9
The Failure to Prosecute Communist Crimes

Prosecution

There is a growing body of literature dealing with the choices and dilemmas new democratic regimes face when they try to address the wrongdoing and atrocities committed by their predecessors.¹ (We discussed some of the related issues in Chapter 7.) In the present chapter, we limit ourselves to tracing the empirical patterns related to how the criminal justice system and the legislature have handled these matters.

When the new Solidarity-led government was installed in August 1989, it warned against any calls for vengeance, but promised to prosecute crimes and major human rights abuses committed by Communist state functionaries. Nine years after the collapse of communism in Poland, the vast majority of state crimes committed under the former system remain unpunished. There has been only one major trial of persons responsible for Stalinist crimes against the Polish nation. It lasted three and a half years and eventually resulted in convictions on charges of torture and cruelty for all twelve defendants, former functionaries of the Ministry of Public Security. Eleven of the defendants were sentenced, in March 1996, to prison sentences ranging from four to nine years, while one received a suspended sentence. All of them appealed against their sentences. In a parallel case, a single defendant, charged with similar crimes, was sentenced to five years in prison. There are, however, numerous cases of major crimes, where all the necessary conditions for prosecution seem to be met – the crimes are well-documented, the culprits are identified and the relevant legal regulations are in place – yet no action is taken, despite the fact that Poland’s courts, at least in principle, are now independent.²
There have been no convictions of top officials either from the Stalinist or post-Stalinist period. Even the president of the Supreme Court, Justice Adam Strzembosz, has declared that ‘in Poland, there is no equality before the law; horrendous crimes [zbrodnie] committed [in the past] for political reasons are virtually ignored by the legal system’ (1994:4). He also emphasized the criminal responsibility of many members of the Stalinist ‘justice’ system in Poland, who sanctioned torture and condemned hundreds of thousands of innocent people to death or long imprisonment in inhumane conditions. He found the impunity of these officials unacceptable and disagreed with those who claimed that prosecution after such a long time would be too cumbersome. In his view, ‘technical difficulties appear insurmountable [only] when there is no political will [to prosecute]’ (1996:17).

While Justice Strzembosz and many other supporters of prosecution are willing to make concessions to the advanced age of those concerned and do not insist on making them actually serve their sentences, they want to hold them accountable. The backers of this approach maintain that such trials would strengthen the new democracy, help reveal the facts and serve as a warning for the future (Strzembosz, 1994:5). Others prefer to leave the past to the historians and emphasize the political context of these abuses. Heated debates notwithstanding, the issue of ‘historical justice’ appears to have been resolved by default, simply by persistent dodging, by the post-1989 political élites, of any actual or potential legal actions against those responsible for the police-state crimes of the past era.

Even in those very rare cases in which legal action is initiated against individuals suspected of violent state crimes committed during the communist period, the police, the Procuracy and the judiciary move extremely slowly, bureaucratic obstacles appear again and again, and an impressive array of legal chicanery is employed to prolong or stall the proceedings. Political manipulation, as well as the intimidation of judges, prosecutors and witnesses, have been well-documented. The few post-Stalinist cases that did reach the court despite flagrant political interference, endless legal haggling and conspicuous stalling tactics, include: the 1970 Gdańsk massacre that resulted in several dozen deaths (Case Study 5, below); the shooting deaths of the nine ‘Wujek’ miners in 1981 (Chapter 4); the 1982 assault on the crowd in Lubin (Chapter 4); the 1983 murder of Przemyk and the 1984 murder of Father Popiełuszko (Case Studies 1 and 2). Only one of these trials (Case Study 1) has resulted in convictions. Of the remaining four cases, all of which
ended in acquittals, the Court of Appeal ruled that they should be retried because they were handled improperly.

The case against those accused of being responsible for the 1970 massacre of workers in Gdańsk illustrates some of the problems that have plagued trials of high-ranking officials of the communist era (Case Study 5).

Case Study 5: The Gdańsk massacre trial

In the 1970 Gdańsk massacre case, twelve people – politicians, generals and colonels – were criminally charged, in 1995, with responsibility [sprawstwo kierownicze] for the deaths of 44 persons who had been killed by troops in a military assault on protesting workers. Among the accused were former high-level officials, including a Deputy Prime Minister, the Interior Minister, the Minister (General Jaruzelski) and Deputy Minister of Defence, and several high-ranking military dignitaries (Podemski, 1995c:22). According to archival data, at a special meeting, the then First Secretary of the Party, Wiesław Gomułka, authorized the use of live ammunition against workers, and his decision met no opposition (KB, 1995).

The investigation, initiated in the fall of 1990, lacked a good plan or organization. Three and a half thousand witnesses were questioned, at least 90 volumes (200 pages each) of mostly handwritten evidence were produced, but it was clear all along that the manner in which this material was being compiled by the War Navy Procuracy would make a trial very unlikely (Lanckorzyński, 1996; Podemski, 1995a,c). There was, for example, no attempt to do ballistic tests that would establish whether the troops fired directly at the crowd or – as the Procuracy claimed – the fatalities had been accidentally caused by ricocheting bullets. It seemed that the War Navy Procuracy hoped to drag the investigation out until 1995, when it would have to be discontinued under the statute of limitations.

Because of the efforts of an aggressive new head of the Gdańsk district Procuracy, Leszek Lanckorzyński, in 1993, the investigation was turned over to the civilian jurisdiction, where it belonged. Lanckorzyński gained access to secret files of the 1971 investigation that were said to have been destroyed but that had been saved by someone in the Procuracy. They contained forensic evidence, including protocols from autopsies and the bullets removed from bodies of the victims, which disproved the ricochet theory. When his intention to proceed with the case became clear, Lanckorzyński was subjected to strong pressure from his superiors who tried to dictate a specific framing of the charges. When he ignored their orders he was suspended in his prosecutorial duties and dismissed from his office as the head of the District Procuracy. He was informed about this decision by the then Minister of Justice and later Prime Minister, the SLD politician Włodzimierz Cimoszewicz. Lanckorzyński’s
successor shared his fate when he tried to continue the case (Lanckorzyński, 1996).

When the case against the 12 accused eventually reached the trial stage, the Gdańsk district court made three consecutive attempts to frustrate the case by trying to dismiss it, trying to move it to the War Navy court and, finally, by asserting that the only appropriate venue for this kind of trial was the State Tribunal. The district Court of Appeal ruled against each of these moves, however (KB, 1995; Lanckorzyński, 1996; Podemski, 1995c). Even when the repertoire of jurisdictional and other challenges was exhausted, the beginning of the trial was repeatedly postponed when various defendants failed to show up in court, allegedly for medical reasons.

In 1996 the court discontinued proceedings against the Ministers of National Defence and the Interior (Jaruzelski and Kazimierz Switała). It ruled that the charges against them implied violations of the constitution that should be dealt with by the State Tribunal. Given that they were not charged with violating the Constitution but with responsibility for murder committed by troops executing their action plans, the court’s decision had no legal justification. In any case, the matter was not submitted to the Tribunal as this would have required an initiative from parliament at a time when it was dominated by the ex-communist coalition. Eventually, the Court of Appeal ruled that Jaruzelski should be criminally indicted and face trial. As of mid-1998, court proceedings against four military and police officials had been suspended and the opening of the trial of the remaining defendants continued to be delayed because it proved impossible to gather all of them for a formal reading of the charges. Jaruzelski was among those who claimed they were unable to appear in court for health reasons, although his health did not prevent him from working in his office and appearing frequently on television and radio interviews, where he vigorously defended his good name.

The small number of cases brought to trial and their inept handling, described here and in Chapter 4, suggest a near-paralysis of the post-communist justice system in cases involving criminal violence by the communist security and military apparatus. They also demonstrate the total impunity of high-ranking officials who were directly or indirectly responsible for the murderous effects of these actions and were actively involved in cover-up schemes related to them.

In addition to the evident failure to prosecute even those major human rights abuses that were criminal under the law that existed then, our research has uncovered a number of other strategies aimed at securing the impunity of those implicated in such crimes, including struggles over the statute of limitations; the courts’ access to secret services operational files; and parliamentary privilege.
The Statute of Limitations

In April 1991, the Polish parliament passed a law which stated that the statute of limitations did not apply to Stalinist crimes against humanity. This was a symbolic gesture that emphasized the applicability of an existing article of the 1969 Criminal Code that had been interpreted as pertaining to war crimes only. The new interpretation was fully consistent with international law, notably the United Nations Convention of December 1948. In September 1991, the Constitutional Tribunal ruled against expanding the category of crimes exempted from the statute of limitations beyond crimes against humanity, but it did not rule out the feasibility of an extraordinary bill on a circumspect postponement of the expiration of statutory limitations in a well-defined category of cases.

Indeed, given that most of the serious, violent police-state crimes were criminal even according to the prevailing law of the time, the legal controversy around the right to prosecute centred not on the issue of retroactive criminalization but on a possible retroactive reinterpretation of the statute of limitations in relation to this type of crime. To quote a Hungarian legal scholar, Csaba Varga:

The source of the dilemma is that the same regime [that] enacted the law...also initiated deeds [that] can be classified as crimes, while hindering the prosecution of these deeds and even rewarding their perpetrators – and, moreover, succeeding in remaining in power for decades. By the time [the regime] collapsed, the time fixed in the law on statutory limitations...had already passed (1993:2; 1995).

Although it may seem reasonable that where ‘prosecution was hindered, the mere physical passage of time could not initiate statutory limitations’ (ibid., 5), and that by postponing its commencement, we show that we ‘take seriously the old law’ (ibid., 6), many lawyers and political actors in East/Central Europe have vigorously argued against such a move. Indeed, the Hungarian Constitutional Court pronounced in its 1992 decision that the original terms of statutory limitations must be observed. It ruled that, ‘one, statutory limitation is not self-limitation of the punitive power of the state but one of the basic rights guaranteed to every subject and that, two, statutory limitation is one of the constitutional pillars of legal security and, as such, it cannot be interfered with by legislative means’ (ibid., 9).
The minutes of the Polish parliamentary debates provide an interesting insight into political divisions over a 1995 bill on deferment of the starting-date of the statutory limitations period in cases of serious crimes allegedly committed by functionaries of the state apparatus at the time when effective prosecution of such crimes was precluded. The only political bloc vigorously opposing the legislation was the ruling ex-communist SLD. Its representative, Krzysztof Baszczyński, declared that, according to his parliamentary caucus: ‘The proposed amendments are contrary to the principles of the democratic state based on law.’ And he added: ‘I wonder how long we are going to continue these exorcisms over the past’ (Sejm R.P., 2 March 1995, 44:108–9).

Nevertheless, the momentum in favour of the bill was so strong that even the SLD’s coalition partner, the rural party PSL, supported it. Its representative, Stanislaw Bartoszek, offered the following argument: ‘By blocking enforcement, the state authorities enabled, in a criminal manner, an expiration of the statute of limitations and secured the impunity of the perpetrators. Thus acquired rights should not be legally protected and should be removed by a legislative act that would allow investigation and prosecution’ (Sejm R.P., 2 March 1995, 44:110).

Thanks to the PSL’s support, the bill was passed and the Criminal Code was amended. Based on this amendment, the normal statute of limitations period for serious crimes against persons, liberty or the justice system committed by state functionaries in the 1944–89 period is counted from 1 January 1990, when their prosecution became politically possible. The timing of the bill was very significant because of the approaching 25th anniversary of the December 1970 massacre of workers in Gdańsk. Prior to the amendments, the statute of limitations on the murders would have run out. All the earlier stalling tactics surrounding this case were carried out with an eye on this date. The bill was a blow to Jaruzelski and his co-defendants, as well as to the ex-communist power bloc that was adamant in condemning the bill. Yet neither the passage of the bill nor the inclusion of its provisions in the 1977 Constitution put an end to the manoeuvres that involved both the defence and the prosecution (Case Study 5). Early in 1998 a journalist wrote: ‘This trial will never end. The Procuracy . . intends to call “only” 1200 witnesses. I have calculated roughly that given the current pace of dealing with this case, the last witnesses – if they live so long – will be called to give their testimony in the year 2043’ (Ostrowski, 1998:21).
The courts’ access to secret files

The law on state secrets and related regulations contained in the 1990 Law on the MSW, UOP and the Police has been repeatedly used in subsequent years to deny the courts access to vital information safely hidden in the Communist secret archives. Despite many legislative proposals, no independent agency has been created to handle the archives, and they remain in the hands of the Interior Minister, the new security agency UOP and the military secret services. All these agencies have relied heavily on former communist security-forces cadres. Their solidarity with former colleagues and, indeed, their fear of exposure of their own past deeds may be understandable. Perhaps less evident is why the non-communist governments of the 1990–3 period failed to challenge and revise laws that denied the courts access to the communist operational files that were crucial for identification of the secret-police individuals involved in various cases of alleged murder, torture and other major violations of human rights. A number of important investigations and trials were aborted when potentially critical evidence was refused by the Interior Ministers of the day, on the basis of the clearly outdated law. This reluctance to act suggests that the former secret services continued to have a strong grip on these governments, both through secret collaborators and because some members of the post-Solidarity political élites were involved in business ventures with former members of the *nomenklatura*.

In June 1994 the Constitutional Tribunal ruled that unless disclosure threatened the state’s interest, the ‘state secret’ classification did not apply to the identities of former secret services operatives and collaborators. The Tribunal found the existing law on this matter inadequate and urged the parliament to initiate necessary changes (Bieroń, 1994:15). The following year, Minister of the Interior Andrzej Milczanowski decided to declassify those archival materials from the period 1944–56 that were kept in the Central Archives of his ministry and in the UOP; in 1996 this period was extended to 1965. His order did not extend, however, to the personal data on operative officers and secret agents. Nor did it apply to all operational records contained in the archives.

In 1995, the Law on the MSW, UOP and Police was amended to make it easier for the prosecution to obtain necessary classified material or to secure the release of witnesses – former or current functionaries of these agencies – from the obligation to keep state secrets. The new law dictates that if the Minister of the Interior refuses the public prosecutor’s request, but the Minister of Justice in his role as the prosecutor general concludes
that this would prevent prosecution of major crimes of violence, Interior has to grant the request. These changes did not apply, however, to the military secret service archives. Moreover, legal enactments do not necessarily translate into deeds when there is no independent control over archival material and both ministers represent the same government. In any case, the time that passed between 1989 and the eventual partial loosening of the strict laws eroded considerably the feasibility of successful prosecution of those past wrongdoings.

**Parliamentary privilege**

Prosecution for past and current crimes is also blocked by the extremely generous provisions of impunity attached to elected offices. Following in the footsteps of the Communist Constitution, the temporary Little Constitution of 1992 and – even more explicitly – the new Constitution of the Polish Republic of 1997 granted full immunity from civil liability, arrest, criminal prosecution and even criminal investigation to members of parliament and senators. While civil liability for actions taken in connection with official duties is barred absolutely (unless personal goods are involved), immunity from prosecution for violations of criminal law is tied to the duration of the politician’s term. This immunity extends to all offences, from impaired driving and fiscal and economic offences to violent crimes, including crimes under investigation prior to the elections (Banaszak, 1994). This privilege may be suspended by a two-thirds majority vote in the respective chamber (the Sejm or Senate) with at least one half of the members present.

This sweeping privilege, granted to 560 individuals (460 members of parliament and 100 senators), has provided shelter to a sizeable number of people suspected of a range of offences, including state crimes and the appropriation of public money. The best-known cases include Senator Aleksander Gawronik, a one-time SB employee accused of major fiscal offences and implicated in one of the notorious financial scams of the transition era (‘Art-B’), and Ireneusz Sekula, the deputy Prime Minister in the last communist government and a member of the post-communist parliament, suspected of large-scale fraud. In both cases, recommendations to lift these individuals’ parliamentary privilege went to a vote and failed to pass; in the case of Senator Gawronik, by just one vote – his own (Paradowska and Janicki, 1995). Sekula’s parliamentary privilege was eventually lifted by parliament, following massive criticism by the mass media, the public and opposition parties of the ruling coalition’s protection of alleged criminals. By that time, potential charges were expanded
to include the illegal investment of considerable public funds and offences related to conflict of interest, stemming from the period of his presiding over the Main Customs Office (GUC) in 1993–5.

There have been many other cases, however, in which parliament refused the Procuracy’s requests to revoke the immunity of incriminated parliamentarians. Parliament’s power to block investigation and prosecution of serious crimes opens the door to inter-party deals based on reciprocal support for perpetrators coming from their ranks; it also creates a debt the individual being protected may be expected to pay back through financial pay-offs, illicit opportunities or political loyalty. Those who enter parliament in order to fend off prosecution for their earlier economic offences sometimes contribute to the election campaigns of several key parties to ensure their support in advance. This appears to be what happened in the case of Senator Gawronik, for example (Poppek, 1994:13).

Yet, in many cases, the Procuracy itself has not been very eager to press for the revocation of the privilege of well-connected parliamentarians. In one such case, Minister of Justice Jerzy Jaskiernia dismissed a senior public prosecutor, Jerzy Zientek, hours after the prosecutor signed a request for the suspension of the parliamentary privilege of presidential candidate Aleksander Kwaśniewski. The request was made in connection with Kwaśniewski’s failure to disclose in his property/income declaration considerable assets owned by his wife. Needless to say, the Procuracy’s request was promptly withdrawn (Jach., 1995/96).

The issue of parliamentary privilege was one of the points of contention in the debates leading to the enactment of the new Constitution. In spite of a number of proposals (including one from President Kwaśniewski) that attempted to limit the scope of immunity granted to the parliamentarians to actions related directly to their office, the long-awaited Constitution, passed by the Parliament in 1997, went in the opposite direction, making the sweep of that privilege even more inclusive.

While in some cases, privilege is used to block prosecution of offences committed while serving in parliament (for instance, many impaired driving cases), it is widely believed that some individuals have sought elected office and received organized backing from their party in order to avoid prosecution for crimes committed earlier or for criminal involvement of a more continuous nature. There is a striking parallel here with the former practice of some Communist Party members who used their membership as an effective shield from arrest and prosecution, even for common criminal offences. They could not be charged unless the Party consented by expelling them from its ranks.
The past is history

A number of factors have to be taken into consideration in explaining the evident paralysis of the justice system with respect to communist state crimes:

1. The first post-1989 government opted for a full and unqualified continuity of the state and law and an evolutionary, rather than revolutionary path of change. This choice implied a deliberate reluctance to prosecute former state crimes and a preference for inaction or even formal absolution of responsibility for the past abuses of power and at least lesser state crimes. The pressing and enormous needs related to socio-economic restructuring and the importance of looking to the future rather than the past were also often invoked as reasons for downplaying the issue of past human rights abuses.

2. The 1980s mobilization of police-state resources, aiming first at suppressing Solidarity and later at tying it to the process of top-down reform and class conversion of the nomenklatura has contributed to the enduring strength and influence of former secret-service networks. They form an invisible but powerful web that pervades the new state security services, private security companies, the criminal underground, the private and state economy and agencies of the state apparatus. The lack of openness about past secret collaborators currently active in important areas of policymaking, the legislature, administration, the criminal justice system and the media has left these institutions vulnerable to hidden pressures and the effects of covert actions, both past and present, sponsored by state secret services and private agencies or networks.

3. The strategy adopted by the last communist Interior Minister, General Kiszczak, and the Party’s First Secretary, General Jaruzelski, was to be perceived and to become key players in the ‘transition’ process – the champions of democratic revolution and political partners of the Solidarity leadership. Both these veteran Communist politicians became top office-holders in the first semi-democratic government, and they were visible guarantors of the continuity of the state, the security apparatus and the conversion process of the nomenklatura into a capitalist class. Jaruzelski became the President of Poland and Kiszczak combined the offices of deputy Prime Minister, the Interior Minister and the Chair of the Committee for Legality at the Council of Ministers. The Committee was a body established by Jaruzelski in the Martial Law period and preserved by the first Solidarity Prime
Minister, Mazowiecki. The peculiarity of this committee was that the Justice Minister, Prosecutor General and the Supreme Court president were all subordinated to its chairman, the Minister of the Interior. This successful strategy meant Kiszczak and Jaruzelski, at least in the initial post-communist period, were both untouchable and extremely powerful. Any investigation of past state crimes that could lead to their exposure had to be discouraged. According to our data they appear to have been implicated in the majority of serious cases of state-sponsored criminal violence and cover-up schemes in the period studied.

4. The ability of former Communist élites and power networks to maintain their dominant economic and political position has been expedited by their collective and individual metamorphosis. Their new socio-democratic and capitalist façade would be threatened by a credible exposure of their dark past as individuals and/or as part of the collective that ruled a criminal regime. The former young *apparatchiks* would have their carefully crafted image as pragmatic technocrats sullied if their Polish and Soviet intelligence connections were revealed, for example, through the disclosure of communist military intelligence archives. The conspiratorial nature of the communist police-state produced dense ties of shared culpability among the Party and security cadres; most of them were culprits and could be indicted for some illicit deeds. It is therefore not surprising that they continue to be collectively interested in keeping their past out of the courts. The ex-communist parliamentary bloc SLD has proven to be an unabashed and relentless opponent of any legislative measures that could undermine these efforts.

5. The communist legacy of a corrupt and politically servile justice system; failure to conduct lustration or verification of judges; decades of negative selection for the judiciary and, especially, for prosecutors’ appointments; personnel continuity in the secret services and police: all have contributed to both the justice system functionaries’ considerable solidarity with former élites and their susceptibility to corruption, blackmail and manipulation.

6. The considerable means of intimidation that the former secret security networks have at their disposal can always be deployed when other tactics to obstruct justice or political process fail. Useful for these purposes are numerous private security companies dominated by former secret service operatives, especially those screened out by the SB/UOP verification procedures (see Chapters 7 and 8).
7. The lack of lustration of the post-1989 top state officials made some of them obvious targets for various pressures and blackmail. This concern may apply to several Justice Ministers/Prosecutors General.

8. Drastic underfunding of the justice system in the transition period was at least partly responsible for the high level of vacancies; the outflow of younger, better educated and abler lawyers to the private sector and the acceptability of corruption as a source of income augmentation for many of those who remain.

9. Finally, there are very real problems of complexity, inadequate evidence and difficulty in handling these cases in democratic courts of law. Many of these crimes took place long ago and they were accompanied by organized denial, manipulation, destruction of evidence, and so forth. The stalling tactics implemented in the post-1989 period have been calculated to render these crimes less and less prosecutable, due to the sheer passage of time and related problems of fading memory, the advanced age of some defendants and witnesses, and expanded opportunities for manipulation, disinformation and interference with due process.

In sum, aside from more philosophical arguments, there are powerful interests vested in the often-repeated slogan that the past should be left to historians and kept out of courts of law. However, in the absence of any interest among the ‘political class’ in Poland in taking the route of a Truth and Reconciliation Commission, the choice of post-apartheid South Africa, the courts may be the only forum for disclosure and clarification of some of the most disturbing aspects of that past. This applies not just to the crimes prosecuted, but, even more importantly, to the mechanisms of ruling that made them possible.