XXXIX POLISH YEARBOOK OF INTERNATIONAL LAW
2019 DOI 10.24425/pyil.2020.134479
PL ISSN 0554-498X

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RECKONING WITH THE COMMUNIST PAST IN POLAND THIRTY YEARS AFTER THE REGIME CHANGE IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract: *The article discusses the point of interconnection between historical policy and international human rights law standards on the example of a so-called decommunisation Act enacted in Poland in 2016 that reduces retirement pensions and other benefits to individuals who were employed or in service in selected state formations and institutions in 1944-1990, amending the Act adopted in 2009. The Act of 16 December 2016 is analyzed in the light of the standards of the European Convention on Human Rights (ECHR), including relevant standards on coming to terms with the past as an element of transitional justice. The examination concludes that there is a discrepancy between the rationale for adopting this legislation in Poland, namely to reckon with the communist past and as such increase social trust in state institutions, and the legal solutions contained in the 2016 Act.*

Keywords: decommunisation, European Convention on Human Rights, Poland, reduction of retirement pensions, transitional justice

INTRODUCTION

The article discusses whether the legal solutions included in the Act of 16 December 2016 to amend the Law on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families[1] (Act of 16 December 2016), which reduced pensions

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[1] Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego,

and benefits to certain groups of individuals based on place of their service or employment in selected civil and military formations and institutions in Poland from 22 July 1944 to 31 July 1990, comply with applicable standards of the European Convention of Human Rights (ECHR), including notably the relevant standards of reckoning with an undemocratic past, as the European Court of Human Rights (ECtHR) interprets them in its case law.

Almost thirty years after the beginning of Poland's transition to democracy, the Act of 16 December 2016 expanded the scope of and made harsher a mechanism, introduced in 2009,[2] of reducing the retirement pensions paid to those who worked in selected formations and institutions of the communist state, even for a single day, during 1944-1990. The amendment entered into force on 1 October 2017, reducing, in some cases for the second time after the 2009 reduction, the amounts of retirement pensions (*emerytury*). It also set forth reductions of benefits (*renty*).

In the first three months in force alone (from October to December 2017), the new regulation affected more than 56,000 individuals, resulting in almost 25,000 appeals against the decisions to re-calculate pensions and benefits.[3] Since then, these numbers have increased, because the reduction also applied to other persons who retired or were awarded other benefits. This demonstrates a mass character of the reduction for individuals in Poland.

Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act of 16 December 2016 to amend the Act on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families], Journal of Laws of 2016, item 2270.

[2] Ustawa z dnia 23 stycznia 2009 r. o zmianie ustawy o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin oraz ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act on amendments to the law on old-age pensions of professional soldiers and their families and to the law on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families], Journal of Laws 2009, No. 24, item 145.

[3] The Social Insurance Institution of the Ministry of Interior Affairs issued 56,544 decisions about change in from 1 October to 28 December 2017. Source: Minister Spraw Wewnętrznych i Administracji. Odpowiedź na interpelację nr 17033 w sprawie bezczynności dyrektora Zakładu Emerytalno-Rentowego MSWiA dotyczącej odwołań od decyzji o ponownym ustaleniu wysokości emerytur, rent inwalidzkich i rent rodzinnych policyjnych w wyniku wejścia w życie tzw. ustawy dezubekizacyjnej [Minister of Interior Affairs and Administration. Answer to written question no. 17033 regarding inaction of the Director of Social Insurance Institution of the Ministry of Interior Affairs and Administration to appeals against the decisions to re-calculate amounts of retirement pensions, disability benefits and family benefits for members of uniformed forces in result of the so-called *ustawa dezubekizacyjna* entering into force], 9 January 2018.

In the past, the ECtHR found inadmissible as manifestly ill-founded the application of *Cichopek and 1,627 Others v. Poland*[4] that arisen from the implementation of the Act of 23 January 2009. However, against this background, as well as other relevant ECtHR case law, the hypothesis of this article is that the legal solutions included in the Act of 16 December 2016 fail to meet ECHR standards, including those on how to reckon with an undemocratic past in a democratic state ruled by law as time passes since the regime change.

To test the above hypotheses, the remainder of this article proceeds as follows. Part 1 explains the mechanisms of reducing pensions introduced in 2009 and 2016, respectively. Part 2 discusses ECHR standards on reckoning with the past through reduction of retirement pensions to certain categories of individuals. Part 3 analyses the Act of 16 December 2016 in the light of applicable ECHR standards. Part 4 concludes.

1. PENSIONS AND BENEFITS REDUCTIONS AS MEANS OF DECOMMUNISATION IN POLAND

The first mechanism that reduced the amount of retirement pensions paid to certain categories of individuals was adopted later in Poland compared to other former communist neighboring states, including Germany and Czechia, coming two decades after the change of regime.[5] The Act of 23 January 2009 decreased amount of retirement pensions received by individuals who were in service or employed in selected branches of the state in 1944-1990. These were the Military Council of National Salvation (*Wojskowa Rada Ocalenia Narodowego*, WRON), the Government Protection Bureau (*Urząd Ochrony Państwa*, UOP), the Police (including the Citizens' Militia) and organs of state security enumerated in the Art. 2 of the Lustration Act of 18 December 2006:[6] the Department, the Ministry, and the Committee for State Security and its organizational units, the Interior Ministry's central secret security units, the Academy of Interior Affairs, the Intelligence Units of the Border Guards, The Polish Army's Intelligence, the Polish Army's Interior Forces, the Directorate of the II Central Staff of the Polish Army. However, those who could prove that – prior to 1990 – they had cooperated with and actively supported persons or organizations "working for the independence of the Polish State", kept their privileged retirement pensions intact.[7]

[4] ECtHR, *Cichopek and Others v. Poland* (App. Nos. 15189/10, 16970/10, 17185/10, 18215/10, 18848/10, 19152/10, 19915/10, 20080/10, 20705/10, 20725/10, 21259/10, 21270/10, 21279/10, 21456/10, 22603/10, 22748/10 and 23217/10), 6 June 2013.

[5] For a detailed comparative account of pension reduction policies in Central and Eastern Europe, *see* the justification to the judgement of the Constitutional Tribunal, 20 January 2010, no. K 06/09.

[6] Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów [Act of 18 October 2006 on the disclosure of information on state security authorities' documents from 1944–1990 along with their contents], Journal of Laws of 2006, No. 218, item 1592.

[7] Judgement of the Constitutional Tribunal, 20 January 2010, K 06/09.

The Act of 23 January 2009 amended laws enacted in 1993[8] and 1994,[9] which regulated a special system of retirement pensions designed for functionaries (*emerytury policyjne*). In this special system, a more advantageous mechanism was used to calculate the amount of retirement pensions than in the universal system of pensions: a person was entitled to a retirement pension after 15 years of service or work in the amount of 40% of the assessment basis of the pension (usually, the assessment basis of the pension is the amount of the final salary). Moreover, for every additional year of service an additional 2.6% of the assessment basis of the pension was added.[10] The Act of 23 January 2009 decreased the multiplier used to calculate pensions in this privileged system from 2.6% to 0.7%. The rationale was that it was unfair that individuals who were in service or employed in branches of the communist state responsible for or linked to gross human rights violations, continue to be rewarded in democratic Poland by receiving pensions that are considerably higher than the average pensions received from the universal system of pensions.

The Polish Constitutional Tribunal (CT) emphasized that the legislator must always employ means formally and substantially compatible with rule of law standards[11] and that when a democratic state adopts legislation aimed at coming to terms with the legacy of totalitarianism – unless the new state complies with the rule of law requirements – it cannot claim superiority over the previous totalitarian regime[12] and it should especially abstain from introducing legislation that would satisfy the need for revenge rather than aim at justice.[13] Consequently, no desired historical policy warrants disrespecting constitutional and international human rights commitments. The CT underscored that

[8] Ustawa z dnia 10 grudnia 1993 r. o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin [Act of 10 December 1993 on social security of professional soldiers and their families], Journal of Laws of 2004, No. 8, item 66, as amended.

[9] Ustawa z dnia 18 lutego 1994 r. o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Straży Marszałkowskiej, Służby Ochrony Państwa, Państwowej Straży Pożarnej, Służby Celno-Skarbowej i Służby Więziennej oraz ich rodzin [Act of 18 February 1994 on Social Security of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service, amended on 16 December 2016 and 11 May 2017], Journal of Laws of 1994, No. 53, item 214.

[10] *E.g.* if someone was employed for 15 years and the assessment basis of the pension was PLN 1,000, the retirement pension was PLN 400; PLN 26 was added for each one next year or employment.

[11] *See* Justification to Wyrok Trybunału Konstytucyjnego [Constitutional Tribunal Judgment], 24 February 2010, no. K 6/09: "The passage of time from regaining sovereignty by the Polish state in 1989, while not without significance, nevertheless cannot be a decisive criterion for deciding on the constitutionality of regulation adopted by the Legislator to reckon with the past. There is no article in the Constitution that would ban the introduction of such regulation. The Constitution does not set time limits for reckoning with the past concerning the communist regime. It is not a competence of the Tribunal to take a stance whether, how, and when the Legislator in democratic Poland can introduce regulations concerning reckoning with the past. Such limits are set by the principles of democratic state ruled by law."

[12] Judgement of the Constitutional Tribunal, 11 May 2007, K 2/07.

[13] Judgement of the Constitutional Tribunal, 24 February 2010, K 6/09.

while it is "not its competence to take a stance whether, how and when the Legislator in democratic Poland can introduce regulations concerning reckoning with the past" the limitations to such reckoning are "set by principles of democratic state ruled by law."[14] The unique context of the transition period did not dispense with the obligation to also apply the standards of a democratic state ruled by law and human rights to those responsible for the previous undemocratic regime that abused human rights.

In 2010, the CT confirmed that introducing a mechanism of reducing the amount of pensions as a form of reckoning with communist past complies with the democratic Constitution of the Republic of Poland of 2 April 1997 (the Constitution). The CT emphasized that there are no statutory limitations to introduce mechanisms aimed at reckoning with undemocratic past, even as the times passes since the end of the regime. However, the CT stressed that the measures must conform to the principles, standards, and values of a democratic state ruled by law. The CT considered that the means employed in the Act of 23 January 2009 have an objective and reasonable justification in Poland's historical experience during the communist period and they realized a legitimate aim, which was to end the operation of the existing system of unearned retirement pensions privileges. Nonetheless, the CT found that article 15b of the Act of 23 January 2009, that reduced the pensions of professional soldiers who were part of the Military Council of National Salvation (WRON) was incompatible with the principle of equality before the law and the prohibition of discrimination in Art. 32 of the Constitution. The CT found that members of WRON did not receive privileged pensions in a democratic Poland before the Act of 23 January 2009 entered into force, in the sense that they received pensions adequate for all other functionaries of the uniformed services. Therefore the CT contended that the reduction of pension amounts in this context would be discriminatory. This outcome was highly politically sensitive, as members of WRON were high level functionaries of the communist state responsible for introducing martial law that was in force from 1981-1983; a de facto *junta* that ruled the country at the time of some of the most gross human rights violations in the second half of the twentieth century.[15] Other provisions of the Act of 13 January 2009 remained in force. In 2013, the ECtHR found the application *Cichopek and 1,627 others v. Poland* – that had arisen from a pension reduction under the Act of 23 January 2009 – inadmissible. In the decision, the ECtHR referred to the judgment of the CT in a case K 06/09. The system introduced by the Act of 13 January 2009 operated in Poland until the 1 October 2017.

In 2016, lawmakers renewed interest in conducting state historical policy with the means of law[16] and revisited the idea of reckoning with the communist past by

[14] Judgement of the Constitutional Tribunal, 24 February 2010, K 6/09.

[15] *See* W. Kulesza, *The Trial of General Jaruzelski Justice of the Victors, or the Victory of Justice?*, in: *Crimes of the Communist Regimes: Proceedings of an International Conference Held in Prague, 24–26 February 2010*, Ústav pro studium totalitních režimů: 2010, pp. 305-312.

[16] More on the practice: A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, 38 Polish Yearbook of International Law 59 (2018).

further reducing pensions – as well as other benefits – to certain categories of individuals. The necessity of amending the relevant existing regulation was framed as a way of finalizing or accomplishing a belated "decommunisation", understood as process of undoing and discarding the remnants of the undemocratic communist regime as a political, economic, and social phenomenon.[17] In 2016-2017, a series of so-called decommunisation laws was adopted in Poland, that included an act compelling the change of names of streets and public buildings on a mass scale, and removal of certain monuments,[18] plus the Act of 16 December 2016 that is subject to analysis in this article.

The legislature argued that the legal solutions included in the Act of 23 January 2009 were not effective enough to achieve the goal of abolishing the remaining privileges in pensions and benefits that related to work in the security apparatus of the communist Poland, and that solutions included in the amending act would result in considerable progress towards this goal.[19] It was also claimed that a legal system in which former functionaries of the state security and members of WRON (who were not subject to reduction of pensions following the CT judgment K 06/09) maintain privileged retirement pensions while many individuals who fought for freedom, independence, and human rights under communism in Poland, are today in a difficult financial situation, is unacceptable. It was also argued that such privileges are commonly perceived in Poland as violating social justice, although this claim was not supported by any empirical evidence, such as results of public opinion polls.

In the Act of 16 December 2016, the legislator put the "decommunisation" element in sharp relief, describing the form of governance in Poland in 1944-1990 as "a totalitarian state." Such wording, which is not typically used in historical or political science to describe the whole of this period – to the contrary, years 1956-1989 are described as post-totalitarian authoritarianism[20] – expresses a very strong negative assessment of a non-sovereign and non-democratic state in that period and implies that any remaining privileges related to it should be abolished.

The Act of 16 December 2016 states that the reduction applies to those entitled to both retirement pensions (*emerytury*) as well as other benefits (*renty*), including disability benefits (*renty inwalidzkie*) and family benefits (*renty rodzinne*). As such, the

[17] More on decommunisation: S. Pomorski, *Meanings of Decommunization by Legal Means*, 22(3) Review of Central and East European Law 336 (1996); A. Czarnota, *Decommunisation and Democracy: Transitional Justice in Post-communist Central-Eastern Europe*, in: S. Eliaeson, L. Harutyunyan, L. Titarenko (eds.), *After the Soviet Empire: Legacies and Pathways*, Brill, Leiden: 2005, p. 166.

[18] Ustawa z dnia 1 kwietnia 2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki [Act of 1 April 2016 on prohibiting the propagation of communism or other totalitarian regime through names of buildings, objects, and public service devices], Journal of Laws of 2016, No. 744.

[19] Justification to the draft Act of 16 December 2016, p. 5.

[20] *See* L. Mażewski, *Posttotalitarny autorytaryzm w PRL 1956–1989. Analiza ustrojowo polityczna* [Post-totalitarian authoritarism in PPR 1956-1989], Arte, Warszawa-Biała Podlaska: 2010.

regulation diminishes the amount of benefits available not only to those who were "in service to the totalitarian state" themselves, but also to their family members: spouses and descendants.

The Act of 16 December 2016 entailed reductions of pensions and benefits to those who served or were employed from 22 July 1944 to 31 July 1990 in military and civilian formations and institutions of the so-called "totalitarian state" in Poland, such as:

- the communist state security organs, notably the Department, the Ministry, and the Committee for State Security with its subordinated formations and organizational units, such as the Citizens' Militia;
- the Interior Ministry, its units and agencies, including those involved in intelligence and counter intelligence and fulfilling various tasks for the state security services (such as Investigative Office or Department for Protection of the Constitutional Order of the State), as well as providing state security services with technical equipment and data, responsible for education, training and human resources for the state security services;
- organization units of the Ministry of National Defense, including army intelligence units, borders protection units, units of the General Staff of the Polish Armed Forces (importantly, the Act does not apply to persons who were compulsory drafted to the Polish Army);
- those employed in the Ministry of Interior Affairs, managerial staff of various local units of the state security services, as well as those in vocational schools, undergoing training to join the state security services; state security functionaries on official or secret postings abroad.

The pensions and benefits reductions also applied to technical or auxiliary staff of these institutions. Similarly to the Act of 23 January 2009, the Act of 16 December 2016 also made exemptions for all those able to prove their "active cooperation with persons or organizations acting in favor of the independence of the Polish State" as well as for those who received a prison or detention sentence for their political activity (an information provided by the Institute of National Remembrance – the Commission to Investigate Crimes Against the Polish Nation, the INR, or a court judgment or decision are considered to be adequate proofs). An exemption was included for persons who were drafted to the indicated institutions and formations within the framework of the compulsory defense service (which applies, among others, to doctors and other medicine professionals). Furthermore, the Interior Minister has been granted special powers to exclude a person from a diminished amount of pension or benefits under two circumstances: when a person could prove they were only briefly in the service of the "totalitarian state" (*służba krótkotrwała*) or if they performed exemplary service for the democratic Poland after 12 September 1990, in particular in service dangerous for health and life. However, those two exemptions depend on an assessment by the Interior Minister; they are not automatic. Moreover, there is no agreement on what counts as "a brief period of service."

The regulation sets the multiplier used to calculate pensions at 0.00% of the assessment basis of the pension for each year in service to the "totalitarian state" from 22 July 1944 to 31 July 1990 for all who were in service to the "totalitarian state", also for those who continued service before 2 January 1999 (a multiplier of 2.6% of the assessment basis of the pension is used for all years of work *outside* of formations and institutions enumerated in Act of 16 December 2016 and for years of work after 2 January 1999). The assessment basis of the pension is 40% of the salary during 15 years in service.

Therefore under the Act of 16 December 2016, persons receive a retirement pension, but in some individual cases persons affected by this reduction suffered a drastic decrease in the amount of pensions or benefits received, which may even cause their destitution, in the context of individual personal situations and costs of living in today's Poland. In some cases this reduction applied to elderly, vulnerable people, with no possibilities to earn additional income. The Act of 16 December 2016 also eliminated a mechanism that those who acquired disabilities because of their service in 1944-1990 are entitled to an increase by 15% of the assessment basis of the pension.

Moreover, the Act of 16 December 2016 introduced a cap on the amounts of pensions and benefits, which cannot in any case exceed the average amount of retirement pensions or benefits paid from the universal system of pensions in Poland in a given year.[21] As a result, those, who on the basis of their contributions to social insurance system after 1990 were entitled to a retirement pension higher than an average one, have their pensions reduced to the average amount, which is removed from the stated purpose of the legislation to eliminate only privileges in relation to work in 1944-1990.

Furthermore, recall that some individuals had already had their pensions reduced under the Act of 23 January 2009, which lowered the multiplier used to calculate pensions from 2.6 to 0.7% of the assessment basis of the pension for service in 1944-1990. Therefore, under the Act of 16 December 2016, the amounts of their pensions were reduced for the second time, without new facts or circumstances being provided to justify it.

Importantly, the reduction is conditional only upon documented service or employment in the selected institutions and formations of the "totalitarian state." The Institute of National Remembrance – the Commission to Investigate Crimes Against the Polish Nation (INR)[22] prepares the information about the terms of service. On the basis of this

[21] In 2018, this was PLN 2,179.28 for retirement pensions. It is noteworthy that the amount of retirement pensions in Poland varies significantly: a small percentage of people receives pensions of around PLN 5,000.00 per month or more, but the largest group of people receives around PLN 1,100.00 per month. Source: Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Struktura wysokości emerytur i rent w marcu 2018 roku* [Structure of amount of pensions and benefits in March 2018], available at: https://bit.ly/31NxTvk (accessed 30 June 2020).

[22] On the INR *see* I. Goddeeris, *History Riding on the Waves of Government Coalitions: The First Fifteen Years of the Institute of National Remembrance in Poland (2001–2016)*, in: B. Bevernage, N. Wouters (eds.), *The Palgrave Handbook of State-Sponsored History After 1945*, Palgrave Macmillan, London: 2018; G. Mink, *Is There a New Institutional Response to the Crimes of Communism? National Memory Agencies in*

information, the Social Insurance Institution of the Ministry of Interior and Administration (*Zakład Emerytalno-Rentowy Ministerstwa Spraw Wewnętrznych i Administracji*, ZER MSWiA) issues a decision about changing the amount of pensions or benefits and notifies the recipients. The decision can be appealed to the District Court in Warsaw within thirty days from the day of receiving notification. The burden of proof is on the plaintiff, who is obliged to prove that the character of their work for the state exempts them from the Act of 16 December 2016. Plaintiffs should first issue complaints to the Director of the Pensions and Benefits Department of the Ministry of Interior Affairs and Administration, who is mandated to direct complaints to the XII Department of the District Court in Warsaw.[23] As it was mentioned above, in the first three months of the Act of 16 December 2016 being into force, more than 25,000 appeals were directed to courts against ZER MSWiA decisions about re-calculating the amount of retirement pensions or benefits.

In January 2018, the District Court of Appeals in Warsaw demanded the CT to verify whether the provisions of the Act of 16 December 2016 comply with the principle of a democratic state ruled by law (Art. 2 of the Constitution) and the principle of equality and prohibition of discrimination (Art. 32 of the Constitution).[24] The District Court of Appeals also questioned the legality of the Act, since an investigation was led into the process of its adoption.[25] As of the end of July 2020, the CT has not yet handed down a ruling in the case P 4/18. The protracted proceedings in the CT resulted in courts withholding rulings in particular cases regarding reductions of retirement pensions and benefits. Interpreting the reasons behind the CT's protracted deliberations on the provisions challenged – which have been directly affecting the enjoyment of rights of tens of thousands of individuals – is beyond the scope of this article.[26] Awaiting the CT's ruling, common courts in Poland issued questions related to provision

Post-Communist Countries: The Polish Case (1998–2014), with References to East Germany, 45(6) Nationalities Papers 1013 (2017).

[23] Wystąpienie Rzecznika Praw Obywatelskich do Ministra Spraw Wewnętrznych i Administracji, [Communication of Human Rights Commissioner to Minister of Interior Affairs and Administration], No. WZF.7060.1204.2017.TO, 3 February 2018.

[24] Case in the Constitutional Tribunal, P 4/18.

[25] The Act of 16 December 2016 was voted in during a sitting of Sejm outside of the regular plenary chamber. The Marshal of Sejm and members of the Marshal Guard were investigated over the alleged abuse of power by the Prosecutor's Office, which eventually discontinued its investigations. The case was reopened by the decision of District Court in Warsaw, Sąd Okręgowy w Warszawie, 18 December 2017, VIII Kp 1335/1. *See* R. Balicki, *O sejmowym posiedzeniu, którego nie było – uwagi na marginesie obrad w Sali Kolumnowej w dniu 16 grudnia 2016 r.* [On the Sejm sitting which did not take place – Comments about the meeting in the Column Hall on 16 December 2016], 40 Gdańskie Studia Prawnicze 413 (2018).

[26] On the CT in Poland after 2015, *see* T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and beyond: Of institution(s), Fidelities and the Rule of Law in Flux*, 43(2) Review of Central and East European Law 116 (2018); T. Koncewicz, *Of Institutions, Democracy, Constitutional Self-defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond*, 53(6) Common Market Law Review 1753 (2016); A. Młynarska-Sobaczewska, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, 23(3) European Public Law 489 (2017).

of the Act of 16 December 2016 to the Supreme Court,[27] ruled on reversing the decision about retirement pensions and benefits reductions, and engaged with a dispersed constitutional review of the provisions of the Act of 16 December, referring directly to the Constitution and relevant standards of international law, specifically those of the ECHR.[28]

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS STANDARDS REGARDING RECKONING WITH THE PAST AND REDUCTION OF PENSIONS

The ECHR standards relevant for the analysis of the legal solutions in the Act of 16 December 2016, include – but are not limited to – requirements regarding proportionality of transitional justice measures, especially in the context of the time elapsed from the change of regime, as well as standards concerning interference with property rights in the context of a state deciding to grant welfare provisions such as retirement pensions or other benefits to individuals.

The ECtHR generally considered that national authorities have indispensable knowledge of the historical background and sufficient understanding of context and nuance to be able to introduce necessary and proportionate solutions to reckon with the past, which the ECtHR may lack.[29] The ECtHR usually held that its role is to correct elements of policies adopted by states in transition, but it abstained from significantly reversing such policies or proposing alternatives. It has been willing to grant a wide margin of appreciation to state authorities and, significantly, has never recognized an obligation to introduce any mechanisms of transitional justice. For instance in *Sfountouris and Others v. Germany*,[30] a case regarding a demand from a Greek national to receive compensation from Germany for the World War II wrongdoings, the ECtHR

[27] Court of Appeals in Białystok in a case III AUa 499/19 directed a question to the Supreme Court (III UZP 11/19).

[28] *See* decisions of the courts of appeals: (i) Decision of Court of Appeals in Warsaw, 23 August 2018, AUz 821/18; (ii) Decision of Court of Appeals in Katowice], 8 July 2019, III AUz 236/19; (iii) Decision of Court of Appeals in Kraków], 20 August 2019, III AUz 138/19; (iv) Decision of Court of Appeals in Lublin, 4 October 2019, III AUz 145/19; (v) Decision of Court of Appeals in Łódź, 9 December 2019, III AUz 362/19; (vi) Decision of Court of Appeals in Rzeszów, 30 May 2019, III AUz 41/19; (vii) Decision of Court of Appeals in Gdańsk, 22 October 2019, III AUz 311/19; (viii) Decision of Court of Appeals in Łódź, 23 December 2019, III AUz 131/19; (ix) Decision of Court of Appeals in Warsaw, 16 December 2019, III AUz 594/19; (x) Decision of Court of Appeals in Szczecin, 25 September 2019, III AUz 81/19; (xi) Decision of Court of Appeals in Białystok, 21 November 2019, III AUz 149/19; (xii) Decision of Court of Appeals in Warsaw, 6 December 2019, III AUz 11xx/19; (xiii) Decision of Court of Appeals in Warsaw, 17 January 2020, III AUz 1194/19; (xiv) Decision of Court of Appeals in Poznań, 2 August 2019, III AUz 104/19; (xv) Decision of Court of Appeals in Poznań, 2 August 2019, III AUz 117/19; (xvi) Decision of Court of Appeals in Katowice, 28 August 2019, III AUz 331/19.

[29] ECtHR, *Ždanoka v. Latvia* (App. No. 58278/00), 16 March 2006, para. 96.

[30] ECtHR, *Sfountouris and Others v. Germany* (App. No. 24120/06), 31 May 2011.

confirmed that the ECHR does not impose any specific obligation upon contracting states to redress injustice or damage caused by their predecessors. However, the ECtHR has been supportive of some transitional justice measures, notably restitution of property[31] and awarding compensation to individuals for crimes committed by another state.[32]

While the ECtHR has not disputed the necessity of transitional justice mechanisms adopted in ECHR contracting states, it has frequently ruled on their proportionality under ECHR.[33] Buyse and Hamilton influentially – and rightfully – contested the idea that there has ever been any "transitional justice exceptionalism", understood as a wider margin of appreciation accorded by the ECtHR to states in Central and Eastern Europe that underwent a transition to democracy.[34] Usually the ECtHR considered that even the particular historical context of the transition to full democracy does not warrant any lesser scrutiny against ECHR standards.[35] However, there have been cases, for example *Rekvényi v. Hungary*, where the ECtHR contended that the "particular history" may justify certain restrictions on political freedoms, in order to consolidate and safeguard democracy, when such measures are answering a pressing social need.[36] In *Ždanoka v. Latvia*, a case concerning the prohibition of standing for elections by members of the communist party before 1991, the ECtHR highlighted the "special socio-political context" of such restrictions of political rights.[37] Nonetheless, the ECtHR also underlined that factors, such as historical and political context changing over time, may – and should – influence assessments of the same measure in the years to come. In *Rainys and Gasparavičius v. Lithuania*, the ECtHR described lustration laws adopted a decade after a change of regime as "very belated."[38] At the same time, the ECtHR underscored that the fact that these measures were not introduced immediately after the change of regime does not automatically entail their incompatibility with ECHR and that it was reasonable that the legislator did not rush and took time to reflect on what measures were best to help embed democracy in a newly democratic state.[39] In *Adamsons v. Latvia*,[40] the ECtHR found that restrictions to electoral rights were justified in the specific

[31] ECtHR, *Zvolský and Zvolská v. the Czech Republic* (App. No. 46129/99), 12 February 2003.

[32] For example, in *Epstein and Others v. Belgium*, the ECtHR approved Belgium's awarding of compensation for Jewish and Roma victims of the German Nazi policies implemented during the World War II, provided that claimants were Belgian nationals. *See* ECtHR, *Epstein and Others v. Belgium* (App. No. 9717/05), 8 January 2008, para. 3.

[33] E. Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5(2) International Journal of Transitional Justice 282 (2011).

[34] A. Buyse, M. Hamilton, (eds.). *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*. Cambridge University Press, Cambridge: 2011, p. 4.

[35] ECtHR, *Affaire Linkov c. République tchèque* (App. No. 10504/03), 7 December 2006, para. 37.

[36] ECtHR, *Rekvényi v. Hungary* (App. No. 25390/94), 20 May 1999, para. 48.

[37] *Ždanoka v. Latvia*, para. 115.

[38] ECtHR, *Rainys and Gasparavičius v. Lithuania* (App. Nos. 70665/01, 74345/01), 7 April 2005, para. 36.

[39] *Ždanoka v. Latvia*, para. 131.

[40] ECtHR, *Adamsons v. Latvia* (App. No. 3669/03), 24 June 2008.

context of the early years of transition, but it also made a far-reaching reservation that with the passage of time, a general suspicion towards a group of persons based solely on their conduct in the past will no longer suffice and the authorities would have to provide further arguments and evidence to justify introducing the restriction of rights. The ECtHR gave the reminder that when it comes to matters affecting property rights, "the public authorities must act in good time and in an appropriate and above all consistent manner."[41]

The ECtHR also found that any rights restrictions must be assessed in the context of the political evolution of the country.[42] In *Ždanoka v. Latvia*, the ECtHR emphasized that an ongoing periodic review of such restrictions should take place to answer whether they are needed for the purpose of building confidence in new democratic institutions.[43] In *Sõro v. Estonia*, the ECtHR considered the passage of several years from restoration of the independence of Estonia to the public disclosure that the applicant was employed as driver in the security services was an important factor for assessing the impugned measure's alignment with ECHR. In this case, the ECtHR held that "any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time."[44]

There is no positive obligation placed on states under ECHR to provide welfare benefits and assistance. Reduction of pensions and benefits is a recognized transitional justice[45] measure under ECHR, provided that it meets proportionality standards as well as all procedural standards and is introduced as a means to safeguard and embed democracy and human rights in a country in transition to full democracy. Diverse mechanisms of pension reductions have been adopted within the Council of Europe after 1989 in regard to individuals who held privileged positions in the undemocratic state and in result have been also entitled to advantageous amount of pensions after the change of regime. The reasoning behind such mechanisms is usually that without a certain restriction of rights, in this case the acquired right to pension or benefit, some individuals would continue to unfairly benefit from their past links to certain discredited branches of the undemocratic state. Therefore, the ultimate aim of mechanisms of pension reduction is to increase the fairness of the social security system and thus general social trust in the institutions of a new, and often fragile, democratic state.

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[41] ECtHR, *Bogdel v. Lithuania* (App. No. 41248/06), 26 November 2013, para. 66.

[42] *Ždanoka v. Latvia*, para. 106.

[43] *Ibidem*, para. 134.

[44] ECtHR, *Sõro v. Estonia* (App. No. 22588/08), 3 December 2015, para. 62.

[45] Transitional justice is understood here after Ruti Teitel, who influentially defined it as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." According to the definition in: *Max Planck Encyclopedia of Public International Law*, "transitional justice" involves a set of mechanisms through which a new democratic government that has emerged from a dictatorship or from civil conflicts seeks to deal with its dark past (R. Teitel, *Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69 (2003); W.-Ch. Chang, Y.-L. Lee, *Transitional Justice: Institutional Mechanisms and Contextual Dynamics*, in: *Max Planck Encyclopedia of Public International Law* (2016), accessible online.

The ECtHR finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one. In general, the ECtHR considers that states are the sole judges of the necessity of interference with property rights, and that the ECtHR may supervise only the lawfulness and proportionality of the restrictions. This is because national authorities, for the reason of their direct knowledge of society and its needs, are better equipped to determine social and economic policy "in the public interest,"[46] understood as encompassing "measures which would be preferable or advisable, and not only essential, in a democratic society."[47] The ECtHR typically does not challenge the social and economic policies of national authorities, unless, as in *Stec and Others v. United Kingdoms*, such policies are "manifestly without reasonable foundation,"[48] which means that they are so arbitrary, that they cannot possibly be justified. However, the ECtHR underscored that "there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his or her possessions."[49]

The ECtHR ruled on retirement pensions and benefits in the context of a right to property in several cases that arose in the wider context of transitional justice processes. For instance in 2009 in the case *Andrejeva v. Latvia*, the ECtHR confirmed that the interest of the applicant in receiving a retirement pension from the democratic Latvian state for her years of service for enterprises based in the territory of the former USSR, but outside Latvia, falls within the ambit of Art. 1 of Protocol No. 1 to the ECHR.[50] The ECtHR emphasized that Protocol No. 1 does not limit the freedom of national authorities to decide whether to introduce a social security system, how to structure it, and what types and amounts of benefits to provide for persons that fall under the scope of the system. However, when the state introduces legislation that establishes such a system, it generates a pecuniary interest for persons who satisfy its requirements.[51] The ECtHR confirmed the possibility of reductions in social security entitlements in certain circumstances and noted the significance of the passage of time for the legal existence and character of benefits. Furthermore, in 2016 the ECtHR ruled in *Béláné Nagy v. Hungary*, a case concerning losing a disability pension without a substantial change in health status, but due to a different methodology of calculating pensions,[52] and emphasized that states introduce relevant regulations and amendments in response to changes in society and evolving views on the categories of persons who are considered as needing assistance, and also to the evolution of the situation of individuals. The

[46] W. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford: 2015, p. 975.

[47] ECtHR, *Handyside v. United Kingdom* (App. No. 5493/72), 7 December 1976, para. 62.

[48] ECtHR, *Stec and Others v. United Kingdom* (App. Nos. 65731/01, 65900/01), 12 April 2004, para. 55.

[49] ECtHR, *Kozacıoğlu v. Turkey* (App. No. 2334/03), 19 February 2009, para. 63.

[50] ECtHR, *Andrejeva v. Latvia* (App. No. 55707/00), 18 February 2009, para. 75.

[51] *Ibidem*, para. 77.

[52] ECtHR, *Béláné Nagy v. Hungary* (App. No. 53080/13), 13 December 2016.

ECtHR underscored that when a benefit is reduced or discontinued, this may constitute interference with possessions, which requires justification by the state. Importantly, the ECtHR emphasized that the margin of appreciation does not allow the state to completely deprive an individual of the once-granted entitlement and that the overall outcome of the reduction must not leave individual without means of subsistence.

The European Commission of Human Rights (EComHR) and the ECtHR considered applications that arose in Poland in the context of eliminating privileged benefits to certain individuals by various legal acts adopted after 1989. The Strasbourg Court commonly held that that the means employed by the Polish legislator were justified given Poland's historical experience during the communist period and realized a legitimate aim, which was to regulate the operation of the existing system of exceptional privileges to some individuals. Notably, the EComHR decided on applications by former Polish functionaries of "public security apparatus or military information" from the years 1944-1956 relating to Art. 21(2)(4a) and Art. 26 of the Act of 24 January 1991 on Veterans,[53] that deprived them of the so called "veteran benefit", among others for their "participating in the armed struggle to consolidate the people's power" in Poland during and in the aftermath of the World War II.[54] The EComHR, in the decision of 16 April 1998 found the application *Styk v. Poland*[55] inadmissible, highlighting that the loss of additional benefit, while retaining a retirement pension under the universal social insurance system, is only a loss of privileged status and does not affect property rights that result from the social insurance system in a manner contrary to Art. 1 of Protocol No. 1 to the ECHR. In the decision, the EComHR acknowledges that the communist-era provisions concerning war veterans were amended to condemn the political role that the communist security services had played in establishing the communist regime and the repression of political opposition in Poland. Likewise, the EComHR also considered the application *Bieńkowski v. Poland*[56] inadmissible, arguing that the applicant's pension right was not impaired. It also found inadmissible an application by a former functionary in the Ministry of Public Security (*Ministerstwo Bezpieczeństwa Publicznego*) and the Committee for Public Security (*Komitet Do Spraw Bezpieczeństwa Publicznego*) in *Domalewski v. Poland*.[57] According to the EComHR, the loss of "veteran status" did not result in the essence of the pension rights being impaired, and that divesting the applicant of "veteran status" did not amount to discrimination contrary to Art. 14 ECHR. Furthermore, the Commission observed that

[53] Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego [Act of 24 January 1991 on war veterans and certain other persons who were victims of war and post-war repression], Journal of Laws of 1991, No. 17, item 75.

[54] *See also* J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, London: 2013, p. 106.

[55] ECtHR, *Styk v. Poland* (App. No. 28356/95), 16 April 1998.

[56] ECtHR, *Bieńkowski v. Poland* (App. No. 33889/96), 9 September 1998.

[57] ECtHR, *Domalewski v. Poland* (App. No. 34610/97), 15 June 1999.

> under the Law of 24 January 1991 on Veterans and Other Victims of War and Post-war Repression, the applicant, in the same way and on the same conditions as all other persons who had previously been employed or had served in the former Communist organs of the public security service, was excluded from the privileged group of "veterans" in view of the political role played by those organs in preserving totalitarian rule and combating and eliminating political opposition to the former regime.[58]

The EComHR also emphasized that the "the statutory measures taken by the Polish State in respect of such persons were primarily aimed at an objective verification of whether those who had served in organs commonly regarded as a machinery of repression satisfy the present statutory conditions for being awarded a special honourable status."[59] It stressed that the decision of the democratic legislator to withdraw privileges for policemen who served during the communist and Stalinist regimes were justified by public interest.

In 2009 in *Rasmussen v. Poland*,[60] a case about the loss of status of a retired judge following a court decision that the applicant's lustration declaration did not conform to facts, and subsequent related loss of a special retirement pension equivalent to 75% of the last full salary (*sędziowski stan spoczynku*) every month (which was attached to the status of retired judge), the ECtHR considered that there was no interference with the applicant's right to the peaceful enjoyment of her possessions within the meaning of Article 1 to Protocol No. 1 to the ECHR. The applicant was granted a partial disability benefit (*renta z tytułu częściowej niezdolności do pracy*) and later an ordinary retirement pension. Therefore, the ECtHR found that the applicant was not deprived of a property right.

Importantly, in 2013 the ECtHR found an application originating from a pension reduction following implementation of the Act of 23 January 2009 inadmissible. In the decision regarding *Cichopek and 1,627 others v. Poland* the ECtHR explained that the pension reduction system introduced by the Act of 13 January 2009 in Poland did not impose an excessive burden on the applicants, as they did not suffer a loss of means of subsistence or a total deprivation of benefits, while the scheme remained more advantageous than other pension schemes from the universal system of pensions. Moreover, the ECtHR emphasized that the fact of serving in the secret police forces of the Polish People's Republic – a formation directly responsible for gross violations of human rights protected by the ECHR – is a justifiable criterion for reducing pensions. The ECtHR also stated that the elimination of pension privileges enjoyed by some members of the former communist political police can contribute to greater fairness of the pension system, provided that all procedural guarantees are met throughout the process of reductions' implementation. In the decision of inadmissibility in *Cichopek*, the ECtHR did not raise the issue of right to fair trial, although the reduction of pensions was automatic, based on the place of employment, and not based on court decision.

[58] *Ibidem*.

[59] *Ibidem*.

[60] ECtHR, *Rasmussen v. Poland* (App. No. 38886/05), 28 April 2009.

3. ACT OF 16 DECEMBER 2016 IN THE LIGHT OF THE ECHR

A careful analysis of the Act of 16 December 2016 reveals its numerous shortcomings, which result in the act's incompatibility with the standards of the ECHR.[61] In the justification to the draft bill, the drafters argued that the planned legal solutions would not have a repressive character, but would only to eliminate unearned retirement privileges. It was emphasized that a retirement pension or benefit will not be not annulled, but decreased. An argument was raised that the previous system of reducing pensions did not lead to accomplishing the goal of reducing pensions privileges for those who worked in the state security organs.

The ECtHR emphasized that all measures of reckoning with an undemocratic past must meet all substantial and procedural requirements, including individualized assessment of guilt, responsibility, and proportionate penalty for conduct in the past. Therefore a collective application of restrictions to rights to individuals does not comply with the goals of transitional justice as ECtHR understands it.[62] The fundamental flaw of both the Act of 23 January 2009 and the Act of 16 December 2016 – which the ECtHR did not engage with when deciding on inadmissibility of the *Cichopek* application – is that they entail reductions of pensions or benefits without a prior individualized assessment by an independent court (which would be compliant with fair trial guarantees) of the role performed by, and conduct of, individuals who were in service to "the totalitarian state in Poland in 1944-1990." This infringes upon the right to a fair trial, including the presumption of innocence (Art. 45 of the Constitution and Art. 6 ECHR). The reduction is based solely on information about the place of work in the indicated time period, provided by the INR, which is not a court.[63] The INR transfers the relevant information to the Social Insurance Institution of the Ministry of Interior Affairs and Administration (ZER MSWiA), which does not verify its truthfulness and accuracy, and issues a decision about re-calculating of the amounts of retirement pensions and benefits automatically. The information concerns events that took place in the distant past and may be unreliable and incomplete. Both acts – those enacted in 2009 and 2016 alike – failed to guarantee individualized assessment of responsibility by an independent court. They do not specify any evidentiary criteria or requirements, nor do they require adversarial proceedings or individualized reasoning

[61] *See* Stanowisko Rzecznika Praw Obywatelskich w sprawie odwołań od decyzji Zakładu Emerytalno-Rentowego MSWiA obniżających z dniem 1 października 2017 r. świadczenia emerytalno-rentowe byłym funkcjonariuszom służb ochrony państwa PRL [Position of the Commissioner of Human Rights regarding appeals against decisions of the Social Insurance Institution of the Ministry of Interior Affairs and Administration reducing starting from 1 October 2017 amounts of retirement pensions and benefits to former functionaries of state security of the Polish People's Republic], WZF.7060.1384.2017, 10 June 2019.

[62] *Adamsons v. Latvia*, para. 135.

[63] A. Żygas, *The Legal Status and Investigative Function of the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation (IPN) Under the Rule of Law*, 4(4) International Journal on Rule of Law, Transitional Justice and Human Rights 133 (2013).

for decision about re-calculating amounts of pensions and benefits. Instead, a reduction is imposed on entire groups of people who were in the service or employed in the listed civil and military formations at the given time.

In *Velikovi and Others v. Bulgaria* – a judgment regarding several applications of Bulgarian nationals who had different degree of association with the communist regime – the ECtHR gave the reminder that, to assess whether there was an unjustified state interference contrary to Art. 1 of Protocol No. 1 to the ECHR, due account must be taken of the special transitional period at the relevant time and the individual circumstances of each case. In cases about transitional justice measures that interfere with individual's property rights, the ECtHR recalled that domestic courts must establish in each case whether individuals profited from a privileged position to unfairly acquire the property right. The ECtHR emphasized that "where the domestic courts have not made such a finding, the respondent Government cannot rely before the Court on suppositions in the opposite sense. Such an approach would run contrary to the principle of rule of law inherent in the Convention."[64]

The openly declared aim of the Act of 16 December 2016 was to eliminate the remaining privileges in retirement pensions and other benefits of the people who worked in the security services, the political secret police, the Ministry of Public Security, and other formations structurally responsible for gross human rights violations in Poland in 1994-1990. However, the list of formations and institutions in the Act of 16 December 2016 is markedly broader and the Act does not acknowledge that persons who worked in one workplace performed varied tasks. There is no individualized assessment of the existence of an actual link between one's work in the indicated formations and institutions and the preservation of the "the totalitarian regime" or an involvement (of various degrees) in gross violations of human rights. The reduction of retirement pensions and other benefits applies also to individuals who did not occupy privileged positions in communist state and society, and performed auxiliary functions in the indicated institutions (such as mechanics, technicians, or bakers). What is lacking is confirmation in each case of an established and meaningful connection between one's conduct in the past and a present-day reduction of retirement pension and benefit. Furthermore, the reduction applies not only to retirement pensions but also to benefits (*renty*) and family benefits (*renty rodzinne*). As such, it also affects family members and others entitled to pensions and benefits of former functionaries and employees of the undemocratic state – including vulnerable persons, especially persons with disabilities and the elderly.[65]

Moreover, the ECtHR explained that, in order to be compatible with Art. 1 of Protocol No. 1 to the ECHR, a measure of interference in property rights must fulfil three basic conditions: 1) it must be carried out "subject to the conditions provided for by

[64] ECtHR, *Velikovi and Others v. Bulgaria* (App. Nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02), 15 March 2007, para. 188.

[65] L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11(4) International Journal of Constitutional Law 1056 (2013).

law", which excludes any arbitrary action on the part of the national authorities, 2) it must be "in the public interest", and 3) it must strike a fair balance between the owner's rights and the interests of the community.[66] The key provision of the Act of 16 December 2016 is vague, and as such does not exclude an arbitrary action on the part of national authorities: exceptions from reductions can be granted (inevitably, discretionarily) by the Minister of Interior, based on an undefined, imprecise criterion of "a brief period of service" (*służba krótkotrwała*), a term which has not been explained in case law. Such wording does not satisfy the qualitative requirements of clarity and foreseeability of law that the ECtHR employed to describe the demands imposed by Art. 7 ECHR. Although the punishment of reducing pensions is not a criminal one, it is nonetheless a punishment.

Next, the principle of good governance requires that where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner.[67] The standard of legal certainty demands that lowering the amount of compensation – an acquired right – should be effectuated without delay, as quickly after the change of regime as possible, to allow individuals to accommodate to the new circumstances and pursue life in a democratic state. Individuals affected by pension reductions following the Act of 23 January 2009 could have had reasonable expectations that, once reduced by law, their pensions would not diminish any further. More severe penalties are usually applied in cases of recidivism. Consequently, the second reduction under Act of 16 December 2016 is contrary to the principles of legal certainty and to *ne bis in idem*, that no legal action can be instituted twice for the same cause of action, derived from Art. 2 of the Constitution and protected by the Art. 4 of Protocol No. 7 to the ECHR. In this aspect, the Act of 16 December 2016 particularly acutely misses the goals of transitional justice, including increasing public trust in state institutions.

Furthermore, the ECtHR confirmed there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of their possessions.[68] In *Velikovi and Others v. Bulgaria*, a series of applications regarding restitution of nationalised property including the compensation schemes, the ECtHR explained that under the Art. 1 of Protocol No. 1 to the ECHR, "deprivation of property must be lawful, in the public interest and must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[69] The ECtHR warned that "the attenuation of those old injuries' cannot create disproportionate new wrongs."[70] Importantly, the ECtHR uses the concept of a certain "threshold of hard-

[66] ECtHR, *Vistiņš and Perepjolkins v. Latvia* (App. No. 71243/01), 25 October 2012, para. 94.
[67] ECtHR, *Rysovskyy v. Ukraine* (App. No. 29979/04), 20 October 2011, paras. 70-71.
[68] ECtHR, *Scordino v. Italy* (App. No. 36813/9), 9 March 2006, para. 93.
[69] *Velikovi and Others v. Bulgaria*, para. 160.
[70] ECtHR, *Pincová and Pinc v. Czech Republic* (App. No. 36548/97), 5 February 2003, para. 58.

ship" that must be crossed to find a breach of the right to property.[71] In *Béláné Nagy v. Hungary*, the ECtHR emphasized that a state cannot completely deprive an individual of the once-granted entitlement, and that the reduction cannot be disproportionate to the point of leaving an individual without any means of subsistence. The ECtHR established general principles of proportionality analysis concerning right to property under Art. 1 of Protocol No. 1 with regard to social benefits. The Court will consider whether interference imposed an excessive individual burden; deprivation of the entirety of a pension is likely to breach the provisions of Art. 1 of Protocol No. 1, conversely, reasonable reductions to a pension or related benefits are likely not to do so. Nonetheless, the ECtHR considered that the balancing test cannot rely solely on the amount or percentage of the reduction in the abstract. The ECtHR takes into account factors including a discriminatory nature of the loss of entitlement, the absence of transitional measures, the arbitrariness of the condition and the applicant's good faith and, crucially, whether the "right to derive benefits from the social-insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his or her pension rights."[72] Consequently, deprivation of the entirety of a pension is likely to breach the provisions of Art. 1 of Protocol No. 1, but reasonable reductions to a pension or related benefits are likely not to do so. Likewise, in a string of cases concerning permanent reductions of pensions as part of austerity policy, the ECtHR sided with governments, when the reduction of benefits did not pose risk that individuals would have insufficient means to live on.[73] For instance, the ECtHR considered that an applicant was not made to bear an excessive burden because the reduction of her salary was not such as to place her at risk of having insufficient means to live on, even if the reduction permanently lowered the amount of benefits received by the applicant by 20%.[74] However, the Act of 16 December 2016 was enacted not due to the necessity of limiting all welfare benefits to introduce austerity policies – Poland at that time was experiencing a considerable economic growth and the state had introduced a series of generous welfare policies.[75] The reduction of pensions and benefits in the Act of 16 December 2016 was clearly motivated by considerations of other nature than austerity.

The legislative amendment introduced in 2016 only affected future payments of retirement pensions and benefits from 1 October 2017 onwards, not payments that had already been made, and did not terminate the whole retirement pensions or other

[71] S. Roksandić Vidlička, *Possible Future Challenge for the ECtHR? Importance of the Act on Exemption and the Sanader Case for Transitional Justice Jurisprudence and the Development of Transitional Justice Policies*, 64(5-6) Zbornik Pravnogo Fakulteta u Zagrebu 1091 (2014), p. 1105.

[72] *Béláné Nagy v. Hungary*, para. 29.

[73] D. Kagiaros, *In Search of a 'Social Minimum': Austerity and Destitution in the European Court of Human Rights*, 25(4) European Public Law 358 (2019), p. 369.

[74] E. Brems, *Protecting Fundamental Rights during Financial Crisis: Supranational Adjudication in the Council of Europe Context*, in: T. Ginsburg, M. Rosen, G. Vanberg (eds.), *Liberal Constitutionalism in Times of Financial Crisis*, Cambridge University Press, Cambridge: 2019, pp. 163-184.

[75] K. Dobrowolski, G. Pawłowski, *The Condition of Public Finances and Its Impact on the Level of Inflation in Poland in 2011-2017*, 9(4) Contemporary Economy 1 (2018).

benefits, only reduced them. However, while under the Act of 16 December 2016 pensions or benefits were not annulled, in individual cases the severity of pension or other benefit reductions may provoke destitution of individuals. Such interference with the right of individuals is disproportionate with achieving the aim of the regulation, which is the reduction of certain present-day *privileges,* and the rationale underlying that is to sanction those who had profited from their position in the communist regime, in particular in its most discredited branches. A number of such cases where the Act of 16 December 2016 imposed a risk of destitution on individuals were discussed in a report prepared by the Commissioner for Human Rights Office, which criticized the repressive character of the act.[76] In such circumstances, it can be said that the very essence of the applicant's acquired rights were impaired – since in some cases the minimum threshold of hardship has been reached and individuals' situation had worsened to the extent that they risked falling below the subsistence threshold. Therefore the insufficiency of a benefit should be a basis for the ECtHR to conduct a more rigorous scrutiny of the Act of 16 December 2016 than the traditional wide margin of appreciation in transitional justice measures that impact on social welfare policy would suggest. The existing ECtHR case law has prepared the groundwork to argue that under ECHR individuals are protected against state-inflicted destitution, degraded living conditions, or similar manifestations of extreme poverty.[77] The ECtHR stressed that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of her possessions.[78] The ECtHR emphasized that it "cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of [their] possessions."[79]

Moreover, introducing a cap on the maximum amount of pensions and benefits is discriminatory to those functionaries who were positively vetted after 1990 and allowed to continue working in service for democratic Poland, and as such contrary to Art. 14 ECHR that secures the enjoyment of rights without discrimination on any grounds. Discrimination means treating persons differently in analogous situations without an objective and reasonable justification.[80] The Act of 16 December 2016 was introduced

[76] Rzecznik Praw Obywatelskich [Commissioner for Human Rights], *Sąd: obniżka emerytury policjanta na podstawie tzw. „drugiej ustawy dezubekizacyjnej" z 2016 r. bezpodstawna* [Court: reduction of a policeman's retirement pensions under the so-called druga ustawa dezubekizacyjna of 2016 unfounded], 12 November 2019, available at: https://www.rpo.gov.pl/pl/content/sad-obnizka-emerytury-policjanta-na-podstawie-tzw-ustawy-dezubekizacyjnej-z-2016-r-bezprawna (accessed 30 June 2020).

[77] C. O'Cinneide, *A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights*, 30 August 2008, available at: https://ssrn.com/abstract=1370241 (accessed 30 June 2020).

[78] ECtHR, *Pressos Compania Naviera S.A. and Others v. Belgium* (App. No. 17849/91), 20 November 1995, para. 38.

[79] ECtHR, *Jahn and Others v. Germany* (App. Nos. 46720/99, 72203/01 and 72552/01), 30 June 2005, para. 93. *See also* C. Lebeck, *Rights in Transitions: The European Court of Human Rights' Judgment in Jahn and Others v. Germany*, 17(2) King's Law Journal 359 (2006).

[80] ECtHR, *D.H. and Others v. the Czech Republic* (App. No. 57325/00), 13 November 2007, para. 75.

27 years after the regime change, affecting, among others, individuals who were positively vetted and had served for decades in democratic Poland. An exception may be made for them by the Minister of Interior, but it is not automatic. Because of the cap on the amount of pensions, anyone falling under the Act of 16 December 2016 in any case cannot receive a retirement pension higher than the average retirement pension in the universal system of pensions - even in a case when they earned their retirement pension contributions after 1990, often in service with a high risk of endangering health or life. The Act of 16 December 2016 also introduces a reduction of disability pensions. Functionaries who were allowed to continue service after 1990, in addition to passing a test of moral integrity, had to be in good health at that time. Consequently, those among them who continued service and have been entitled to disability pensions, must have acquired disabilities in connection to service performed after 1990 in democratic Poland. Compared to those functionaries of the democratic state who started serving after 1990, the persons affected by the reduction, especially those who served "the totalitarian state" in 1944-1990 only for a short period of time (and were not granted an exception by the Interior Minister), are discriminated against, since persons in similar situations are treated markedly differently. A personal characteristic[81] – the documented fact of working in a certain formation or institution of undemocratic state pre-31 July 1990 – gives thin grounds to justify a differentiation in treatment between individuals regarding their contributions to the retirement pensions system after 1990. As a result of the mechanism of the Act of 16 December 2016, persons who were vetted and allowed to continue serving in a democratic state in this respect are treated markedly differently to those who started their service after 31 July 1990 and also acquired the right to retirement pension, that is after 15 years in service.

Moreover, the ECtHR invites stricter scrutiny of the methods used to achieve the stated and accepted public purposes as time passes since the change of political regime. The ECtHR confirmed that a state, when introducing more repressive mechanisms of transitional justice, especially after a significant lapse of time, must provide very strong justifications for the regulation to pass the test of proportionality (*Adamsons v. Latvia*). The ECtHR underscored that with the passage of time, a general suspicion towards a group of persons based solely on their conduct in the undemocratic regime no longer suffices, and the authorities have to provide clear and strong arguments and evidence to justify introducing any further restriction of the rights of these individuals. For instance in a judgment delivered in 2015 in *Sõro v. Estonia*, the ECtHR held that "any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time."[82] These recent considerations fit into reasoning established in the 1960s by the EComHR in one of the early judgments (*De Becker v. Belgium*). The case concerned a journalist who could not exercise his profession in the 1960s Belgium due to conviction for collaborating with Nazis in

[81] *See* J. Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Right*, 13(1) Human Rights Law Review 99 (2013).

[82] *Sõro v. Estonia*, para. 62.

Belgium during the World War II. The EComHR clearly established that the abuse of rights clause of Art. 17 ECHR applies to persons who threaten the democratic system of the member states only to an extent strictly proportionate to the seriousness and duration of such threat and "cannot be used to deprive an individual of his rights and freedoms permanently merely because at some given moment he displayed totalitarian convictions and acted accordingly."[83]

The ECtHR supports a periodic review of transitional justice mechanisms and advised that they should be evaluated in the light of political developments by a state (*Ždanoka v. Latvia*). The ECtHR specified that a state should verify whether, with the passage of time, the enacted mechanisms remain necessary and proportionate, especially given that circumstances that previously justified particular mechanisms can cease to exist or be transformed. ECHR standards remind states that they should be mindful to introduce mechanisms that will not answer to the desire of revenge or retribution under the guise of reckoning with the past. While the ECtHR has emphasized in its case law that in assessing transitional justice mechanisms aimed at redressing decades-long injustices, due account must be taken of the special transitional period at the relevant time, a regulation adopted 27 years after the regime change cannot be regarded as adopted in an immediate "transitional period." Moreover, the ECtHR's approach to transitional justice measures have been that "the weight of the circumstance of transition in the balancing exercise was determined on the basis of the general circumstances of the interference with the fundamental right to property."[84] These measures should be assessed without any "exceptionalism." To the contrary, the proportionality analysis should take into account the fact of increasing the severity and expanding of the scope of the regulation adopted in 2016, when looking at the regulation adopted in 2009.

To conclude, the passage of time is but one of the crucial factors that must be taken into account in assessing the legal solutions included in Act of 16 December 2016, next to individualized assessment, prohibition of arbitrariness, stability and predictability of law, protection of legitimate expectations, threshold of hardship (being especially mindful of insufficiency of a benefit in some cases, especially when affected individuals could be regarded as belonging to vulnerable groups in need of special protection, such as the elderly or persons with disabilities), discrimination (difference in treatment which is not objectively and reasonably justified), and proportionality of interference in property rights.

CONCLUSION

The Act of 16 December 2016 is not an appropriate measure of response to a problem defined as the removal of the remaining retirement pensions and benefits provided to

[83] ECHR, *De Becker v. Belgium* (App. No. 214/5), 27 March 1962, para. 279.

[84] M. Varju, *Transition as a Concept of European Human Rights Law*, 2 European Human Rights Law Review 170 (2009), p. 180.

those who worked in state security organs in Poland in 1944-1990 as a means of accomplishing the process of decommunisation, because of the incompatibility of its mechanisms with applicable standards of the ECHR. The solutions included in the Act separate it from the official rationale to achieve social justice by levelling the amounts of retirement pensions to correspond to the average retirement pensions in Poland paid from the universal system of retirement pensions, and are not proportionate to the aim pursued.

First, the legal solutions included in the act entail collective treatment of activities that merited individual evaluation. The Act of 16 December 2016 failed to guarantee individualized assessment of responsibility by an independent court, which is incompatible with Art. 6 ECHR. It also contravenes standards elaborated in the ECtHR case law that with state interference contrary to Art. 1 of Protocol No. 1 to the ECHR, due account must be taken of the special transitional period at the relevant time and the individual circumstances of each case.

Second, the act employs vague wording, which does not satisfy the qualitative requirements of clarity and foreseeability of law that the ECtHR employed to describe the demands imposed by Art. 7 ECHR.

Third, the Act of 16 December introduced harsher penalties for persons who had already been affected by pension reductions under Act of 23 January 2009, without providing additional justification. This contrary to the principles of legal certainty and to *ne bis in idem*, that no legal action can be instituted twice for the same cause of action, derived from Art. 2 of the Constitution and protected by the Art. 4 of Protocol No. 7 to the ECHR. An overtly repressive character additionally puts into question the actual motivations of the legislator.

Fourth, it was not sufficiently justified why harsher penalties apply to individuals as the time passes from the change of regime, which does not meet the requirement of providing strong justification for transitional justice mechanisms with the passage of time, as established in the ECtHR case law.

Fifth, while persons are not deprived of retirement pensions or benefits, in some individual cases a threshold of hardship is crossed due to the introduction of severe mechanisms of re-calculating the amounts of pensions. These reductions particularly affect vulnerable persons, especially persons with disabilities and the elderly. The ECtHR has emphasized in its case law that the reduction of benefit cannot be disproportionate to the point of providing individual without means of subsistence.

Sixth, the legal solutions are also incompatible with prohibition of discrimination in Art. 14 ECHR, because those who were positively vetted and continued service in the democratic state suffer from the cap on retirement pensions and benefits, while their contribution to the social security system after 1990 alone would entail that they are entitled to higher amount of retirement pension than an average one in the universal system of retirement pensions.

Therefore, as it currently stands, the Act of 16 December 2016 cannot be regarded as a means of transitional justice under ECHR.