Ди Грегорио А.

VETTING IN POST-AUTHORITARIAN SOCIETIES: A PROPOSAL OF CLASSIFICATION FROM THE POINT OF VIEW OF COMPARATIVE LAW

Аннотация. *The aim of this article is to describe the so-called «vetting», within the framework of transitional justice policies. In order to do that, it is first necessary to answer a series of preliminary questions.In general we talk about post-authoritarian justice (term which I do prefer to others, like transitional justice), dealing with the past, coping with the past, but also «militant democracy». The latter is a concept not usually employed in writing on these matters but, as I will explain, still very pertinent to the issue. In fact, I consider necessary to highlight the relation between vetting and protection of democratic legal order. Vetting is only one of the transitional justice measures, aimed at removing from public life representatives of the leadership and management of the old authoritarian regime (political élite, administrators).The definition and the meaning are not the same in other languages. The methodological basis of the research is a systematic, structural-functional, comparative approaches, methods of analysis, synthesis, induction, deduction, observation. Main results of this article: 1. Linguistic and definition problems: vetting in the framework of post-authoritarian justice; 2. Transition to democracy: a record; 3. A brief history of vetting; 4. Circulation of models and comparison between countries and areas; 5. The phenomenon of lustration in post-communist Europe; 6. Conclusion: vetting as a protection of democracy.*

Ключевые слова: *Конфликтология, политика, право, post-authoritarian societies, политическая стабильность, политический режим, государство, интересы, ценности, безопасность.*

1. LINGUISTIC AND DEFINITION PROBLEMS: VETTING IN THE FRAMEWORK OF POST-AUTHORITARIAN JUSTICE

The aim of this article is to describe the so-called «vetting», within the framework of transitional justice policies. In order to do that, it is first necessary to answer a series of preliminary questions.

In general we talk about post-authoritarian justice (term which I do prefer to others, like transitional justice[1]), dealing with the past, coping with the past, but also «militant democracy'[2]. The latter is a concept not usually employed in writing on these matters but, as I will explain, still very pertinent to the issue. In fact, I consider neces-

[1] This is a general (or even generic) term, very used in the doctrine, referring to many kinds of different means to cope with the past. From the legal point of view, it is a sum of measures regarding different branches of law. The term and the research field of «transitional justice» has appeared in the last 20 years, when the fall of authoritarian regimes has become to be defined «transition to democracy». See, in particolar, J. Elster, Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy, in Archives Européennes de Sociologie, vol. 39, 1998; Id., Closing the Books. Transitional Justice in Historical Perspective, New York, Cambridge University Press, 2004; R. G. Teitel, Transitional Justice, Oxford, Oxford University Press, 2000. For a deep analysis and an accurate collection of documents N. J. Kritz (ed.), Transitional Justice: How Emerging Democracies Reckon with Former Regimes, 3 vols, Washington, U. S. Institute of Peace, 1995.

[2] See the classical K. Loewenstein, Militant Democracy and Fundamental Rights, in The American Political Science Review, vol. 31, nos. 3–4, 1937. More recently A. Sajó, The Self-Protecting Constitutional State, in East European Constitutional Review, vol. 12, nos. 2/3, 2003 and P. Macklem, Militant democracy, legal pluralism, and paradox of self-determination, in International Journal of Constitutional Law, vol. 4, no. 3, 2006. See also T. W. Adorno, What Does Coming to Terms with the Past Mean, in G. H. Hartman (ed.), Bitburg in Moral and Political Perspective, Bloomington, Indiana University Press, 1986.

DOI: 10.7256/.2014.1.12941

sary to highlight the relation between vetting and protection of democratic legal order[1].

Vetting is only one of the transitional justice measures, aimed at removing from public life representatives of the leadership and management of the old authoritarian regime (political élite, administrators)[2].

The definition and the meaning are not the same in other languages.

In Italian and French we talk about «epurazione/épuration», that involves not only the classical vetting (removal, dismissal, within the public administration) but also a process of purification (cleansing, purge), in the political apparatus in general.

In the former Communist countries (not only Slavic) they talk about «lustration» (in Czech *lustrace*, Slovak *lustrácia*, Polish *lustracja*, Russian *люстрация*, Bulgarian *лустрацията*, Serbian *лустрација*, Croatian *lustracija*; Romanian *lustrație*, Lituanian *liustracijos*, etc.).

In German terms are completely different: they use word Ü*berprüfung* — that literally means examination, revision, review, control — or *Berufsverbot*, that is the prohibition to perform some professions, referring to the legislation adopted in 1956 with the aim to forbid members of the officially dissolved Communist Party to perform certain public functions.

The problem of definitions is preliminary to other relevant issues. After such specifications, we may proceed to a series of classifications.

More than twenty years after the last big wave of transitions to democracy (in Central and Eastern Europe, in South Africa and in Latin America), we can observe the same request of post-authoritarian justice in the more recent and fragile transitions from authoritarian regimes. In particular, there is a quest for vetting of former political, administrative and security forces[3]. It is very interesting to achieve a comparative overview of this phenomenon, dividing experiences in chronological waves, comparing areas or countries at geographical and historical levels. It is a complex issue that involves the characteristics of transition from an authoritarian regime to a democratic one and, where it is possible, this issue can be analysed within the main problem of the protection of democracy.

It is very important to focus the study on the quality of democratic regimes starting from the beginning of their foundation. For this purpose we can concentrate the attention on vetting of political and administrative classes, at the same time considering other kinds of transitional measures, linking this issue to the more general problem of the protection of democracy. In so doing, it is possible to underline a special perspective of vetting measures, which are addressed not only to the past but also to the future. The complexity of the perspective justifies the relevance of measures otherwise considered transitional.

The main part of research dealing with post-authoritarian justice has been written in years immediately following the adoption of the related measures[4]. The transitional justice phenomenon has already finished for several countries, having been part of their «constituent» moment. For others, on the contrary, it is a current question, even decades after the transition[5].

For instance, in former Communist Europe even today it is possible to hear about spying, collaboration with secret services of the old regime and fears about the past. The same has not happened in other post-authoritarian transitions.

The problem of dealing with the past is not simply transitional: it concerns not only the affirmation of constitutionalism but also its consolidation, and the concerns arising from the threats posed to the democratic system.

This is a very complex phenomenon. Even the study of a specific post-authoritarian justice measure, such as vetting, is not easy: it is crucial to examine legislation, jurisprudence, doctrine, in addition to the political contest and the application praxis.

[1] A. Di Gregorio, Epurazioni e protezione della democrazia. Esperienze e modelli di «giustizia post-autoritaria» (Vetting and protection of democracy. Experiences and models of «post-authoritarian justice'), Milano, FrancoAngeli, 2012.

[2] For the most comprehensive study on vetting see A. Mayer-Rieckh, P. de Greiff (eds.), Justice as Prevention: Vetting Public Employees in Transitional Societies, New York, Social Science Research Council, 2007.

[3] See cases of Iraq, Afghanistan, Kosovo, the Arab Spring, and also the new wave of legislative and jurisdictional measures in many Latin American countries.

[4] For example, in the Italian case.

[5] That is reason why I do prefer term «post-authoritarian» justice and not «transitional» justice.

DOI: 10.7256/.2014.1.12941

The study of the transitional justice measures is obviously multidisciplinary, but what is the most important legal aspect in the case of vetting?

There is a strict relation between some of the concepts which need to be examined:

- transition to democracy (constitutionalism)
- quality and protection of democracy
- vetting/post-authoritarian justice

With regard to the replacement of the old bureaucratic-administrative and military apparatus, it is often necessary to add up this to other kinds of post-authoritarian justice (measures of different types may be covered by the same laws, as it happened in Italy after fascism or in Germany after communism). This is perhaps the more relevant remedy to the construction of a new democratic order, since it exceeds the reasons purely transitional of the punishment for moving forward, taking care of loyalty to democracy of the future servants of the State. Vetting includes for example prohibition of access to certain public offices or removing from them, the forfeiture of certain rights or benefits (such as social benefit), etc. Here also are relevant issues of labor law, as well as the administrative one. The subjects «purged» are those who have been part of the former regime or those who have collaborated with it to some extent. There are authors who make a distinction between measures of «verification» of the loyalty of civil servants (vetting) and measures of purging/lustration. According to others, vetting and lustration would be the same thing[1].

It is also important to highlight a series of legal issues arising when it comes to vetting and that can also be found in the protection of democracy such as the balance between the «militant» protection of democracy and the respect of the democratic procedures and values. This balance is typically attempted by constitutional or supreme courts whose case-law has had and still play a crucial role in defining the vetting policies of the new democracies. The courts were asked to choose one value or another depending on the circumstances[2]. Just on the basis of some particular sensitive judgments regarding this balance, one may wonder if the purge is functional to democracy and to the various kinds of democracy. Because of potential infringement of fundamental rights, there have been many obstacles to the adoption of vetting measures, not only at national but also at the international levels. This can sound strange, considering the high international pressure to adopt transitional justice initiatives.

There exists an imperfect relationship between the models of transition and the models of transitional justice. Sinking into oblivion seems more likely where there is no regime change, as in the U.S. after the Civil War. Punitive action seems more likely where there is a radical break with the past, as in revolutionary France. However, counter-examples, such as post-Franco Spain and post-apartheid South Africa, witnesses how other factors can affect the form of post-authoritarian justice. There is no doubt that a radical break with the past seems nearly always to create problems for democratic state building.

Vetting or lustration laws are considered as the most controversial measures of transitional justice because of their alleged encroachment of human rights. Many critics, however, underestimate the tremendous challenge countries in transitions must face in their relation with the members of previous regimes and their networks.

[1] For P. M. Freeman, D. Marotine, La justice transitionnelle: un aperçu du domaine, in http://es.ictj.org/images/content/8/9/899.pdf., November, 19 2007, p. 19, the term «vetting» would refer to the examination, based on different sources of information, of the past of an individual to check its ability to hold public offices. The vetting is to be distinguished from the lustration because the latter would be connected, specifically in Eastern Europe, to laws and policies that involve the «ban» on a large scale, on the basis of belonging to a party or institution of the repressive regime. The lustration would put into question the collective responsibility and not that of the individual and would violate the principle of the presumption of innocence. A program of classical vetting according to the Authors is to be in three main stages: registration, evaluation and certification (as happened in Bosnia-Herzegovina in relation to judges and prosecutors).

[2] See W. Sadurski, Rights Before Courts. A Study of Constitutional Courts in Post communist States of Central and Eastern Europe, The Netherlands, Springer, 2005; M. Safjan, Transitional Justice: The Polish Example, the Case of Lustration, in European Journal of Legal Studies, Vol. 1, no. 2, 2007; J. Almqvist, C. Espósito (eds.), The Role of Courts in Transitional Justice. Voices from Latin America and Spain, Oxford, Routledge, 2011.

DOI: 10.7256/.2014.1.12941

How does this relate to the more general problem of the memory of totalitarian regimes in Europe? How does it relate to the more general problem of the protection of democracy? How can we reconcile the different values in conflict?

2. TRANSITION TO DEMOCRACY: A RECORD

The main «waves'[1] of establishment of the liberal-democratic form of State in the last century (constitutional transitions), were different from each other and in many ways incomparable. The transitions after the World War II have been completely unique, because of their national and international context. In this case, in building new institutional structures of the defeated countries (all of which had experienced an authoritarian regime), there have been different influences (that of the victorious Allies, the native pre-authoritarian, the example of other European democracies and the bond of peace treaties)[2].

In the subsequent post-authoritarianism wave, which hit Southern Europe at the end of the Portuguese, Spanish and Greek regimes, the transition was much less bloody, since there was no international involvement, and the establishment of democracy was relatively quick and painless (a little more troubled the Portuguese one), also due to the non-virulent characteristics of their authoritarian regimes (or the short duration of the same, as in the Greek case). These aspects have facilitated the transition to the liberal model in spite of the considerable length of the dictatorships in Spain and Portugal[3].

The third wave is that of the post-communism, even if in the same period transitions occurred also in several Latin American countries, as well as in South Africa (albeit starting from different historical, social and cultural contexts)[4]. This phase of political transformation is therefore particularly rich and complex and in many countries has not yet reached the conclusion.

As repeatedly pointed out by scholars[5], post-communist transitions have experienced several levels of transformations, the political-institutional being perhaps the most manageable and the most feasible, while the economic, social and national transitions (issues of statehood and minorities) still represent unresolved issues in several countries.

Following such a big wave, there have been some cases of transitions imposed through international military conflicts (Afghanistan, Iraq) or transitions — started in the first half of the «90s — not yet crowned by a full statement of the liberal model in some Asian and African countries and some «liberalization» in areas of the Middle East (most recently, see the «democratic» revo-

[1] S. P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, Norman, University of Oklahoma Press, 1991.

[2] J. H. Herz (ed.), From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism, Westport, Greenwood Press, 1982; S. Han (ed.), Divided Nations and Transitional Justice: What Germany, Japan and South Korea Can Teach The World, Boulder, Paradigm Publishers, 2012.

[3] G. O'Donnell, P. C. Schmitter, L. Whitehead (eds.), Transitions from Authoritarian Rule. Vol 1: Southern Europe, Baltimore, The Johns Hopkins University Press, 1986; A. Costa Pinto, L. Morlino (eds.), Dealing with the Legacy of Authoritarianism: the «Politics of the Past» in Southern European Democracies, London, Routledge, 2011.

[4] For the Communist Europe see L. Stan (ed.), Transitional Justice in Eastern Europe and the Former Soviet Union, London/New York, Routledge, 2009. For Latin America A. Barahona de Brito, Human Rights and Democratization in Latin America. Uruguay and Chile, Oxford, Oxford University Press, 1997; K. Ambos, E. Malarino, G. Elsner (eds.), Justicia de transición. Informes de América Latina, Alemania, Italia y España, Konrad Adenauer Stiftung, Berlin-Montevideo, 2009. For South Africa, E. Hassen, The Soul of a Nation. Constitution Making in South Africa, London/Cape Town, OUP, 1998; V. Federico, C. Fusaro (eds.), Constitutionalism and democratic transition. Lessons from South Africa, Firenze, Firenze University Press, 2006; A. Lollini, Post-Apartheid Constitutionalism, Sant'Anna Legal Studies, n. 3, 2008; Id., Constitutionalism and Transitional Justice in South Africa, Oxford-New York, Berghahn Books, 2011.

[5] For the Italian doctrine see G. de Vergottini, Le transizioni costituzionali, Bologna, il Mulino, 1998; M. Ganino, Democrazia e diritti umani nelle Costituzioni dei Paesi dell'Europa orientale, in M. Ganino, G. Venturini (a cura di), L'Europa di domani. Verso l'allargamento dell'Unione, Milano, Giuffrè, 2002; S. Gambino (a cura di), Costituzionalismo europeo e transizioni democratiche, Milano, Giuffré, 2003; L. Mezzetti, Teoria e prassi delle transizioni costituzionali e del consolidamento democratico, Cedam, Padova, 2003.

DOI: 10.7256/.2014.1.12941

lutions in the Arab countries started in 2011 that seem to have failed). In these latter cases the consolidation of democracy, or the formation of the State itself, are uncertain. Therefore, it is difficult to fully envisage a «successful» model of transition which is vital to address the issue of protection in the broadest sense of democracy.

3. A BRIEF HISTORY OF VETTING

Starting from the end of the World War II, in many European countries, mainly Italy and Germany, several transitional justice measures were adopted in a systematic way (in Italy named «de-fascistizzazione» and in Germany «de-nazification'). It is about a wide policy concerning different branches of law (criminal, administrative, labour, electoral). In many European countries (for example France and Belgium) there was a special legal institute, the so-called «moral unworthiness'[1].

In Germany de-nazification was carried out mainly by the Allied Forces, initially in the occupied territories. Then, for criminal offenses amnesty laws were adopted and in the civil service vetted personnel was reinstated. Only the establishment of the Nazi Party and State was eliminated.

Furthermore, we must underline that in the «Grundgesetz» (the Constitution of the Federal Republic of Germany; from 1990 the Constitution of the unified Germany) there are some articles concerning the so-called «protection of democracy». The German Nazi past has directly influenced those provisions, generating an attitude towards the respect of the democratic values by public personnel. In fact, the political system of the Federal Republic of Germany is also-called *wehrhafte* or *streitbare Demokratie* (fortified democracy). This implies that the public authorities are given extensive powers and duties to defend the *freiheitlich-demokratische Grundordnung* (liberal democratic order) against those who want to abolish it. The idea behind the concept is the notion that even a majority rule of the people cannot be allowed to install a totalitarian or autocratic regime, thereby violating the principles of the German constitution, the Fundamental Law.

Several articles of the German constitution allow a range of different measures to «defend the liberal democratic order':

- Art. 9 allows for social groups to be labelled *verfassungsfeindlich* (hostile to the constitution) and to be prohibited by the Federal Government.
- According to Art. 18, the Federal Constitutional Court (*Bundesverfas-sungsgericht*) can restrict the basic rights of people who fight against the *verfas-sungsgemäße Ordnung* (constitutional order).
- The Federal and State (*Länder*) bureaucracies can exclude people deemed «hostile to the constitution» from the civil service according to Art. 33 (*Berufsverbot*). Every civil servant is sworn to defend the constitution and the constitutional order.
- According to Art. 20, every German citizen has the right to resistance against anyone who wants to abolish the constitutional order, though only as a last resort.
- Political parties can be labelled enemies to the constitution by the Federal Constitutional Court, according to Art. 21[2].

[1] Moral unworthiness (indegnità, indemnité) was a kind of betrayal of a lower category, punished with «national degradation», a penalty which consisted in the loss of many rights, both political and civil, essential to conduct a normal life. In Belgium, the sanctions were so severe as to be able to speak of «civil death». In France, the penalties provided for national indignity were, for example, the loss of the right to vote and to hold elective offices, disqualification from public service, exclusion from managerial functions within the semi-public companies, the banks, newspapers and radio, as well as the legal professions and teaching. The «unworthy» was also expected to refrain from living in certain parts of the country, the colonies or protectorates. An amendment of 30 September 1944 added the confiscation of all or part of the assets of the «unworthy».

[2] «(1) Political parties shall take part in forming the political opinion of the people. They may be freely set up. Their internal organisation must comply with democratic principles. They must render public account of the origin of their income and their assets and of their expenditure. (2) Parties which, through their aims or the conduct of their members, seek to damage or overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be anti-constitutional. The Federal Constitutional Court shall determine the question of anti-constitutionality. (3) Detailed rules shall be laid down by federal laws».

DOI: 10.7256/.2014.1.12941

An interesting interpretation of these rules is contained in the decision of the Strasbourg Court in the case of *Vogt v. Germany*[1].

In Italy very severe measures were adopted on paper. Among these, we remember the decree n. 159 of July, 27 1944, which contained many dispositions related to the criminal and administrative punishments (*Sulle sanzioni contro il fascismo*: sanctions against the fascism). Those acts were repealed many years later: the vetted officials were reinstated; a general amnesty was adopted for criminal offences. For this reason, we can talk about «unperformed» or virtual vetting/purge. But it is not exactly so[2]. As far as the measures of protection of democracy are concerned, we now have only the XII article of the «Final and Transitional Dispositions» from the 1947 Constitution, stating that «It shall be forbidden to reorganize, under any form whatsoever, the dissolved Fascist Party». Also, the law has established, for not more than five years from the implementation of the Constitution, temporary limitations to the right to vote and eligibility for the leaders responsible for the Fascist regime.

Following post-war experiences, we have in Europe transitions from authoritarian rule in Greece, Portugal and Spain in the second part of ninety seventies. In this case, there is not a unique approach: each country reacted differently. For example, a real and severe vetting was provided for only in Portugal. But even there after a few years the new leadership decided to reconcile with the past and to cancel previous interdiction measures.

In Spain, after the death of Franco and the return to democracy, new governments choose the way of oblivion. But with the passing of time a social request for punishment, at least of the cruellest offenses committed during the Franco's regime, is growing continually. In 2007 a special *Ley de memoria historica* was adopted, but the measures introduced have been mostly symbolic. Until now, there have been constant attempts to initiate trials to condemn past abuses and violations of human rights but the Supreme Court continue to consider the 1977 Amnesty law untouchable, notwithstanding the fact that other courts argue the supremacy of the international law over it (especially in the case of crimes against humanity).

In transitions occurring in Latin America there has been no vetting at all. In this area the most diffused measure of transitional justice is the «truth telling» (*comisiones por la verdad*), plus some criminal trials.

4. CIRCULATION OF MODELS AND THE COMPARISON BETWEEN COUNTRIES AND AREAS

As far as the models of vetting are concerned, their circulation is not always in one direction, that is, they not necessarily come from the Western European world. In some cases it might be more complex, if we consider the contribution of the experiences of the Central and Eastern European Countries (CEE) to the more recent cases of post-authoritarian transition.

In fact, in the «*Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States*»[3], the term «lustration» is used to indicate in general political and administrative vetting in the member States of the Union. This term is considered more mod-

[1] Decision of September, 2 1995. Mrs. Vogt was a teacher dismissed because of her political activities (she was a militant of the Communist party in the Western Germany). The Strasbourg Court reminded that the right to hold public office was purposely omitted from the European Convention of Human Rights but it is possible that a person dismissed from public office denounces its dismissal if its ECHR rights were infringed. In the case of Mrs Vogt, the Court considered that German authorities intended the loyalty to the democratic order in an absolute manner, not distinguishing between professional duty and private life. Dismissal of Mrs Vogt should have been a too severe sanction, considering that the teacher was suddenly deprived of her job and of the possibility to find out another of the same quality and level. The decision is available at www.echr.coe.int/ECHR/EN/Header/Case-Law.

[2] Some authors consider that vetting has in fact occurred, even if in a indirect manner. See H. Woller, I conti con il fascismo. L'epurazione in Italia 1943–1948, Bologna, il Mulino, 1996; R. Canosa, Storia dell'epurazione in Italia. Le sanzioni contro il fascismo 1943–1948, Milano, Baldini & Castoldi, 1999; P. Allotti, Studi recenti sull'epurazione nel secondo dopoguerra, in Mondo Contemporaneo, n. 1, 2008.

[3] Ordered by the European Union and elaborated in January 2010 by Prof. Carlos Closa Montero, Institute for Public Goods and Policy Centre of Human and Social Sciences (Csic) in Madrid http://ec.europa.eu/justice/doc_centre/rights/studies/docs/memory_of_crimes_en.pdf.

DOI: 10.7256/.2014.1.12941

different waves of post-authoritarian transitions	geographical dimension	ideological characteristics of transition	types of post-authoritarian justice
After the World War II	Europe Japan	post-authoritarian (right-wing ideologies) and post-conflict transition caused by war with a precise rupture	criminal trials; administrative vetting/lustration (de-nazification, «de-fascistizzazione') intervention of the international community (international tribunals of Nuremberg and for the Far East, obligations deriving from peace treaties)
Mid-70s of XX century	Southern Europe (Greece, Portugal, Spain)	post-authoritarian (right-wing authoritarianism, militarism) transitions negotiated or caused by coup d'état	Spain: oblivion (apparently) Greece: trials and vetting Portugal: initial severe vetting and subsequent reconciliation
From 80's and 90's of the XX century but also in recent years (Brazil, Colombia, etc.)	Latin America	post-authoritarian (militarism, right-wing regimes) negotiated transitions	truth commissions; ngos and actions of victims› relatives
From 1989 up to today	Central and Eastern Europe	post-communist negotiated transitions	lustration; opening of files; institutes for the recovery of memory and files of former political police
«90's of XX c.	South Africa	post-apartheid negotiated transition	truth and reconciliation commission
The first decade of XXI c.	former Yugoslav Countries (Bosnia, Croatia, Macedonia, Serbia)	post-conflict justice (civil and ethnic war with international intervention) double transition: from communism and from nationalism, in the first case apparent transition (lack of real democratic regimes), in the second, due to war events	criminal trials; compensation of victims and refugees; vetting of judges and security forces; memory tribute; reconstruction of original ethnic composition of the region (protection of minorities); some measures derive from other post-communist countries (lustration, disclosure of files …,) intervention of the international actors
End of the first decade of XXI c. up to 2010	Iraq	post-authoritarian, post-conflict	de-baathification commission; international intervention
After the Arab Spring: 2011-	Tunisia, Egypt, Bahrain	post-authoritarian	Criminal trials against former dictators; Commissions of Inquiry; Reinstatement of banned parties (Ennahdha in Tunisia) or ban of past or transitional parties (like Muslim Brotherhood in Egypt after the ouster of Morsi) In Tunisia: set up of the Ministry of Human Rights and Transitional Justice and of Transitional Justice Academy

DOI: 10.7256/.2014.1.12941

ern and all-inclusive, even with reference to the «old» members of the Union[1].

It is important to underline that the legal culture of a specific area leads politicians to select transitional justice mechanisms more suitable for a specific context in a specific historical moment (traditional justice in Africa, for example justice through reconciliation in South Africa; the search for truth in Latin America).

There are many models of post-authoritarian justice, according to the prevalence of one or another kind of measure (for instance the «trial model», aimed at criminal punishment; the reconciliatory model, that prefers to resort to truth commissions; restitution model; lustration model; and so on). Models circulate because they are prestigious (see the German case), or more suitable for certain contexts (truth commission) or because they are an intermediate solution between punishment and oblivion (political vetting). In the more recent transitions to democracy, the circulation transplant and even imposition of models are highly diffused phenomena.

Since the end of the Second World War, the main requirement of transitional justice has been the punishment of the authors of the most brutal offences through the use of the criminal trial and punishment. This necessity is less evident, though not completely absent, in transitions from regimes in which human rights violations occurred at more ambiguous and hidden levels, acting on the people's morality and mind.

The past can be a burden even many years after the transition, especially at a social level. Sometimes it is necessary to wait for a so-called «generation turnover». In some cases old wounds, non completely healed, can become infected. Czechoslovak and German examples testify that it is easier to cope with the past when the new regime imposes itself to the old one without compromise. But even in negotiated transitions, at the beginning the new élite has some qualms about substituting old leadership with which it has negotiated the transition. At a second moment — though many years later — the necessity of vetting/lustration resurfaces sometimes with a particular aim, for example to fight against political enemies. There is a deep relationship between vetting and transitions and between models of transition and models of vetting.

So, the choice of vetting is complex and multilevel. There are at least two levels of research: interaction between transition and vetting, and between vetting and protection of democracy.

The interest in these topics stems from the desire to improve the knowledge of the mechanisms of transition to democracy, and the protection of democracies from a previous authoritarian system: the unresolved conflicts in matters of inheritance of the past, as experience shows, can hinder the democratic stabilization of a country in spite of the change of regime.

Furthermore, it is crucial to understand to what extent the previous form of State influences the outcomes of purging measures ('ideological» element) and if it comes to issues that extend beyond the «constituent/founding» moment. Even the geographical context has its specificity: geography not always represents a unifying element (it is an element sometimes confused with the cultural and even ideological ones).

Let us observe the following record. The elements necessary for classification are as follows:

- time of transition
- geographical context
- the ideological characteristics of the previous regime
- the prevailing type of transitional measure

In this classification we could integrate other kinds of transition, such as post-conflict transitions in non fully democratic contexts following cruel civil wars in Africa and Asia. Unfortunately, in these conditions there is a lack of fundamental principles of the so-called «transition paradigm'[2].

[1] Another example: the Report on the Transition to Democracy recommended the transitional government of Iraq to evaluate the Eastern European phenomenon of lustration: see Iraqi Opposition Report on the Transition to Democracy, in Journal of Democracy, vol. 14, no. 3, 2003. See also Roman David, From Prague to Baghdad: Lustration Systems and their Political Effects, in Government & Opposition, vol. 41, issue 3, June 2006.

[2] Implying the achievement of democracy as a natural development. This paradigm is today discredited, even among American scholars. See T. Carothers, The end of the transition paradigm, in Journal of Democracy, Vol. 13, no. 1, 2002; Id., The «sequencing» fallacy, in Journal of democracy, Vol. 18, no. 1, 2007.

DOI: 10.7256/.2014.1.12941

The choice of the cases examined (Europe since the World War II in three moments of political transformation; Latin America; South Africa) is justified by their paradigmatic value and the fact that their legal orders have passed the test of democratic consolidation. We have therefore chosen the most significant experiences in a historical period particularly relevant from the point of view of regime change. The exemplary value of the cases examined is evidenced by the reference to them in the recent post-authoritarian transitions in which, although the direction of change is not entirely clear, we perceive the importance of carrying out vetting measures and sanctions.

The study of these problems, therefore, can help answer a series of questions relevant to a better understanding of the regime change:

- The lessons that might be learned from European, Latin American and South African cases in more recent transitional democracies;
- The evaluation carried out thanks to the enrichment of experiences, of successful or failing models and the contextualization of the models (some experiments are good only in certain contexts and rejected in others);
- The possibility of using the experiences and models of protection of democracy «from the past» in carrying out measures of protection from enemies of the present (the link between cleansing and loyalty to democracy is very strong).

Other questions to pose:

- Are the conflicting values in the application of such measures always the same?
- Are there more effective jurisprudences in overcoming the most striking contrasts between the values?
- Are there changes in these policies when a country adheres to the European Union or to the Council of Europe?

What is the overall impact on the protection of rights of the participation in supranational organizations (Council of Europe, Organization of the American States) and what is the role of the case-law of the courts of those organizations?

How could historical memory affect the quality of democracy?

The pacts deriving from negotiated transitions to democracy seem not to be as decisive as suggested by Jon Elster[1]. Whilst the link between policy and law, and consequently the weight of political manipulation, has been much more evident. But it is an element of macro-environment. Others, and not less relevant aspects, are pervasive, such as the role of constitutional courts in addressing in one direction or another the different aspects of the transition even many years later.

5. THE PHENOMENON OF LUSTRATION IN POST-COMMUNIST EUROPE

In recent years the geographical area in which vetting has been experienced in many forms and differences is that of former Communist Europe (except Russia and the other countries members of the Commonwealth of Independent States). When we talk about vetting policies, the study of legal systems of post-communist countries, including former East Germany, is particularly interesting for many reasons:

- The complexity of their transition that has taken place at several levels
- The magnitude of the phenomenon of post-communist justice from the point of view of the countries involved and of the types of measures adopted
- The continued relevance of these issues and the clear link with the protection of democracy

Historical, cultural, and institutional factors distinguish transition to democracy in Central and Eastern European countries from other transitions and affect policy choices about the best means to deal with the past. Crucial differences in the scope of citizen collusion, the nature of the crimes committed, and the nature of the break with the past help explain why these countries turned to lustration, rather then adopting other possible transitional justice measures[2].

[1] J. Elster, Closing the Books. Transitional Justice in Historical Perspective, cit.

[2] Literature on lustration is very wide. Among others see: R. Boed, An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice, in Columbia Journal of Transnational Law, Vol. 37, no. 2, 1999; K. Williams, A. Szczerbiak, B. Fowler, Explaining Lustration in Eastern Europe: «A Post-communist politics approach», in Democratization, Vol. 12, Issue 1, February 2005; A. Czarnota, Lustration, Decommunisation and the Rule of Law, in

DOI: 10.7256/.2014.1.12941

Regime changes in Central and Eastern Europe involved peaceful transitions and often the retention of former communist officials in public offices. In Bulgaria and Romania, many former communist officials never left office. In Poland, Hungary and Albania, communist officials have gradually been elected to positions of power, sometimes even constituting a parliamentary majority. East Germany and the Czech Republic are the only two countries in which there have been substantial changes in government positions since the fall of communism.

The research on post-authoritarian justice in the post-communist world is focused on multiple areas of investigation, of which the most important are four:

- The purge of public agencies (vetting);
- The disclosure and declassification of the archives of the political police of the regime;
- The new statute of limitations for crimes not punished in the past for political reasons;
- Criminal trials against former communists and officers or agents of secret police guilty of serious human rights violations.

Other measures are equally important, although not always considered in a unified framework: the restitution in terms of nature, or compensation, for property nationalized by the communists; the rehabilitation of victims; official apologies and the removal of symbols or tributes to the communist regime; the foundation of special public institutions for memory and historical research; the general historical evaluation of the communist system (often assigned to specific laws).

The more sensitive measures from the point of view of constitutional law are lustration and reopening of the statute of limitation which are the most debated measures before the constitutional courts. These issues are significant from the point of view of the change of regime and the new legal perspective, as well as emblematic of the clash between constitutional values. The various measures are still closely linked. This is clearly demonstrated in the case of lustration and disclosure of the police files (sometimes both are dealt with in the same law)[1].

In this area vetting is called lustration.

In a wide sense lustration is a form of cleansing the system of the remnants of the past which are believed to inhibit democratic transition. The word derives from the Latin «lustratio», meaning purification by religious rites[2]. It implies the purification of State organizations from their sins under the communist regimes and is often used synonymously with «decommunization»[3].

In the context of post-communist transitions, lustration is a legal process that authorizes government action in two broad ways: mass screening procedures of candidates for positions in the new government; criminal proceedings against the élite, State bureaucrats and other authorities of the former regime. Lustration is a means for securing knowledge and, in some instances, accusing and punishing those who upheld the tainted past regime. Lustration laws do not criminalize, but they do authorize punishment based on past involvement. What kind of involvements are punishable, and the extent to which they are punishable may vary country by country[4]. Laws differ in terms of who initiates the process of lustration,

Hague Journal on the Rule of Law, no. 1, 2009; L. Stan (ed.), Transitional Justice in Eastern Europe and the Former Soviet Union, cit.; R. David, Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland, Philadelphia, University of Pennsylvania Press, 2011.

[1] In many cases, to have an appreciable result in policies of dealing with the past it was necessary to wait for the opening of the archives and the declassification of documents.

[2] See Webster's International Dictionary of the English Language, 1904; J. Rohozińska, Struggling with the Past. Poland's controversial lustration trials, in www.ce-review.org/00/30/rohozinska30.html, Sept. 11, 2000.

[3] Maria Los (Lustration and Truth Claims: Unfinished Revolutions in Central Europe, in Law & Social Inquiry, Vol. 20, Issue 1, 1995) explains the important differences between «lustration» and «decommunization». Decommunization tends to refer to the purging or vetting of former Communist nomenklatura members, therefore it involves a smaller subset of individuals. By contrast, lustration targets not only Communist officials, but also individuals who collaborated with the Secret Police. Therefore lustration casts a net around a larger group of people. The different targets require different laws, different theoretical justifications for vetting, and different means of implementing laws, not to mention substantially different costs and benefits.

[4] Williams K., Szczerbiak A., Fowler B., Explaining Lustration in Eastern Europe: «A Post-communist politics approach», cit.

DOI: 10.7256/.2014.1.12941

be it the individual in question or a public institution, and how the lustrated individual is then treated. Measures range from the self-explanation of former collaborative activities, to the public exposure of collaborators, to the removal and barring of former collaborators from public office or other positions, as defined by the law (the ban is usually temporary and depends on positions). Some lustration laws also include dispositions about disclosure of the Secret Police files, on the basis of which the entire lustration proceeding is carried out.

This is a current phenomenon, because lustration laws continue to be applied, modified, re-introduced or adopted *ex novo* in all this area. Lustration in the CEE was designed to facilitate the transition from the pre-1989 past to the future. Yet, well over a decade later, a number of countries have extended the duration and scope of lustration laws or even introduced them for the first time, when a new political majority appeared. Probably, these changes are the consequence of a particular cycle of political competition. In Hungary and Poland the outburst of policies for dealing with the past in recent years means a form of dissent towards the process of transition from Communism by political forces at that time excluded from the negotiations (the so-called round-tables).

In many Central and Eastern European countries there has been cross-party support for the initiation of lustration laws. Only the remnants of the former Communist Party (often with new names and new agendas) have consistently opposed lustration policies since such policies might negatively affect their ability to participate in the new democratic system.

The political orientation of the dominant party affects the initiation and content of the lustration laws. Countries in which the Communist Party has retained the majority in Parliament have been hesitant to enact broad lustration laws (Albania, Bulgaria, Romania). But why more than twenty years after the transition lustration is always a tool of political fight in several countries such as Albania, Bulgaria, Romania, former Yugoslav Republic of Macedonia, Hungary?

«Velvet revolutions» involved round-table negotiations with members of the Communist regime. The negotiated change of regime was relatively peaceful, and ensured that former politicians and apparatchiks either retained the perks and benefits they received under the former system and/or were able to continue to hold office and participate in the new political system. In essence, there was no credible break with the past political system evident to the citizens. There was no definitive ending of the former corrupt system, so it was difficult to demonstrate that the new political system was moral, democratic, and competent (but not in the case of Czechoslovakia and East Germany).

Early in the transition process there was a strong desire for a radical break with the past. Lustration laws were thus based on a primary assumption that officials and collaborators of the former regime would undermine the new democratic system.

There has been and there still is a high level of political manipulation of lustration and disclosure of files. Politicians have an incentive to use lustration as a means of discrediting their competitors with the electorate (especially in the Balkans). Once this is done the opposition, when it obtains power, retaliates. Under certain conditions, this leads to a cycle of escalation in which laws are extended in time and scope, and the initial impulse to limit lustration loses force. Despite this tendency, however, there is wide variation in the scope of the legislation and its duration. The institutions that constrain political control over the lustration laws also have an influence.

In 1996, the Council of Europe's Parliamentary Assembly proposed guidelines to ensure that lustration laws comply with the requirements of the rule of law based State. The Resolution n. 1096 of June, 27 1996[1] is based on a twofold approach. Firstly «it attempts to show why it is so important that the heritage of former communist totalitarian regimes be dismantled, and how it can be done».

[1]. On measures to dismantle the heritage of former communist totalitarian systems, http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1096.htm. See also Democracy and Decommunization: Disqualification Measures in Eastern and Central Europe and the Former Soviet Union, Rapporteur's report by Mary Albon, European Commission for Democracy through law, doc. CDL (94) 12, Strasbourg, Avril 6, 1994, at www.pjtt.org/assets/pdf/project_reports_pdf/EE/DEMOCRACY%20AND%20DECOMMUNIZATION_%20Venice%201993.pdf.

DOI: 10.7256/.2014.1.12941

Secondly, it raises the problem of how to achieve justice without violating human rights. In particular, the Resolution urged to follow, in those matters, a series of criteria contained in the document of the rapporteur Severin of June, 3 1996[1]. Those principles are justified by the necessity of proportionality of lustration, compared to the purposes of the relevant laws, and are examined in 13 points which can be summarized as follows: the focus of lustration should be on threats to fundamental human rights and the democratisation process; revenge may never be a goal of such laws, nor should political or social misuse of the resulting lustration process be allowed; the aim of lustration is not to punish people presumed guilty but to protect the newly-emerged democracy; lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of State and approved by Parliament; may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy; lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy; shall not apply to elective offices; shall not apply to positions in private or semi-private organizations; disqualification from office based on lustration should not be longer than five years; people who ordered, perpetrated, or significantly aided in perpetrating serious human rights violations may be banned from office; no person shall be subject to lustration solely for association with, or activities for, any organisation that was legal at the time of such association or activities; in no case may a person be lustrated without his being provided with full due process protection.

There is also a rich case-law of the European Court of Human Rights[2] regarding lustration and other transitional justice measures in the area of Central and Eastern Europe[3]. The Court of Strasbourg, however, has demonstrated a more respectful attitude toward lustration laws. The 1996 rules were in fact very severe.

As Claus Offe has remarked, there is a tension between «backward looking justice» and «forward looking justification»[4]. The public and/or politicians might understand lustration as a solution to problems of government trustworthiness, but it is at best a short term and backward-looking solution that could actually undermine the long run credibility and legitimacy of democratic institutions and officials.

Constitutional courts are potentially independent actors in the lustration model, moderating the self-serving interests of politicians. The degree of constitutional court autonomy affects its ability to render unbiased decisions. The greater the constitutional court autonomy from the influence of politicians and powerful citizen groups, the more closely we might expect the implementation of lustration laws to reflect the actual letter and spirit of the laws. As such, constitutional courts have a potentially moderating influence on the use or misuse of lustration over time. Lustration laws have been reviewed by constitutional courts, that have provided different, sometimes

[1]. http://assembly.coe.int//main.asp?link=http://assembly.coe.int/documents/WorkingDocs/doc96/EDOC7568.htm.

[2] http://hudoc.echr.coe.int.

[3] Rekvényi v. Hungary (20–5–1999); Rotaru v. Romania (4–5–2000); Hasan and Chaush v. Bulgaria (26–10–2000); Streletz, Kessler et Krenz v. Germany (22–3–2001); Malhous v. the Czech Republic (12–7–2001); Slivenko v. Latvia (9–10–2003); Sidabras and Džiautas v. Lithuania (27–7–2004); Partidul Comunistilor and Ungureanu v. Romania (6–7–2005); Rainys and Gasparavičius v. Lithuania (7–7–2005); Turek v. Slovakia (14–2–2006); Ždanoka v. Latvia (16–3–2006); Hutten-Czapska v. Poland (19–6–2006); Velikovi and others v. Bulgaria (15–3–2007); Matyjek v. Poland (24–4–2007); Bobek v. Poland (10–12–2007); Luboch v. Poland (15–1–2008); Adamsons v. Latvia (24–6–2008); Vajnai v. Hungary (8–7–2008); Chodynicki v. Poland (2–9–2008); Jałowiecki v. Poland (17–2–2009); Žičkus v. Lithuania (7–4–2009); Rasmussen v. Poland (28–4–2009); Welke and Białek v. Poland (1–3–2011); Petrenco v. Moldova (30–3–2010); Wrona v. Poland (5–4–2010); Górny v. Poland (8–6–2010); Tomasz Kwiatkowski v. Poland (19–4–2011); Moczulski v. Poland (19–4–2011); Zawisza v. Poland (31–5–2011); Zablocki v. Poland (31–5–2011); Moscicki v. Poland (14–6–2011). See E. Brems, Transitional Justice in the Case Law of the European Court of Human Rights, in The International Journal of Transitional Justice, vol. 5, issue 2, 2011; A. Buyse, M. Hamilton (eds.), Transitional Jurisprudence and the ECHR. Justice, Politics and Rights, Cambridge, Cambridge University Press, 2011.

[4] C. Offe, Varieties of Transition: the East European and East German Experience, Cambridge, Polity, 1996.

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contrasting, interpretations (for example the Czechoslovak and Czech Courts have approved the severity of the Czechoslovak law; Hungarian and Polish Courts have mitigated the excess of respective laws; Albanian, Bulgarian and Romanian Courts have repealed lustration laws)[1].

Lustration quickly emerged as a focal point for political leaders and citizens and became the primary regional solution to the problem of transitional justice. The model adopted by Czechoslovakia in 1991, a front runner in democratic consolidation, was followed by other States in the region.

The Czechoslovak Act No. 451/1991 *On Laying Down Some Further Preconditions for the Execution of Some Offices in the Apparatus of the State of the Czech and Slovak Republic*[2] (the so-called «big» lustration law), excludes persons involved in certain elements of the communist regime[3] from employment in a range of high public influence jobs. Act No. 279/1992 of the Czech National Council *On Some Further Preconditions for the Execution of Some Offices Secured by Designation or Appointment of Servicemen of the Police of the Czech Republic and of the Prison Service* (the «little» lustration law) extends lustration to areas of police and prison service.

Constitutional Court decision of November 1992 (Pl. ÚS 1/92) removed «category c» (candidates for collaboration) from law purview and otherwise affirmed its constitutionality. The lustration law was set to expire after five years but in 1995 the Czech Parliament passed Act No. 254/1995, extending its application for five years, and in 2000 it extended it indefinitely via Act No. 422/2000. The Czech Constitutional Court decision of 5 December 2001 (Pl. ÚS 9/01) re-affirmed lustration law constitutionality[4].

In Poland, the first lustration act was the *Act on the Disclosure by Persons Holding Public Office of Work, Service or Cooperation with the State Security Services during the Years 1944–1990* (11th April 1997)[5]. Later, *Lustration Act on Disclosure of Information on Documents of Security Service Organs Collected during the period 1944–1990 or on the Content of these Documents* was approved on 18th October 2006: Lustration Office in the Institute of National Remembrance was created to take over the lustration duties of the previous Public Interest Spokesman. The number of lustrated people significantly expanded. On 11th May 2007, the Constitutional Tribunal ruled some elements of the *Lustration Act on Disclosure of Information* unconstitutional: in total, 39 points were criticised. The verdict was not unanimous: 9 out of 11 judges made reservations about particular points[6]. Following the ruling, a subsequent reform of the Act passed on September 7th, 2007.

The introduction of the Act stipulates that positions of «public confidence» require appointees who have proven to be honest, decent, responsible and brave, and that the Constitution guarantees all citizens a right to information about persons holding such positions. It also states that work for or cooperation with the communist security

[1] For more information on these decisions, that are in fact very complex and not easy to summarize, see A. Di Gregorio, Epurazioni e protezione della democrazia, cit.

[2] In Czech and English on the website of the Czech «Institute for the Study of Totalitarian Regimes» www.ustrcr.cz.

[3] Communist Party officials from the district level up; employees of the State Security, including not only full-time StB (the Political Police of the regime) officers but also those who collaborated with them part-time by signing secret agreements to inform on others; People's Militia members; political officers in the Corps of National Security; members of purge committees in 1948 or after 21 August 1968 (the Soviet invasion); students at KGB schools for more than three months, and owners of StB «conspiracy apartments».

[4] V. Cepl, Ritual Sacrifices: Lustration in CSFR, in East European Constitutional Review, Vol. 1, no. 1, 1992; J. Šiklová, Lustration or the Czech Way of Screening, in M. Krygier, A. W. Czarnota, The Rule of Law after Communism: Problems and Prospects in East-Central Europe, Aldershot, Ashgate, 1999; J. Příbáň et al. (eds.), Systems of Justice in Transition: Central European Experiences since 1989, Aldershot, Ashgate, 2003; D. Kosař, Lustration and Lapse of Time: «Dealing with the Past» in the Czech Republic, in European Constitutional Law Review, vol. 4, issue 3, 2008. See also A. Di Gregorio, La transizione in Cecoslovacchia: principali profili di diritto costituzionale, in S. Gambino (a cura di), Costituzionalismo europeo e transizioni democratiche, Milano, 2003.

[5] In Polish and English on the website of the Institute of National Remembrance www. ipn.gov.pl. See also J. Rohozińska, Struggling with the Past, Poland's controversial lustration trials, cit.; M. Safjan, Transitional Justice: The Polish Example, the Case of Lustration, in European Journal of Legal Studies, Vol. 1, no. 2, 2007.

[6] www.trybunal.gov.pl.

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organs is equivalent to breaking human and civic rights for the sake of a totalitarian communist regime.

Article 3a defines «collaboration» as conscious and secret collaboration with operational or investigative units of the State security system, as a secret informer or a person assisting with acquiring information. Article 4 lists public positions that require screening for secret service collaboration as defined by the Act. The list covers all top positions in State structures: 47 types of positions in total. Those holding or applying for the positions listed in Article 4 are obliged to file a statement on their collaboration with the communist secret services provided they were born before August 1st, 1972 (Article 7).

Lustration statements are passed on to the Lustration Office of the Institute of National Remembrance, where they are verified. In case the Lustration Office believes there is evidence pointing to the lustration statement being not true, its prosecutor initiates a court lustration case (Article 20). If the lustrated person stated that he/she collaborated with the communist secret service under duress, the lustration case is initiated by the court. Lustrated persons are treated under the criminal code (Article 20). When the court rules that the lustration statement is untrue, a lustrated person is deprived of his/her right to be elected to public positions listed in Article 4 for 3 to 10 years, and is removed from a currently held position if it is listed in Article 4. The Lustration Office of the Institute of National Remembrance is responsible for archiving lustration statements.

Hungary has been particularly susceptible to cycles of political escalation. There have been at least three major revisions of the scope and duration of lustration laws. Act XXIII of 8 March 1994 O*n the Screening of Holders of Some Important Positions, Holders of Positions of Public Trust and Opinion-Leading Public Figures and on the History Office* affected about 10.000 positions[1]. The aim of the Hungarian lustration was to prevent anyone who had collaborated with the III/III Department of Interior Ministry (the political police) from holding such posts. If the person belonged to one of the mentioned categories and did not resign voluntarily, their name and relationship with these organizations would be published in the official gazette. The law also provided for the creation of two groups of three judges, which would examine the records and look for files on anyone holding relevant posts. The process was set to last from July 1994 to June 2000. In July 1996 the reduction of law scope was approved, it limited the number of people under examination to 540 posts. Act XC of 2000 extended the scope of mandatory screening[2].

The new Hungarian Fundamental Law entered into force in 2012, and its Transitory Provisions, envisage a new start of purging policies. Also, the IV constitutional amendment, adopted in March 2013 states, among the other things, that «The holders of power of the communist dictatorship shall tolerate factual statements, except for any wilful and essentially false allegations, about their roles and actions related to the operation of the dictatorship and their personal data related to such roles and actions may be disclosed to the public».

Lustration laws have not proven to be a magic panacea. There is not even consensus about the need for lustration. In part, dissent over lustration reflects the complexity of separating the innocent from the guilty in societies where so many were both. In a totalitarian system, everyone is to some extent a victim and a collaborator[3]. Disagreement also reflects the lack of harmony over the need for a radical break with the past. There are competing pressures for continuity and change in the new system.

One of the primary arguments against lustration as a tool for building a strong democratic, rule of law State, is its assignment of collective

[1] www.freedominfo.org/regions/europe/hungary.

[2] G. Halmai, K. Lane Scheppele, Living Well Is the Best Revenge: the Hungarian Approach to Judging the Past, in A. James McAdams (ed.), Transitional Justice and the Rule of Law in New Democracies, Notre Dame and London, University of Notre Dame Press, 1997; C. Kiss, The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary, in Europe-Asia Studies, vol. 58, issue 6, 2006; E. Barrett, P. Hack, A. Munkacsi, Lustration as Political Competition: Vetting in Hungary, in A. Mayer-Rieckh, P. de Greiff (eds.), Justice as Prevention: Vetting Public Employees in Transitional Societies, cit.

[3] See Václav Havel, New Year's discourse, 1990.

DOI: 10.7256/.2014.1.12941

guilt without determining individual responsibility for actions or harm. As a result, lustration may unjustly punish individuals on the basis of association rather than actual guilt, and as such undermine the fundamental right to due process and individual liberties inherent to a rule of law State. The international human rights community has spoken out strongly against lustration laws for their violation of individual liberties, such as freedom of expression, right to privacy, and due process.

Additionally, lustration laws may violate fair employment laws, especially if the individual is not guaranteed the right of appealing before removal from his position. On such a basis, the International Labor Organization has therefore spoken out against the laws in both theory and practice[1].

We can argue that much too high international standards can be impossible to reach in a transitional country. Also it is important to underline that compared to the period after the World War II, there has been a deep evolution of post-authoritarian justice measures that today seem to be more efficient.

6. CONCLUSION: VETTING AS A PROTECTION OF DEMOCRACY

Among the issues of constitutional relevance related to the study of transitions, there is the protection of democracy, in order to provide a bulwark against possible threats that could undermine the foundations of democratic order or against dangerous temptations to return to the past. This is an old issue that has been the subject of renewed interest in recent years, especially with the escalation of terrorist threats. Despite this, the defense of democracy «from the past» and that «in the present» is not equal. It is necessary to make a clear-cut distinction, while these two trends are flowing in an identity of purposes and concerns.

The protection of democracy *ab origine*, i.e. at the time of the establishment or restoration of a democratic legal order, has the main purpose to facilitate its consolidation to prevent the return of the past authoritarian forces. It is essentially a measure that looks back to the past, due to its origin and the context in which it is inserted, following the collapse of an authoritarian regime.

The measures of «protection of democracy», introduced in countries traditionally considered «pure» democracies, have been due to the more specific needs, such as the fight against domestic and international terrorism. In fact, it was considered insufficient to use means already provided for State management of crisis or to resort to the principle of necessity to justify government measures limiting fundamental rights (as in the period of the liberal form of State). In principle, it can therefore be assumed that the introduction of specific constitutional norms, or emergency laws, responds to the need still very much felt in democratic systems not to allow abuses of power and therefore to carry out in each case a balance between different constitutional values (if the legislator fails, other institutional organs such as constitutional courts come into play).

It is a remake of the old debate on democracy «defending» itself and the so-called «pure» democracy[2]. The main difference today, compared to the previous systems, is a particular protection of fundamental rights, especially through judicial review (both at national and international levels). This protection in the period of the liberal State — but also between the two world wars — had certainly not reached current levels.

When we talk about protection of democracy, we usually refer — in constitutional law — to the measures of protection against anti-system (unconstitutional) parties. But I think that the discourse is much more extensive and may expand until measures of post-authoritarian justice can be included, as evidenced by the case-law of some constitutional courts or of the Court of Strasbourg. In all the «variants» of protection of democracy there are similar concerns relating to the boundaries of the limitations of pluralism and of the principle of equality not subverting the very nature of democracy.

[1] See for example N.J. Kritz (ed.), Transitional Justice, vol. III, cit., pp. 322–334

[2] Usually exemplified by the German example: Bonn against Weimar. Switzerland, that was never subjected to the authoritarian regimes in the modern age, is a democracy named «pure» (no protection of democracy at all). But the same we can say about Belgium, even if this country was subjected to the German occupation during the last war.

DOI: 10.7256/.2014.1.12941

A big difference emerging in the comparison between transitions occurred after the World War II and those happened in the late XX century, is that in the latter case post-authoritarian justice measures are not completely «transitional». Having been moved to democracy and having passed the consolidation test, several countries show a continuous attention for the heritage of the past, both in cultural and political dimensions.

It must be also underlined, in those matters, a variable influence, depending on the context, of a series of macro-environment elements (law, politics, tradition), having a function of controlling society[1]. For example, in the transitional countries political influence may affect the other two elements. Nevertheless, if in certain countries there are no doubts about the prevalence of political dimension, in others the situation is more complicated. Not all transitional legal orders are able to reach the so-called «democratic consolidation». This is particularly evident in the study of vetting measures: in those matters we could find all the three paradigmatic elements of the Monateri's classification; the «political control» is obviously everywhere prevailing, but we could emphasise the legal aspect considering the «constitutional» protection of democracy.

The link between post-authoritarian justice and democracy is complex. The most important thing to check is whether these measures are designed only to a need for justice, or are also related to the building of the new democratic order. As pointed out by the Parliamentary Assembly of the Council of Europe in 1996, to assess the measures taken in the aftermath of the collapse of communism, such measures must be directed to the construction of democracy[2]. In this sense becomes extremely interesting to investigate the phenomenon by comparing the stability and protection of democracy with post-authoritarian justice.

Historical experience shows that to achieve the best results, we need to apply different measures in a complementary manner, but it is rarely the case. It is therefore not only a question of transitional measures but also of democratic consolidation.

The interest on vetting and other post-authoritarian measures stems from the need to improve the knowledge of transition to democracy dynamics and the protection of post-authoritarian democracies. As the experience shows, unresolved conflicts regarding the remnants of the past could hinder the democratic stabilization of a country despite the regime change.

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[1]. Cfr. U. Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal System, in American Journal of Comparative Law, vol. 45, 1997.

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