the archives available in the everyday press.

SUMMARY

Polish lustration and the models of transitional justice

Transitional justice in the post-communist countries of Eastern Europe concentrates on the problem of the lustration of former secret service officers and their clandestine collaborators and on the question of access to files created by the communist political police. The aim of the article is to present the Polish experience in this field in view of the theoretical framework available in transitional justice literature. Thus, the text begins with definitions of some basic notions connected with dealing with the past. The article also proposes three basic models of transitional justice. The third part offers an account of Polish lustration and public disclosure measures and assigns those instruments to the models of transitional justice. The final section presents some concluding remarks on the evolution of Polish lustration.

Keywords: decommunisation, democratisation, lustration, transitional justice, vetting