**Totalitarianism vs. Democracy: Teaching Legal Ethics in Diverse Regimes**

This lecture is divided into several sections:

1. How the lawyers became helpless in time of totalitarianism – how to solve the question of unjust law of the previous regime?
2. Independece and accountability of the lawyers in democratic and totalitarian regimes.

1)**The ways, how legislative and judicial power solve a conflict between two different regimes , totalitarian and democratic system existing one after another. How to handle the conflict of the „UNJUST LAW“ of the previous regime.**

**a) amendment of the law - new law with no retroactive effects**

**b) „This law was not a law at all. It was a perversion of law, and therefore it has always lacked validity“.**

**c) the possibility of accepting moral arguments as a priority of one positive prior to other positive law, breaking the standard legal principles such as legal certainty or prohibition of retroactivity.**

**d) Interpretation of the law valid in times of the authoritarian regime**

What principles of law do we support and what principles of law are we willing to waive while applying any of these solutions?

**Materials:**

Radbruch, G. (1946). Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristen-Zeitung 1*. translated by Litschewski Paulson, B. and Paulson S.L. (2006) Statutory Lawlessness and Supra-Statutory Law. Oxford Journal of Legal Studies, vol. 26, no.1. pp.1-11.

Hart, H. (Feb. 1958). Positivism and the Seperation of Law and Morals. *Harvard Law Review, 71*(4), 593-629.

CASE OF STRELETZ, KESSLER AND KRENZ v. GERMANY, Applications nos. 34044/96, 35532/97 and 44801/98 (STRASBOURG 22. March 2001).

Decision of Constitutional Court of ČSFR Pl. ÚS 1/92 (“Unlike a totalitarian system based on immediate purpose and never linked to legal principles, the less the constitutional and democratic principles are based on completely different values ​​and criteria. Each State, much less the one who was forced to suffer more than 40 years of fundamental rights violations by totalitarian power, has the right to establish a democratic establishment, to apply also legal measures aimed at averting the risk of subversion, the possible recurrence of totalitarianism, or at least their limitation. Legal certainty must be the certainty of its content values. The now-established rule of law, which is based on value discontinuity with the totalitarian regime, cannot therefore accept criteria based on a different system of values. Respecting continuity with the old system of values ​​of the previous law would not, therefore, be a guarantee of legal certainty, but would, on the contrary, jeopardize the values ​​of new ones, jeopardize legal certainty in society, and shake the confidence of the citizen in the credibility of the democratic system”).

**Alkotmánybíróság (AB) [Constitutional Court] no. 11/1992** (Contending that the change of the system is based on legality.) The principle of legality requires the constitutional government to demand that the rules of the rule of law be fully applied. Political changes were made in a procedurally flawless manner, according to the rules of the old regime, including the legislative process, thereby preserving the binding force of these old legal norms. The old law retained its validity. Fundamental requirements of the constitutional state cannot be eliminated by reference to the historical situation and the requirement of justice in the rule of law. The rule of law cannot be based on the weakening of the rule of law. Legal certainty is more important than necessarily partial and subjective injustice.

Task:

**Analyze and point on particular characteristics of the ways transitional justice from previous task on the text of Lon L. Fuller – The Problem of the Grudge Informer. What are the standpoints of particular deputies, what solution do they propose and how would you categorize the proposals according to the first task?**

**2) Independence and Accountability of lawyers in democratic and totalitarian regime**

Development of the statutory law regulating lawyers in Slovakia

Period of the Slovak republic under influence of the Nazi Germany ( 1939-1945)

**Government regulation no.6/1939 Coll.**

On the service of civil servants, judges and lawyers.

§ 1.

The oath, all incoming civil servants have to vow, is as follows:

"I swear to the living God that I will always be faithful to the Slovak state and obedient to its government, I swear that I will obey all laws and regulations, that I will be diligent, conscientious and impartially fulfilling my official duties under the laws and regulations that **I obey commands of my superiors,** and I will take care of all my actions for the benefit of the Slovak state and the interests of the service, so God help me. "

Attorneys following the registration in the Chamber of Lawyers make this oath:

"I swear to the living God that I will always be faithful to the Slovak state and obedient to the government, I swear that we will keep all laws and regulations in force, and that I will fulfill all my duties conscientiously.“

The period of the rule of the Communist party in Czechoslovakia (1948-1989)

**Act no. 322/1948 Coll. on Advocacy**

§ 1

The role of advocacy.

Attorneys are required **to contribute to the maintenance and consolidation of the people-democratic regime and to assist state authorities in the implementation of law**; they do so by providing legal aid to the parties, in particular by giving legal advice, writing legal documents, representing the parties, and acting before the courts and other public authorities.

Act no. 57/1963 Coll. on Advocacy

The role of the advocacy

§ 1

Czechoslovak law provides legal assistance to citizens, organs and organizations according to the legal order of the Socialist Republic and in accordance with socialist legal knowledge

§ 2

Advocacy assists with all its activities in educating citizens to preserve laws, to protect socialist property, to observe labor discipline, to respect the rights, honor and honor of fellow citizens, to honor all obligations towards the state and society, and to adhere to the rules of socialist coexistence .

The period after the fall of Communism ( 1989-)

Act no. 132/1990 Coll. on Advocacy

A Duty of the Advocacy

(1) Advocacy helps to establish constitutional citizens' right of defense and to protect other rights and interests of citizens and legal entities in accordance with the Constitution and the laws.

Advocacy is an independent profession, that could be carried out only by this statute.

**Shapes of Independence of the lawyer** – main focus on the political independence

* Financial
* Economic
* Competential
* **Political**
* Personal

**Materials:** Mešencová Case

 Polakovič case

Introduction to Mešencová case

**Attorney Maria Mešencova was removed from the list of lawyers because she became a police agent.**

In May 2004, Mrs. Mešencová was appointed a defense attorney of the Ukrainian citizen, who was accused of fraud - smuggling "oil and mineral oil" along with about eighty others. The attorney was subsequently approached by her colleague, lawyer P.Polakovic, who represented another accused in the same case and offered her client and the attorney herself a bribe of SKK 100,000 (app.3500 USD) for each for changing the original testimony. Attorney Mešencova retained a different expectation than her colleague expected, namely to announce the offer to the police, and in the light of the evasive need, she then accepted the police offer to help police officers get evidence of her colleague's corruption

The Slovak Code of Criminal Procedure has set the Slovak police relatively far-reaching possibilities of investigating corruption, including the possibility of a relatively extensive use of the agent in this area "when detecting, detecting and indicating the perpetrators of corruption, agent and other person as a member of the Police Force may be appointed by the Prosecutor at the suggestion of a police officer of the Ministry of the Interior of the Slovak Republic. "

The attorney was not an agent against her client, but against her colleague who tried to bribe her.

The lawyer who attemped to commit a bribery asked the Slovak Bar Association (SAK) for disciplinary prosecution of the lawyer - Mešencová. Slovak Bar Association has concluded that the lawyer had no right to cooperate with the police as an agent because it threatened the independence of the lawyer in relation to the client. Because the lawyer threatened expulsion from the chamber, the matter had to decide yesterday to the Supreme Court of the Slovak Republic, which adopted a very shrewd decision. On the one hand, a lawyer according to the SR can not act as a police agent, on the other hand the NS SR refused to remove the lawyer from the chamber.

**Further reading for Polakovič case :**

* decisions of the Special criminal court where he was found guilty for attempt of bribery
* 2 Decisions of the appelate court – Supreme Court of Slovakia, that confirmed the previous decisions
* Decision of the Constitutional Court of the Slovak Republic, that revoked the decision
* Final decision of the Supreme Court of Slovak republic – the lawyer accused of bribery was aquitted.