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Transitional Justice, the Post-Communist Post-Police State and the Losers and Winners : An Overview of the Problem

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TRANSITIONAL JUSTICE, THE POST-COMMUNIST POST-POLICE STATE AND THE LOSERS AND WINNERS. AN OVERVIEW OF THE PROBLEM

Recently we witness explosion of 'transitional justice industry'[1] it means overproduction of scholarly papers and book devoted to the problem of 'dealing with the past'. In this paper I want to clarify from socio-legal point of view some of the issues connected with transitional justice in post-communist transformation.

Some sorts of institutional and personal continuities and legacies are among the expected results of 'regime change' anywhere except in the most brutal of circumstances, and probably even there too. However, one of the most interesting approaches and potential spheres of social research in relation to transformation of post-communism, has to do with a specific element of the institutional structure of the communist state: the place of the secret police and machinery of surveillance of communist societies. This unresolved satisfactory matter determined the shape and quality of the democratic regimes in all post-communist countries[2].

The secret police haunts the memory of post-communist citizens after 19 years since the transfer of power. Its significance, pervasiveness and scale of operations were unparalleled in any other political formation known, and on some views it has bequeathed legacies of profound, if characteristically hidden, significance in the post-communist present. One approach to post-communism is to investigate whether and if so how this most central of communist institutions has come to influence the creation of the post-communist institutional structure.

19 years after the collapse of communism, the problem of the 'files' still exists and plays a role, particularly before parliamentary elections. People in the West learnt, for example, from Timothy Garton Ash's, *The File*[3] of the East German *Stasi* and its archives, together with the infiltration of the whole of the society with its agents. The so-called Gauck Commission presides over one hundred and forty kilometres of files, notwithstanding that a portion were systematically destroyed in the last days of communism in the former German Democratic Republic. No doubts, it will take many years to fully comprehend the activities and role of secret services of the most significant institution in the communist 'prerogative state'.

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[1] See for instance, Elster Jon, (2006), *Closing the Book*, Cambridge University Press and Chandra Lekha Sriram, Transitional Justioce Comes of Ages, Berkeley Jopurnal of International law vol. 23 (2005) bibliography there.

[2] See Elster, Jon; Offe, Claus; Preuss, Ulrich (1998), *Institutional Design in Post-communist Societies,* Cambridge University Press, Cambridge.

[3] Garton Ash, Timothy (1997), *The File. A Personal History,* Vintage, New York.

Countries have dealt in various ways with the problem of the secret services, a term we stress, because the problem cannot be reduced merely to one of access to archives. As Noel Calhoun has aptly entitled his survey of accounting with the past in Germany, Poland and Russia, the role, character, and legacies of these institutions lead to a host of *Dilemmas of Justice in Eastern Europe's Democratic Transitions*[4].

Thus, questions of lustration (dealing with erstwhile informers to the secret police) and decommunization (dealing with former, usually higher, Party officials) are running sores that have to do what post-communists should do about the presence of the past, and particularly the former activities of secret services. They are commonly treated as primarily moral questions of retributive justice, which of course they also are. However, there is a significant sociological dimension to them, as is most strongly argued by Łoś and Zybertowicz[5]. For the questions of lustration and decommunization involve core questions about building a new political and legal order. They are thus not merely matters of criminal law and criminology, but equally ones of public law, or *droit politique,* that is the principles, structures and institutions that constitute a new regime, and new polity.

The thesis of Łoś and Zybertowicz is expressed in the title of their book: *Privatizing the Police State*. The process of transformation, that is, of both exit from communism and the beginnings of the new structures, particularly those connected with the new distribution of property, was to a significant degree, they claim, controlled by members of the former secret services. Writing primarily of Poland, but claiming more general applicability, they claim that '[a] well orchestrated party/army/police strategy allowed the most powerful *nomenklatura* networks to maintain a relatively high degree of informal control over the multiple, unexpected processes of change that turned an attempted reform into a systemic transformation'[6]. Particularly worth noting are their analyses of the influence of the special services on economic changes and the connections between post-communist transformations, secret police skills and access to information and networks, with processes of globalisation.

The implications of this analysis for a socio-legal understanding of the quality and actual functioning of law are very important especially if one follows seriously Eugen Ehrlich that 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself,'[7]. Tracing the specific character of particular social orders, and the particular ways they impinge on (and are affected by) the formal legal order, would seem an obvious necessity. But with regard to the 'posthumous' operations of the institutions of these police states, this has rarely been done, partly because it is extremely hard to do and more importantly because the problem has often been assumed away. From a socio-legal viewpoint, however, as also from that of the truly agonizing normative dilemmas of transformation, the following thesis is key: 'A degree of police-state privatisation seems inevitable in any peacefully negotiated transformation of a police state into a demo-

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[4] Calhoun, Noel (2004), *Dilemmas of Justice in Eastern Europe's Democratic Transitions,* Palgrave/Macmillan, New York.

[5] Łoś, Maria and Zybertowicz, Andrzej (2000), *Privatising the Police – State. The Case of Poland,* Macmillan, New York.

[6] Ibidem, p. 217.

[7] Ehrlich Eugen, *Fundamental Principles of the to Sociology of Law,* Basic Books, 2002, p. LVIV.

cratic state. The creation of democratic institutions does not in any way prevent the continuation of co-operation, or even consolidation, of the informal power networks of the previous regime. On the contrary, *an early proclamation of the transforming state as a fully democratic state, based on the rule of law, practically guarantees the undisturbed operation of those informal, secret forces within the new state and economy. Being trained and conditioned to act in secrecy and to engage in conspiratorial practices, they could only be detected and restrained through massive surveillance and repression*' (emphasis in the original)[8].

I agree with Łoś and Zybertowicz that, in a situation of 'controlled change', otherwise known as 'negotiated revolution', the rule of law too early declared can lead and usually do lead to a façade form of justice. It is less clear, however, that their thesis about the necessity for mass repression, surveillance and control does have a universal character in post-communist circumstances, or that it could ever be realized particularly under the circumstances of a negotiated revolution, *or* that it should be. There is little account of *variation* in their analysis and yet, and as anyone who travels from Poland to Kazakhstan will quickly sense, variations within the 'post-communist' region, precisely in the pervasiveness of the trends Łoś and Zybertowicz stress, are profound. How much of a difference is a question to which we do not have definitive answers. It is true that liberal institutions could be easily bent to illiberal purposes but it does not mean that illiberal ones will prove more resistant? Perhaps some risks just have to be taken at this was one of the main dilemmas facing the new ruling elites during the early stages of transformation. But, and this is a credit to the somewhat marginalized analyses of Łoś and Zybertowicz, at least one should be aware that they are risks. Often that has not happened until the risks have eventuated.

TRANSITIONAL JUSTICE; 'DEALING WITH THE PAST'

The past does not merely figure as subtext of much that happens in the post-communist present. The whole epoch of post-communist transformation can be characterise as one great process of dealing with the communist past.

Within that whole, the concept of transitional justice focuses on legal practices and problems faced by states and societies under transformation, particularly stemming from the fact that law is typically required to serve two ambitions, often in significant tension with each other: to function both as a stable *framework* of transformation and as a (frequently changing) means of achieving it [9]. In principle, tensions are often thought to flow from the different demands of seeking to instantiate the rule of law in the present, to repair its absence in the past, and to establish conditions for it in the future. Each of these aims may pull in quite different directions from those to which the others tend[10]. Not every country has faced these tensions, however, since not all law-makers share these three aims, or any of them.

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[8] Łoś, Maria and Zybertowicz, Andrzej, op.cit., p. 223.

[9] Teitel, Ruti (2000), *Transitional Justice,* Oxford University Press, New York.

[10] See, e.g. Rokita in Krygier, Martin (1994), 'Four Visions of Communist Law', 40 *The Australian Journal of Politics and History*: 114–117.

The main line of division exists between the states that emerged from the collapse of the Soviet Union itself, and the former satellites of east-central Europe. Legal strategies to 'undo the wrongs of the communist past' are an issue for societies that seriously engaged themselves in transformation and release from the iron embrace of communist institutions. Such strategies do not feature, however, in each of former communist states. Strategies of dealing with the past are more visible in Central-eastern European former communist countries and absent in the present Russian Federation, Kazakstan, Kyrgyzstan, Azerbaijan. Why? That is too serious a problem to dispose of in a few sentences, but there are several obvious social conditions one can point to: the longer period that communism existed in these countries, the depth to which communist institutions, practices and thoughtways had soaked into the society, the complicated problem of nationalities and, in the central Asian republics, the role of tribal connections in the exercise of state power.

Of particular interest is the position of Russia. Apart from the period immediately after 1992, when the problem of coming to terms with the past was at least mentioned in public discourse, after Vladimir Putin took power there was a period of 'normalization' and elimination of questions to do with the past, except occasionally to praise it. Indeed at the symbolic level nearly post-Putin's Russia seeks to stress continuities with the USSR. These are not as far-reaching as in Belarus under Lukashenko, but they are strong and evident. They do not spell a return to communism as a system, but perhaps to a much older Russian tradition of state-centered authoritarianism, that at times sought to borrow from the West but not emulate it. Marc Raeff memorably dubbed the ambitions of those times the 'well-ordered police state [11].

In this connection, the situation of Ukraine is interesting. The real anti-communist revolution in Ukraine was the Orange Revolution of 2005, and the events in Kiev's Independence Square. After the moral awakening that this revolution symbolized, the problem of dealing with the past, or rather the need to face it, began to feature in public discourse. One might suggest the hypothesis that an effective post-communist transformation, let alone a transition to…., depends on at least the possibility of public discussion of the communist past. It is not yet clear that this will occur in Ukraine [12].

The problem of dealing with the past does not, however, merely involve dealing with the remnants or legacies of former communist regimes. Transitional justice in post-communist states is also a *constitutional* problem for new post-communist social, political and legal systems.[13] Dealing with the past as a constitutional question is a problem of creating social conditions for the new social-political order, as well as regenerating damaged moral bonds in the society. This makes dealing with the past, or the limitation or still more impossibility of doing so, the most important problem *par excellence* in the process of building a new polity.

The transitional justice problem in all post-communist countries that have taken an active approach to these matters can be divided into two main issues:

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[11] Raeff, Marc (1983), *The Well-Ordered Police State: Social and Institutional Change Through Law in the Germanies and Russia, 1600–1800,* Yale University Press, New Haven.

[12] Riabczuk, Mykoła (2004), *Dwie Ukrainy,* Kolegium Europy Wschodniej, Wrocław, pp. 136–149.

[13] See Adam Czarnota 'Transitional Justice in Postcomunism", in: *Encyclopaedia of Law and Society*, ed. by David S. Clark 2007.

A. the problem of legal continuity namely relations between new and old regimes, and,

B. the problem of de-communization (legal means for removal of communist legacies from the state and society). This problem in turn can be subdivided into four categories, namely:

B1 the problem of retributive justice for crimes committed under the former regimes,

B2 the problem of lustration of former collaborators with the communist secret services (vetting),

B3 rehabilitation and compensation for victims of communist regimes,

B4 the problem of restitution of property after communism.

RELATIONS BETWEEN OLD AND NEW REGIMES

The type of exit from communism determined the approach taken to this problem. In the countries of east central Europe, exit from communism was institutionalised *via* 'round table talks' [14]. Countries which did not even simulate such an institutionalised passage generally accepted a straightforward continuation of the former regime.

The Round Table talks established a point of connection between the old communist and new post-communist regimes. The agreements established a base for legal continuity between regimes, with consequences for the new legal and political order. Symbolically a new law-governed state, as stated in amendments to the constitutions, was born as a legitimate child of a communist regime that typically had been installed illegally and had operated with no respect for law. This combination of discontinuity with continuity has created tensions between the demands of legality and those of preserving the revolutionary ethos, with its commitment to material justice, where they existed. Such tensions still exist. One could argue that the existence of such tensions is a positive extension of the 'self-limiting' nature of the revolutions that ended communism, at least in central Europe, and that their persistence has had a positive significance. The Hungarians called this the 'revolution of the rule of law' – the revolutionary part was that existing law would be taken seriously[15]. Those tensions between the formal demands of law and material justice allowed those revolutions to avoid the flaw at the heart of most previous revolutions, where the logic of righteous virtue and morality justified everything. In the countries of east central Europe, a clear choice has not been made, and this salutary tension continues.

DECOMMUNIZATION AND LUSTRATION

Some new post-communist regimes (e.g., Poland) tried to address the problem of continuity and at the same time stress discontinuity by adopting, with rather meagre results, a policy of drawing a so-called thick line between the present and the past.

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[14] Elster, Jon (ed.) (1996), *The Roundtable Talks and the Breakdown of Communism*, Chicago University Press, Chicago.

[15] See Sólyom in Sólyom, László and Brunner, Georg, editors (2000) Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, University of Michigan Press, Ann Arbor.

The idea was to integrate all citizens in the process of building a new political and social order after communism, while at the same time stressing that it will be a new political and social structure, not a simple continuation of the former regime. It has proved impossible to sustain such a policy. Instead, discussion of decommunization and lustration has recurred.

The terms are often confused with each other, and confusing for everyone. At its broadest, decommunization can refer to all political and legal strategies the aim of which is eradication of the legacies of communism in a social and political system. This would include both a narrower conception of decommunization (focussing on elimination of personnel), and lustration (focussing on informers). But these terms are often used interchangeably. Wojciech Sadurski injects some clarity on these matters, by reconstructing the meaning of these categories in political discourse in Central-Eastern European post-communist countries: lustration' applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), while 'decommunization' refers to the exclusion of certain categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together[16].

Even this does not get us all the way, for the question formulated broadly as 'lustration' usually includes three problems, namely lustration proper (screening of former collaborators and members of secret services), access to secret services files, and decommunization. Quite often it is very difficult to separate them even analytically, especially lustration from de-communization.

Lustration and de-communization became an issue in all east central European post-communist countries when a real struggle for the future social and institutional structure began[17]. That shows that, contrary to the dominant perception, lustration and de-communization are not backward looking but forward looking. They were and are part of the political process and political struggle. The peculiar character of the post-communist negotiated revolution, when all elements of social life are undergoing radical change at the same time, is a type of transformation in which dealing with the past cannot be reduced to the question of what to do with the hangman. It is not just a response to gross violation of human rights, retributive justice, compensation and restitution of property and truth telling. Lustration and de-communization became legal and political tools in re-arrangement of the constitutional setting of the society and state.

However, the *legal* strategies of decommunization and lustration play a rather limited role in post-communist societies. They have been used mainly in political bat-

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[16] Sadurski, Wojciech (2005), *Rights before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe,* Springer, Dordrecht, pp. 245.

[17] Alexander mayer-Rieckh and de Grieff, Pablo, ed., (2007), Justice as Prevention: *Vetting Public Employees in Transitional Societies (Advancing Transitional Juctice), Social Science Research council, New York,* Grzelak, Piotr (2005), *Wojna o lustrację,* Trio, Warsaw, Wildstein, Bronisław, *Dekomunizacja której nie było,* Ksigarnia Akademicka, Cracow, 2000, Calhoun, Noel, op.cit., pp. 92–131. In relation to Polish case see 'The Politics of Lustration law in Poland, 1989–2006, in: Justice as Prevention, op.cit., pp. 222–260.

tles, where they play the role of curtailing discourse on the operation of the communist system. Instead of serious societal discussion public discourse is limited by attacks on a few scapegoats.

ACCESS TO SECRET POLICE FILES

The problem is not just what to do about people. For there are also the files, all those millions of them. In 1992 Germany became the first former communist country to open up secret police files to citizens.[18] Other post-communist countries followed and passed similar legislation, for instance Hungary in 1994 and Bulgaria in 1998. This was not possible everywhere, due to both economic and organizational limitations. In Poland the issue was discussed only in 1997 in connection with a presidential lustration law project in which it was suggested that a Civic Archive be established within the framework of the state archives. In the wake of the election held in September 1997 this idea was absorbed into the governmental project of a law that created an Institute of National Remembrance which was introduced in July 2000. The law regulates access of interested persons to information collected about them by the secret services between 1944 and 1989.

Communist regimes were based on control of society not only through the party cells in all factories and organizational units but also through permanent surveillance by the secret police and its collaborators. The scale was not the same in each country in the communist camp, some 'barracks' were under more relaxed surveillance, but nevertheless the so-called problem of the files exists everywhere.

Legal strategies adopted by particular countries vary. The most radical was the strategy adopted in the former DDR. Each person, not only citizens, has a right to have an access to his/her own file with names of secret collaborators not erased. Although we occasionally learn about the personal tragedies when brother spied on brother and a husband on his wife, and although such a strategy might clear the atmosphere of universal suspiciousness, it is not clear that it stimulates public discussion about the mechanisms of the past and citizens' involvement in sustenance of the regime. It still has a private character. It is a private citizen having access to his/her file through the Gauck Commission.

Other countries such as Poland adopted a middle-of-the-road approach, based on separation of the archival substance of the secret services in the Institute for National Memory. Each citizen will have a right to apply to have access to his/her file but the decision will be taken by somebody on the basis of evidence of victimization. This only began in 2000 and that might already have been too late. Hungary allows everyone to see his/her own file, but with the name of the spies redacted – because of a constitutional court decision that even spies have privacy rights. If a former spy runs for office, however, a three-judge panel will publish the contents of the spy's files so that people know what they would be voting for. If the spy stays in private life, the files remain sealed.

The peculiar type of exit from communism, first through round-table talks and then partly free elections (Poland) and later, more frequently, fully free ones after

[18] See interesting description on the sacle in former DDR in Funder, Anna(2002)*Stasiland*, Text Publishing, Melbourne.

1989, shows that even the communists were not conscious of the issue. They did not demand 'sunset clauses' or general amnesty. They did not take charge and destroy all the files, though we know that they destroyed many during 1989 and 1990.

RETRIBUTIVE JUSTICE

An important step in historical retributive justice was taken in some countries (among them Poland) which established 'communist crimes' with the status of crimes against humanity, similar to genocide. Communist crimes were not subject to the statute of limitations. On the same approach some countries established institutes for national remembrance with prosecutorial powers. The main aim is to document and prosecute the crimes committed by the functionaries of the communist regimes. In all post-communist countries despite the large number of inquiries, the courts have received a very small number of indictments. Prosecution was abandoned for lack of satisfactory documents and impossibility of identifying perpetrators. If trials started they were prolonged, to the former victims.

RESTITUTION OF PROPERTY

Restitution of expropriated and nationalized property, sometimes called reprivatization, is one of the most burning issues, only partly resolved by post-communist regimes. This is one of the most difficult and complicated issues of transitional justice. Communist regimes were based on nationalization of property. There is also the question of what to do with property that had been created *under* communism – new factories, housing blocks etc. – where these were built over preexisting privately owned property. After the collapse of communism there is a need for creation of a new system of property rights. In the majority of cases restitution of property is impossible, so usually it is replaced by compensation for lost property, in percentages and forms deemed affordable in particular countries.

However, economic and political aims are often in conflict with moral claims to restitution of property; there are different logics, and moralities, in play here. In many cases the restitution of property has an ethical dimension especially in the case of ethnic minorities, religious communities' property, Jewish property. Thus, Istvan Pogany writes that reprivatization, as property restitution is called, 'offers a principal means to redress some of the worst and most heinous injustices to the past'[19]. He is obviously treating the question of reprivatization not merely as a technical economic question about what and how to privatize and reprivatize to introduce the market.

Specialists in property law, however, approach this as a technical problem. For two reasons, we want to draw attention to another approach to the problem of privatization. The first has to do with the socio-legal dimensions of the problem; the second with its connection with the 'next phase'. Systematic research has been undertaken on the problem in a selected number of post-communist countries, and one of the senior researchers, Grażyna Skąpska, has summarized some results of this

[19] Pogany, Istvan (1997), *Righting Wrongs in Eastern Europe*, Manchester University Press 1997, p. VII.

work[20]. She reveals the complicated historico-geographic situation of property in this part of the world and reminds us that expropriation of property by communists was, in the case of victims of Nazism, preceded by the Nazi expropriation of property. Communist regimes accepted those expropriations. Then a new phase of ethnic cleansing began, as with the forced expulsion of Germans in the former eastern Prussia, Silesia, western Pomerania, as well as the expulsion and confiscation of property of the Sudeten Germans from Czechoslovakia and Hungarian property in Slovakia, under the Beneš decrees.

Skąpska emphasizes that the expropriation of property also liquidated communities and dehumanized societies. This is why the problem of property restitution must be approached as an ethical problem – restoration of the possibilities of functioning for religious (Jews, Byzantine Catholics, Orthodox, Protestants) or ethnic (Jews, Lemkos, Germans, Silesians) communities destroyed by communism and its Nazi predecessors.

Skąpska suggests that acceptance of a strategy of reprivatization can provide a 'moral impulse' necessary in societies undergoing transformation. However, the only country that has made a principled commitment to reprivatization is Germany after reunification. As a result, 95% of state owned property was reprivatized. The other post-communist countries have not treated privatization as a matter of key importance, but have directed themselves largely by the dictates of economic doctrine. As a result, a large proportion of cases brought before the European Court of Human Rights have to do with restitution of property. There is also considerable pressure from institutions outside the region (among them the American courts and Congress). Even if the will were clear, however, there is a host of questions that are and will remain hard to answer: how far back to go? To what year? At whose expense? In what manner? On the basis of what criteria? Declaring eligibility to claim property restitution, limiting it to citizens, or permanent residents, for example, inflames emotions and generates the sort of sentiment expressed in the disappointed post-communist aphorism quoted earlier, 'we wanted justice; we got the rule of law'.

Reprivatization is a key element of the economic constitution (distribution of property rights) of post-communist societies. Acceptance of a drastic form of restitution would limit the possibilities of control over property by *nomenklatura* networks. On the other hand, restitution in a strict sense is impossible because of the complicated, mixed up property rights involved over the (often considerable) passage of time, and often is regarded as unjust.

Whoever decides on the criteria of reprivatization has enormous power. These are decisions with very long term effects, even though they are often presented as merely matters of technical expertise. They have significance for the nature and quality of democracy and the rule of law, because issues of the legitimacy of new regimes, problems of alienation or inclusion and social justice, in other words acceptance of the new system, are connected with the issue of restitution of property. In this sense, property is too important to be left to economists.

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[20] See Grazyna Skąpska in Czarnota Adam; Krygier, Martin; Sadurski, Wojciech eds., (2005), *Rethinking the Rule of Law after Communism,* Central European Press, Budapest.

WINNERS AND LOSERS

After 19 years of transformation, problems with transitional justice exist in every former post-communist country, but not every country has the same problems. In all of them, however, there is an evident split between beneficiaries of the transformation, and those who have lost from it. Indeed, as Andrzej Rychard has forcefully pointed out, given the complexity of the changes the situation is more complicated: there are also winners who will be losers, and losers who will be winners, it is not always clear who is who, and that changes over time [21]. These distinctions, while they are played out in the economic domain, have political significance and influence the process of democratization of the society and political system, as well as the quality of the functioning of law and legal institutions. To high degree the distinction between winners and losers is connected with the mechanism of transitional justice or absence of it, especially transitional justice understand as the strategies involved in building new constitutional fundament. New polity requires new time of normativity as roadmap for public morality. It si impossible to achieve this without serious application of strategies of proper "dealing with the past".

The groups who consider themselves 'losers' of the transformation must be connected to the democratic institutions. Populist slogans – common in this part of Europe – need to be combated, not just by words, but by inclusive operations of transitional justice, democracy and legal institutions. Some consider this to be the promise of the European Union, through its structural funds, the process of negotiation and accession (for those invited) and the whole process of adaptation of law and institutions to so-called European standards. It can be done by European Union as will as it can not be reduced to purely economical issue. The problem of the past is still hanging upon the former post-communist countries and without solving it the quality of democracy and rule of law will be rather poor[22].

[21] Rychard, Andrzej (1996), 'Beyond Gains and Losses: In Search of "Winning Losers"', *Social Research* 63, no. 2.

[22] W. Sadurski, A. Czarnota and M. Krygier, eds., (2006) '*Spreading democracy and the Rule of Law*', Springer.