

## CHALLENGES TO DEMOCRACY IN CENTRAL AND EASTERN EUROPE

Hanna Suchocka\*

### Abstract

The article focuses on the recent (25 years), development of democracy in Central and Eastern Europe, especially in Poland as the country in the region where the first non-communist government was established in 1989. It highlights an extremely difficult and hazardous challenge for former communist countries when tackling the process on two different levels - political and economic. The article shows how difficult it was to achieve a uniform public consensus on the chosen road to economic transformation. The governments faced many obstacles, including public apathy. It was easier to achieve social support for political changes. A common tendency in all the Central and Eastern European countries after the collapse of communist rule was a return to traditional democratic principles developed by the Western constitutionalism, i.e. the principle of separation of powers, rule of law, political pluralism, guarantees of human rights and freedoms, based on human dignity, and independence of the judiciary. It was done by adoption of new constitutions or substantial amendments to the old ones. In new democracies, however new threats have appeared, having some impact on the future of democracy and state of law in these countries, it is especially an instrumental approach to the law. Article shows it by example of lustration laws. Despite all the difficulties, post-communists Central European countries has undertaken important structural reforms in political and economic area which helped them “to return to Europe”.

Key words: democracy; transformation; constitution; rule of law; separation of powers; lustration.

## ELS REPTES DE LA DEMOCRÀCIA A EUROPA CENTRAL I DE L'EST

### Abstract

*Aquest article se centra en el desenvolupament recent (25 anys) de la democràcia a l'Europa Central i de l'Est, en particular a Polònia com a primer país de la regió on es va establir un govern no-comunista el 1989. L'article apunta el repte difícilíssim i arriscat que va suposar per als països excomunistes el fet d'afrontar el procés a dos nivells diferents: el polític i l'econòmic. L'article mostra les dificultats que van sorgir a l'hora d'arribar a un consens públic uniforme quant al camí escollit per a la transformació econòmica. Els governs es van trobar amb molts obstacles, com ara la passivitat pública. Resultava més fàcil obtenir suport social per als canvis polítics. Una tendència comuna en tots aquests països de l'Europa Central i de l'Est després de la caiguda dels règims comunistes va ser el retorn als principis democràtics tradicionals desenvolupats pel constitucionalisme occidental, com per exemple: el principi de la separació de poders, l'estat de dret, el pluralisme polític, la garantia dels drets i les llibertats humanes, basats en la dignitat humana, i la independència del poder judicial. Aquest procés es va portar a terme amb l'adopció de noves constitucions o modificacions substancials a les anteriors. Tanmateix, en les noves democràcies han sorgit altres amenaces que tenen cert impacte en el futur de la democràcia i de l'estat de dret en aquests països, especialment per una aproximació instrumental a la llei. L'article mostra com a exemple les lleis de depuració. Malgrat les dificultats, els països postcomunistes de l'Europa Central han portat a terme importants reformes estructurals en les àrees política i econòmica, fet que els ha ajudat en el seu “retorn a Europa”.*

*Paraules clau: democràcia; transformació; constitució; estat de dret; separació de poders; depuració.*

---

\* Hanna Suchocka, professor of Constitutional Law at Adam Mickiewicz University in Poznań, [hannasuch@libero.it](mailto:hannasuch@libero.it).

Article received: 17.04.2015. Blind review: 23.04.2015 and 25.04.2015. Final version accepted: 5.05.2015.

**Recommended citation:** Suchocka, Hanna. “Challenges to democracy in Central and Eastern Europe”. *Revista catalana de dret públic*, No 50 (2015), p. 19-31, DOI: [10.2436/20.8030.01.41](https://doi.org/10.2436/20.8030.01.41)

## **Summary**

- 1 Background to political changes
- 2 What happened after the Round Table Agreements in 1989 in Poland
- 3 Return to traditional democratic principles

## 1 Background to political changes

The history of most post-communist countries, especially in Central Europe and the Baltic states, is inextricably bound up with the concept of democracy. Poland, with its historical tradition of the continent's first written constitution, dated May 3<sup>rd</sup> 1791, is a special case.

However, what was much more important for the democratic transformation was the crucial role of intellectual forces which shaped the struggle against the system of societies in communist states after 1945 in some countries in Central and Eastern Europe. The leading role was played by Poland. The perception that the Yalta Conference Agreements finally sealed the fate of Poland and other European countries, and that the question of national independence was settled in the negative for the foreseeable future, meant that for the vast majority of Polish intellectuals resistance to communism was rooted in the language of democratisation rather than national liberation. The highly influential Polish Catholic monthly "Więź", an advocate of the Mounierist vision of personalism which was openly published in communist Poland, was also instrumental in introducing the language of democratisation into the political debate. This sat well not only with the liberal traditions of most post-War intellectuals, but also with the opportunity to use the official language of Marxist rhetoric as a vehicle for promoting intellectual concepts which were rejected by the official post-war political establishment. This phenomenon was also apparent in Czechoslovakia, and to some extent in Hungary.

The Solidarity revolution of 1980-81, although as much a national movement as a democratic movement, also perceived its identity in terms of the "democratisation" of political life in Poland. The same rhetoric was used by the intellectuals of Charter 77 in Czechoslovakia, and then by Civic Movement in Hungary. So strong was the rhetoric of democratisation that it was extended to the economic sphere, for it was during this time that the greatest support for the concept of worker self-management was visible within intellectual circles, and again, seen very much in terms of the democratisation of the workplace. This process was seen as the only viable method for economic reform of the centrally planned economy, under conditions in which the introduction of private property and the market economy was still regarded as a political and technical impossibility. At this time there was a kind of agreement for the so called "third road".

In Poland, the Round Table Agreements of 1989, which were the first agreement between the opposition and communist leaders, were perceived as a "democratisation" of Poland's political system, and not as the introduction of democracy itself. The acceptance of the leading role of communist party was included in the Agreements. Even at this late historical stage, the dominance of the Soviet Union in Central Europe was understood as a given, and the rhetoric of national independence resorted to the language of democracy and human rights. It was difficult to act in other way, especially because since the 1970s this had been the language of anti-communist activists all over in Central Europe, following the acceptance, at least in propagandist terms, of the Helsinki Accords on human rights by the region's regimes.

As a result, when we talk about the relationship between the post-1989 transformation and democracy, this has to be understood in the context of the previous acceptance of the language of democracy (democratisation) by almost all the leading actors in this transformation, including the post-communists. The crucial difference was that whilst even as late as 1989, the post-communists spoke of "democratisation" in the hope that this process would fall short of full democracy, the anticommunist opposition did so in the hope that it would be the first step towards establishing a real democracy in the country.

## 2 What happened after the Round Table Agreements in 1989 in Poland

The Round Table Agreements were concluded ten years after the first visit by Pope John Paul II to Poland when he said: "open the doors to reforms of political and economic systems", nine years after the founding of Solidarity, and eight years after Solidarity had been banned. The Round Table negotiations and the subsequent agreements were perceived by intellectuals as step towards the complete democratisation of the political system.

From the outset, there had been voices criticising the very notion of a deal between the Solidarity opposition and Poland's communist rulers, and those voices demanding a more radical path. They sought to deny the significance of the Round Table and the resulting elections.

The semi-democratic elections to parliament on June 4<sup>th</sup> were one of the main results of the Round Table Agreements. It is true that the June 4<sup>th</sup> elections were still restricted, because the proportion of parliamentary seats for the ruling parties and the democratic opposition had been prescribed by the Round Table Agreements and not the way election results. That was nevertheless a major milestone and a first important step to weakening the omnipotent communist power. Although the elections could not be called completely free, they no longer were simply an orchestrated show of public support (99%) for the ruling communist party. Unlike all previous communist bloc elections, the results had not been determined in advance. For the first time it was possible to make a choice between lists and not simply vote for one common list of candidates. I am firmly convinced that at that time there was no better way than talking to our opponents. Would the choice of a more radical path, and not entering into an agreement with the communist leaders have created better democracy? I think that the case of Romania could be used here as a negative example. It would be rather difficult to argue that the assassination ("political murder") of Ceausescu and his wife were better foundations for establishing democratic rule than the Round Table Agreements in Poland.

However, after June 4<sup>th</sup> the political dynamics went beyond the Round Table Agreements. Newly elected members of Parliament from the "Solidarity list" did not feel bound by the agreements. The political restrictions set out in the agreements were rejected by the new parliamentarians. In the end, this political development completely changed the existing political system.

As a consequence of this process, the first non-communist government in this part of Europe was created in September 1989 and the new amendments to the Constitution were adopted in December that year. The fundamental political principles of the previous systems were abolished, including: the principle of the leading role of communist party, eternal friendship with the Soviet Union, and the old economic system, based on state ownership.

This was followed by the extremely difficult and hazardous challenge of tackling the process at two different levels: political and economic. Such a challenge was being embarked upon on such a scale for the first time in history. This would subsequently lead to criticism, casting doubt on the wisdom of such a historic path, as public reaction to the changes taking place in those two spheres differed from the very beginning.

The political changes won much broader public acceptance and they could be carried out relatively quickly. They seemed to be immediately felt and their positive results were visible in society, since citizens were finally given a say in how their country was run.

The process of economic changes turned out to be much more complicated. It was exceedingly difficult to achieve a public consensus on the chosen path of economic transformation. There was no time for in-depth studies and social consultations. It had to be done quickly. The entire package of Balcerowicz reforms was proposed for adoption by the parliament in December 1989.

The diverse reactions to the political and economic changes taking place were deeply rooted in the very beginnings of Solidarity. The movement, which had emerged under the idea of winning space for genuine personal and political freedom ('There is no freedom without Solidarity'), prepared the society for the political changes to come. However, being a trade union, it did not and could not prepare the society for such a radical change of economic models.

Relations between labour and capital became crucial for understanding the problem. Poland was a good example of the many misunderstandings of those two concepts in the general public consciousness, and how difficult it was to come up with any clear-cut evaluations of ongoing processes.

The entire Polish economic transformation began with an employees' movement, a trade-union movement (Solidarnosc) struggling for the dignity of labour, and particularly decent wages and guarantees of trade union freedoms. An attempt was thus made to change the existing situation, to change working conditions, but the nature of the new system that would replace the existing one was never fully defined. There was a fairly

widespread belief in the possibility of creating a system that would essentially become a modified version of socialism. During the early period of transformation, the predominant and rather simplistic thinking was that it would be sufficient to eliminate political barriers, introduce political and economic freedoms and the problems would solve themselves.

In that respect, the Balcerowicz plan of economic reforms fell upon ground that was completely socially unprepared. That came as a shock to many trade unionists involved in the Solidarity movement. There was some belief, or at least hope, that economic changes could be carried out without incurring such high social costs. It seemed that since a bloodless Solidarity revolution had been possible, an economic transformation without social costs and hardships should be possible as well. That turned out to be a kind of myth.

### **3 Return to traditional democratic principles**

A common tendency in all the Central-Eastern European countries after the collapse of communist rule was a return to the traditional democratic principles developed by the Western democracies in the course of their constitutional development. The general principles of so called socialist constitutionalism ran contrary to Western democratic principles. The most characteristic features of that system included:

1. Rejection of the separation of powers and its replacement with the principle of unity of power.
2. Acceptance of the concept of citizens' rights rather than human rights.
3. Recognition of the will of the state as essential in creating individual freedom [rejection of the personalistic concept].
4. Recognition of the leading role of a single party which entailed the rejection of political pluralism.

This entire catalogue clearly shows that socialist constitutionalism was an attempt to construct a system that was alien to the European constitutional tradition. This was amply demonstrated in practice. As soon as the Soviet-influenced communist system collapsed, a general tendency to restore the traditional tenets of European constitutionalism emerged. Those tenets were regarded as the cornerstone of a democratic order, unlike the principles of socialist constitutionalism, which paved the way to an authoritarian system.

In both in the countries which were part of the Soviet Union itself, such as the Baltic States and Ukraine, as well as in those which were part of a broader Soviet satellite system, such as Poland, Hungary, the Czech Republic, Slovakia, Romania, etc., the tendency was to return to traditional democratic principles.

Those principles included:

- 1) the sovereignty of the nation,
- 2) free elections,
- 3) guarantees of human rights and freedoms, based on the personalistic concept and human dignity,
- 4) the separation of powers,
- 5) independence of the judiciary.

Amid the arguments and entire phraseology surrounding “returning to Europe”, the tendency to invoke constitutional tradition and to restore constitutional principles rooted in the European legacy became one of the most visible elements in that return to Europe, and of the return to Western democracy in a broader sense.

That aspiration is explicitly expressed, for instance, in the preamble to the Constitution of the Czech Republic of 16 December 1992: ‘We, the citizens of the Czech Republic [...], determined to build, protect and develop the Czech Republic in the spirit of the inalienable values of human dignity and freedom [...] as a member of the family of European and world democracies...’ and in the Polish Constitution in slightly different words:

“Having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate...”

A characteristic feature is a stronger tendency among post-communist states than among traditional European states to enshrine in their constitutions precisely those principles which had been eliminated and which are regarded as the foundation of a democratic order emanating from the European tradition. These include issues centering on the definition of the status of the individual. As a result of Western European evolution, the concept of human dignity, together with the concept of freedom, has become an integral element of political relations. Those two concepts have defined the scope of the catalogue of human rights.

The common tendency to return to democracy was quite apparent. It was a clearly negative reaction to the shortcomings of the previous system. It was expressed in the provisions of new constitutions or amendments to the constitutions. Some new constitutional solutions were created under the influence of the general sense of euphoria that accompanied the collapse of the old system. Often, especially when new constitutions emerged very rapidly, some solutions used in Western European constitutionalism were emulated rather mechanically, e.g. the Constitutions of Bulgaria and Romania written in the early 1990s. The “long Polish way” to the new Constitution (in 1997) was a better solution, because the legislature could identify some mistakes made at the beginning of the transformation regarding the relations between the organs of state, based on our own post-transformation experience.

Now, twenty five years after the collapse of Soviet empire, many questions arise: how deeply have the new constitutional provisions based on the personalistic concept and separation of powers taken root in the individual societies? How stable are they? What role do they play as guarantees of democratic order? What does democracy mean for the post-communist countries?

There is not one simple answer. Different countries built their post-communist democratic system in different ways. As a point of departure for this analysis, I use the definition of democracy in the Papal encyclical “*Centesimus annus*”.

This encyclical was issued by John Paul II at the beginning of the transformation in 1991 and he took into account the situation in that part of Europe at that time. For that reason, the definition of democracy included in the document can be taken as a good starting point. Democracy is defined as “a system [that] ensures the participation of citizens in making political choices, guarantees the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate (...) [The Church thus] cannot encourage the formation of narrow ruling groups which usurp the power of the State for individual interests or for ideological ends. (...) As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism”.<sup>1</sup>

Those words are extremely important, as they point to possible shortcomings in the democratic system. They are particularly relevant to the newly-emerging democracies in the post-communist states. The democratic procedures emerging there are weaker than in well-established democracies, and weak democracies face many more threats.<sup>2</sup> As a result, the problems of democracy in post-communist states encompass a broader range of topics for discussion than a simple analysis of the rules governing free elections and the organisation of state organs. In countries lacking a genuine political culture rooted in a consolidated democracy, what is important is how power is exercised, and especially the checks and balances between different powers built on the principle of the separation of power. It is this which often decides the actual substance of the formally democratic parts of the constitution and other laws.

We should never forget the negative legacy in Central-Eastern European states from the previous period, which was a dichotomy between declarations of democratic, constitutional principles and the real practice of political power. The governments of those countries had no problem enshrining freedom of speech in the constitution, whilst maintaining preventive censorship. They “guaranteed” freedom of association, whilst

1 John Paul II, *Centesimus Annus*, pp. 46-47, [www.vatican.va](http://www.vatican.va).

2 This is apparent in the reports of the Venice Commission of the Council of Europe, concerning the rule of law (CDL-AD(2011)003rev., as well as opinions on individual states, for example on the new constitution of Hungary (CDL-AD (2011)016, and on Romania (CDL-AD (2012)026).



ensuring the leading role of the communist party and banning all opposition parties. The transition from totalitarianism to a democratic system first meant moving away from the principle of the unity of power in the system of state organs. The separation of powers was thus adopted as an essential condition for the transition to a democratic organisation of the state authorities.

If we perceive ‘democracy’ as a set of formal rules governing political life (as mentioned above), then we can agree that democracy as a basis for the political system has been an established fact in the majority of post-communist countries since 1990. The best examples of this are the post-communist countries’ new constitutions. All the constitutions contain traditional democratic principles such as the separation of powers, the rule of law, political pluralism, guarantees of human rights and freedoms and the independence of judiciary. All the countries were accepted as members of the Council of Europe on these grounds.

However, democracy as an established system of behaviour and as a kind of political culture is still in the process of formation. In order to adopt a mature form, further work is necessary. With regard to democratic traditions, the countries in this part of Europe did not have the historical opportunity to develop a mature democratic culture. Most of them were unable to develop their own political system at a time when the democratic systems of Western Europe were becoming stabilised. A common feature was that none of them has truly democratic mechanisms. The dichotomy between an attachment to democracy on the one hand and the extent of democratic behaviour on the other led to a very weak psychological infrastructure of democracy in those societies. As a result, the uncompromising struggle against political rivals, rather than their programmes - a feature typical of many countries with stable democracies - could lead to dangerous consequences in the Eastern countries, although they cause negligible harm in the West.

One may say that 25 years is long enough. But it is not only a question of time. The development of quasi-democratic attitudes over an extended period of time may work against true democracy. This can clearly be seen in the work of the Venice Commission, e.g. on the role of the judiciary and the relations between the executive and judiciary power in some countries (Ukraine, Moldova, Hungary).

Above all, we must remember that the societies in many of the post-communist states were not created to function democratically. One should not lose sight of that important social aspect. These societies often lack what might be called a sense of democratic attitudes.

In some countries a tendency to support authoritarian methods often emerges and such methods may gain greater acceptance than democratic ones as a way of putting things in order. Belarus was the first such example. The referendum of 1995 and the parliamentary elections were evaluated by international organisations as unfair. (This was at a time when Belarus had special guest status while waiting for full membership of the Council of Europe). The OCSE Parliamentary Assembly stated that the referendum violated international standards. However, there was no doubt that a majority of Belarussians succumbed to demagogy and voluntarily supported the referendum. The same was true in the following referendum in 1996, which authorized Lukashenko to stay power “for ever”, i.e. as long as he wishes. This example probably best illustrates the way democratic processes, of which a referendum is undoubtedly one, can be exploited in a frustrated society that is accustomed to life in a highly centralised, omnipotent state.<sup>3</sup> A system manipulating public opinion was in use in Ukraine in the final years of Kuchma’s presidency and then during Yanukovych’s term and is now apparent in Putin’s Russia.

I believe that it is not the constitutional solutions themselves but rather potential threats to democracy which may decide the course of development in the post-communist states. Some threats have closer links with nostalgia for the past, but others are connected to a new post-communist situation.

The first group includes the following:

1) the effect of the pioneering period

---

<sup>3</sup> This referendum was the first step since the start of the transformation process towards closer ties with Russia (the Russian language was given equal status to Belarussian, economic integration with Russia, change in the state’s symbolism and ability to dismiss Parliament if it systematically violates the constitution.)

- 2) economic difficulties,
- 3) public passivity.

#### 1) The effect of the pioneering period

When drawing up a balance sheet of the last 25-years, we must ask what was neglected during that period, and what was responsible for the critical perspective in the public mentality, instead of seeing this period as a period of success?<sup>4</sup> One of the grounds for some degree of criticism was the fact that in the early days of the transformation, the reformers failed to perceive the threats that inevitably accompany any “pioneering period”. At that time, they concentrated on the positive sides of transformation, which was understandable, because people had to be mobilized. It is much easier to see all that today, but at that time it was overlooked. The reformers were not aware that the transformation would entail all the negative syndromes of a “pioneering period”.

The most important of these syndromes are:

- the disintegration of the social bonds and principles which had governed the existing system;
- the collapse of the existing authorities;
- the rise of first-generation fortunes without the traditions of a trademark, firm and everything that obliges people to follow certain rules.
- the rejection of traditional prohibitions and precepts.

This situation created a kind of ethical vacuum, which was filled in a variety of ways. The new political culture had not yet developed. Corruption and clientelism flourished, encouraged by these syndromes. In some countries this paved the way to oligarchy. Politicians engaged in reforms and suddenly having to solve emerging problems, often in an atmosphere of labour unrest, proved incapable of creating a real (not Utopian) vision of the future of the country. Society felt lost.

#### 2) Economic difficulties

In every system, the economic situation - including unemployment - is an important factor in bringing about changes of government in successive elections. Stable democracies are no exception. In the case of the post-communist countries, however, this problem took on a different, more dangerous dimension, because it could strike a blow at their still frail democratic foundations. In the stable Western European democracies, changes take place within the democratic order, within the framework of established ground rules in which no-one undermines the essence of democracy. However, in the post-communist states, where democratic structures were being created or restored, such changes in certain situations might damage the development of democratic structures or prevent it for an extended period. The economic and social processes taking place in post-communist Europe were more closely interconnected than in traditional democracies. As a result, all the fluctuations and threats in the economic and social spheres constituted, and still constitute, a much greater threat to democratic processes than elsewhere. Any analysis of those countries' democratic processes, and any attempt to assess the progress of democracy there, requires a broader consideration of the state of their economies. It is this influence that largely shapes the state of society, the way it perceives democracy and what is traditionally known as democratic behaviour.

The creation of a new economic system required a base in a form of property owners with all the attributes of behaviour ascribed thereto, and such a group did not exist in 1989. Whilst initial surveys found that societies in Central Europe were theoretically in favour of reform, at the same time it might be said that no clear part of those societies was interested in the change in practice. The fall of communism in 1989 was based essentially on a “moral wave” of rejection of a system which was perceived as unjust and undemocratic. However, that

---

<sup>4</sup> Słodko-gorzki smak wolności, młodzi intelektualiści o 25 latach przemian w Polsce (Sweet-bitter taste of freedom, young intellectualists on 25 years of transformation in Poland), ed. M. Król, Instytut Spraw Publicznych, Warszawa 2014,



did not imply positive support for the market economy system: support for economic reform was purely theoretical. In real terms, most of post-communist society was interested in maintaining the majority of the myriad industrial and sectoral privileges of the socialist economy, together with the welfare functions of the state.

Because of its role in allocating resources according to relative prices and not political decisions, the market economy effectively cut across the interests of those groups which had paradoxically been the most active in overcoming communism - namely workers in large state enterprises and private peasant smallholders, especially in Poland's Solidarity revolution. "Did the revolution eat its children?" However, it also demonstrates the real paradox with which reformers felt they were faced from 1989 onwards: how could they carry out radical reforms, which would undermine the real interests of large social groups in the country, without risking defeat in democratic elections?

Today, for example, the challenge for those in Ukraine who wish to restore both the democratic process and economic reform to full health is whether they will ever again be in a sufficiently dominant position within an already weakened political process to implement the reforms necessary for long-term economic growth.

The political paradox in many post-communist countries has been that the rapid establishment of democracy has enabled political forces which did not understand the delicate balance of constitutional rights and obligations to emerge on a wave of the population's dissatisfaction with democratic parties. Again, these political forces did not question the nature of the democratic process as such; they merely acted (or act in some countries) to order and command institutions which are part of the democratic fabric, such as the civil service, freedom of the media, autonomy of secondary education, and independence of the banking system. I call this process the emergence of political rent-seeking through a monopolization of democratic institutions by one political option as a result of democratic elections.<sup>5</sup>

### 3) Public passivity

After seventy or even forty years of restricted social initiative, many social groups were, and in some countries still are, under the spell of passivity. A common experience of the new governments in the post-communist countries was public passivity. As a result, many changes in those countries had to be accomplished first at the central level. Only after the mechanisms developed under the previous system had been destroyed could individuals and new organisations begin to develop normally.

According to the Polish sociologist Prof. E. Wnuk-Lipiński, the paradox of our transformations lies in the fact that the market economy, which abhors central management, is being imposed from above. The institutions of a democratic state, which should develop with the active participation of society, are also being built from above. The continuation of policy reforms from above is becoming increasingly difficult.

The current case of Ukraine (where there is no well-established civic movement) suggests that the lesson of the past twenty-five years in Europe clearly shows that the scope for top-down reforms is limited. The leadership of a country can create macroeconomic stability (which has been difficult in Ukraine's case) and keep external threats at bay (even harder). However, real reform of state institutions requires a broad social consensus.

In contrast to the concept of overcoming passivity by gaining support for slogans devised by the political class, ideas have emerged that stress the need to fill the social vacuum between the family and the state. The creation of the intermediate structures that are so important for the stability of the democratic system can help to overcome public passivity. As the encyclical *Centesimus Annus* formulates: "the social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good."

---

<sup>5</sup> See the opinion of the Venice Commission on the New Hungarian Constitution, CDL-AD (2011)016,

For this reason, the problem of decentralisation was so important to the political elite in Poland in the early 1990s and is so crucial for today's leaders in Ukraine.<sup>6</sup>

However, in the new democracies, new threats have appeared, and have some impact on the future of democracy and state of law in these countries. These threats are:

- 1) an instrumental approach to the law,
- 2) decommunisation and lustration laws.

#### 1) Instrumentalisation of the law

In some post-communist countries, a situation has arisen in which the winner takes all and then attempts to solidify the entire political system by introducing amendments to the constitution adopted by qualified majority, which diminish the role of the minority - which is an important element in democratic society. The opinion of the Venice Commission on Hungarian Constitution states: "The crucial distinction between ordinary and constitutional politics and the subordination of the former to the latter should not be disregarded, lest democracy and the rule of law be undermined in Hungary. (...) The Fundamental Law entered into force 1 January 2012. Since then, the Constitution has already been amended four times. Before the entry into force of the new Constitution, the previous Constitution was amended 12 times after the elections of 2010. Frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates." As the Commission formulated recently with regard to Romania, "[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections."<sup>7</sup>

The Venice Commission stresses that the Hungarian Fundamental Law should not be seen as a political instrument. An instrumental approach to the law is one of the chief threats to democracy. A state order in which the law is treated instrumentally as a tool for achieving political aims is a bad state order. A perception of the law solely as a method of achieving one's own group's or party's political objectives is incompatible with the principle of the rule of law.

This could be dangerous for the principle of the rule of law, and one of necessary elements of the rule of law should be legal certainty.

"The principle of legal certainty is essential to the confidence in the judicial system and the rule of law. It is also essential to productive business arrangements so as to generate development and economic progress. To achieve this confidence, the state must make the text of the law easily accessible. It has also a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct."<sup>8</sup>

6 The problem is well understood by current Ukrainian authorities. In the framework of new Constitutional Commission established by president Poroshenko March 3<sup>rd</sup> 2015, three sub-commission were organized: -on human rights and freedoms,- on decentralisation and -on the judiciary.

7 Opinion on the Fourth Amendment to the Constitution (CDL-AD(2013)012).

8 See Venice Commission report on the rule of law, CDL-AD(2011)003rev.

## 2) The problem of lustration (decommunisation) laws

The principles of the rule of law pose a challenge to decommunisation and lustration laws. Central and Eastern European states proposed such laws at various stages of their transformation.<sup>9</sup> This kind of document is usually both juridical and political in nature. It is necessary to strike the appropriate balance between these two aspects if the lustration (or vetting in a political selection) laws are to be seen as an important step in establishing the rule of law in the country. These regulations are always delicate and controversial, and especially when they are submitted twenty-five years after the beginning of the transformation, as is occurring in Ukraine.<sup>10</sup>

The main question which now arises concerning this kind of law is whether the lustration procedure is admissible as a rule in a country which in its Constitution declared itself to be a democratic country governed by the law. If we are to build a democratic system, can we adopt just, albeit undemocratic solutions at the start of that process? Opponents of decommunisation argued that limiting the rights of large groups of individuals establishes a dangerous precedent. Could not the limitation of rights as a normal *modus operandi* easily become a habit? This problem has recurred in many countries after post-communists returned to power as a result of elections. It was argued that decommunisation would have prevented a comeback by the forces of the ancien régime.

The problem of the vetting (lustration) procedure was analyzed by UN High Commissioner for Human Rights in a document entitled “Rule of law tools for post-conflict states, Vetting: an operational framework”.<sup>11</sup> One role of the vetting procedure was strongly emphasised in this document as “an important aspect of personnel reform in countries in transition”. The document states that vetting processes to exclude persons who lack integrity from public institutions is one of the important aspects of institutional reform efforts in countries in transition (in post-conflict countries).

In the light of this document, it is possible to argue that the vetting (lustration) procedure may be introduced, but under certain conditions:

- it must be a post-authoritarian, post-conflict country.
- the country must be in transition.
- the persons undergoing the procedure are not in a state of integrity.

According to the document: “Integrity relates to the qualities that enable it to fulfill this mandate in accordance with fundamental human rights, professional and rule-of-law standards.(...) Public institutions that perpetuated a conflict or served an authoritarian regime need to be transformed into institutions that support the transition, sustain peace and preserve the rule of law. Institutions that abused human rights and defended the partisan interests of a few need to become institutions that protect human rights, prevent abuses and impartially serve the public.(...) Institutional reform contributes to transitional justice in that it enables public institutions, in particular in the security and justice sectors, to provide criminal accountability for past abuses.”<sup>12</sup>

One may suppose that because of the dual nature of lustration law (political and legal), and the threats that laws of this nature could constitute in a democratic state ruled by law, the Parliamentary Assembly of the Council of Europe adopted Resolution 1096 (1996) “On Measures to Dismantle the Heritage of former

---

9 See Venice Commission opinions: Amicus Curiae Opinion on the Law on the cleanliness of the figure of high functionaries of the Public Administration and Elected Persons of Albania, CDL-AD(2009)044; Amicus Curiae Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security (“Lustration Law”) of “the former Yugoslav Republic of Macedonia”, CDL-AD(2012)028, <http://venice.coe.int/>

10 Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, CDL –AD (2014) 044, <http://venice.coe.int/>.

11 UN, New York and Geneva 2006.

12 Ibid.

Communist Totalitarian Systems”. The Resolution clearly stated that lustration (and vetting law, accordingly) can be compatible with a democratic state under the rule of law, if several criteria are met.

This point of view was strongly supported by the Venice Commission, which said in its opinion on Albania: “The lustration process has been regarded as one of the means of bringing about historical justice [in many new democracies], in order to overcome the non-democratic past and to bring transparency to public life. The Venice Commission recalls however that lustration procedures, despite their political nature, must be devised and carried out only by legal means, in compliance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is done, then lustration procedures can be compatible with a democratic state governed by the rule of law”.<sup>13</sup>

Taking these opinions as our starting point, one should agree that post-communist countries fulfilled all the conditions at the beginning of their transformation. The problem is more complicated now, as many years have passed since the start of the transformation process. This has been the case in Albania, Macedonia and now Ukraine. Ukraine is undoubtedly a post-authoritarian (post-conflict) country, and despite being a member of the Council of Europe, is still in transition. The transition began in the early 1990s, but is not yet complete. Recent events show that today, in its next step towards a democratic change, Ukraine would like to dismantle its heritage as a former authoritarian state. One of the challenges is also the state of its judiciary.

Ukraine is a country which needs institutional reform, especially of its judiciary, in order to create a non-corrupt and non-politicized “corpus” of judges, to enable judges to be criminally accountable for past abuses. The behaviour of judges (non-integrity) could be one of the main obstacles to establishing the rule of law and legality in Ukrainian society. According to the Polish Constitutional Court, lustration should focus on threats to fundamental rights and the democratization process. “the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism, while the secondary goal thereof, subordinated to the realization of the primary goal, shall be the individual penalization of persons who undertook collaboration with the totalitarian regime”. (K2/07).

From this perspective, and in the light of the document by the UN High Commissioner for Human Rights, one can answer that the lustration process could as a rule be allowable in Ukraine but as part of a very clearly defined procedure.

Taking into account the Parliamentary Assembly document,<sup>14</sup> the Venice Commission identified the guidelines pertaining to lustration procedures. These are:

- a) guilt must be proven in each individual case;
- b) the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;
- c) the different functions and aims of lustration and criminal law must be observed;
- d) lustration has strict times limits in both the period of its enforcement and the period to be screened.<sup>15</sup>

One can agree that the general decision to undertake lustration is always a political one. However, this decision however should be made into a juridical act to guarantee a just procedure, based on individual responsibility and presumption of innocence. Nevertheless, the political character of such a law often prevails over its juridical elements and clear juridical procedure. The legislators in different countries always look for “legal shortcomings” making a lustration law.

In the light of the Venice Commission’s opinion, lustration does not constitute a violation of human rights *per se*, as a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. However, in order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between defending the democratic society on the one hand and protecting individual

13 Venice Commission AD(2009)044.

14 Resolution 1096 (1996), para. 12.

15 CDL – AD (2014)044.

rights on the other. Despite their political nature, lustration procedures must be devised and carried out only by legal means, in accordance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is done, then lustration procedures can be compatible with a democratic state governed by the rule of law.

Above all, such a law must be very precise and based on a very clear procedure. Revenge may never be the aim of such a law, and nor should political or social abuse of the resulting lustration process be allowed. Revenge is never a good basis for establishing the rule of law and legality in a society.

I have described the degree to which the ethos of change before and after 1989 was dominated by the rhetoric of democracy.

The experience of post-communist countries over the last twenty-five years has therefore raised interesting questions on the relationship between democracy, the rule of law and reform, but has provided no easy answers. Loyalty to the democratic ethos prior to 1989/1990 undoubtedly made it impossible for the new elites after 1989/1990 to do anything other than to act within its framework, if they were not to risk their own self-identity. On the other hand, the tensions between democracy and reform were evident and there was a fear of populist forces gaining the upper hand in elections. In reality, it was not only populism which began to undermine the basis of the forces of reform within the democratic process, but also the inability of those forces to implement an effective political strategy under democratic conditions, and the inability to understand that winners in democracies are not those who are right, but those who are the most well-organised.

Despite all the initial difficulties described above, the majority of post-communist Central European countries have undertaken important structural reforms in the political and economic sphere which have helped them “to return to Europe”.

Thanks to the new constitutions and political experience, it was possible to create more stable multi-party pluralistic system in those countries. Despite all the difficulties, the democratic system based on the rule of law was established in the countries of central Europe. These new democracies are attempting to meet European standards in their lawmaking processes. The threats which emerged in the initial stage of reforms are slowly (depending on the country) becoming a thing of the past.