Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe

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LUSTRATION AND CONSOLIDATION OF DEMOCRACY AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE

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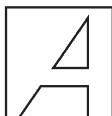

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Preface

by
Dr. iur. Stefanie Ricarda Roos,
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A country's efforts to cope with the past (particularly if that past was totalitarian or authoritarian) and the public culture of remembrance is one of the traditional work areas of the Konrad-Adenauer-Stiftung as it promotes democracy and the rule of law world-wide. The work of the foundation in this area is based on the general belief that coping with the past is a precondition for former totalitarian or authoritarian regimes to successfully transform into sustainable democracies and constitutional states. In Southeast Europe, the Konrad-Adenauer-Stiftung promotes efforts to deal with the past *inter alia* through its regional Rule of Law Program (active in the following seven countries: Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania and Serbia). Regarding the topic of coping with the past, the program's focus is on political-juridical aspects of dealing with the past, *i.e.* analysing how one can both deal and reconcile with the past through law and legal norms while respecting the limitations that the rule of law imposes.

The renowned German author, jurist, and professor of public law and legal philosophy, *Bernhard Schlink*, in his essay entitled "Die Bewältigung von Vergangenheit durch Recht" ("Coping with the Past through Law"), commented about the potential role which the law might play in coping with the past:

That which has passed cannot be overcome. [...] And law does not presume to overcome the past either. [...] Yet law can be recruited for anything which the society and politics do with the past. It can support remembrance, forgetting, and suppressing. It supports remembrance in particular through criminal prosecution, indemnification, compensation and reparation, truth commissions and tribunals, and through the granting of access to files and archives.[1]

Remembrance plays a particularly decisive role in the successful development of a political culture. This is one of the reasons why coping with the past is one of the traditional areas of work of the Konrad-Adenauer-Stiftung, which is a German political foundation: Democracy is oriented towards and dependant on openness, transparency, trust, individuality and solidarity. All of these are democratic virtues of citizens living in a democracy. A democracy which replaces a dictatorship or any other form of a totalitarian or authoritarian regime endangers its credibility (and forfeits it altogether in the eyes of the dictatorship's victims) when perpetrators go unpunished, and the new democracy does not prevent them by legal means from retaining their positions and further pursuing their careers. It therefore follows that the purpose of legal sanctions and of lustration, which is the topic of the publication at hand, is primarily the preventive affirmation of civic virtues and the strengthening of democracy.

I would like to once again refer to *Bernhard Schlink* in order to illustrate to what extent law, in particular law which serves the purpose

1 Translation by the author. The original text which is published in *Bernhard Schlink*, Die Bewältigung von Vergangenheit durch Recht, in: *Schlink*, Vergangenheitsschuld und gegenwärtiges Recht, 2002, p. 89 (89-92), runs as follows: „Was vergangen ist, kann nicht bewältigt werden. [...] [U]nd auch das Recht [maßt] sich eine Bewältigung des Vergangenen nicht an[..]. [...] Gleichwohl kann das Recht in alles eingespannt werden, was Gesellschaft und Politik mit Vergangenem machen. Es kann das Erinnern unterstützen, das Vergessen und das Verdrängen. Das Erinnern unterstützt es besonders durch Strafverfolgungen, Wiedergutmachungen, Wahrheitskommissionen und –tribunale und die Gewährung von Einsicht in Akten und Archive."

of ”lustration“, can contribute to the socio-politically crucial endeavor of coping with the past. *Schlink* writes:

> *It is not the manner in which society constructs the past and integrates it into the biography, but how it chooses the manner of construction and integration. [...] The actual contribution [of law – the author] has to be seen in the provision of forms and procedures in which the decision about the manner of construction and integration [of the past – the author] is being made. Exclusion not through a night of the long knives, but through criminal proceedings, criminal proceedings not as revolutionary tribunals, but as legal proceedings before a court, legal proceedings before a court not in judicial usurpation of decision-making power, but with the rule-of-law-induced respect for the decisions made by the legislator, [...] as what counts is the respective political discussion, publicity and enlightenment, and within this political discussion, it is the construction of the past and its integration into the biography which counts. [The specific contribution of law] to coping with the past consists in its forms and practices. They are a contribution to political culture as such.*[2]

2 Cf. Ibid., pp. 122. Translation by the author. The original quote reads as follows: Es ist ”nicht die Weise, wie Gesellschaft das Vergangene konstruiert und in die Biographie integriert, sondern wie sie sich für die Weise der Konstruktion und Integration entscheidet. [...] [Die] eigentliche Leistung [von Recht – *d. Verf.*] ist die Vorgabe von Formen und Verfahren, in denen die Entscheidung über die Weise der Konstruktion und Integration [des Vergangenen – *d. Verf.*] getroffen wird. Ausgrenzung nicht durch eine Nacht der langen Messer, sondern durch Strafprozesse, Strafprozesse nicht als revolutionäre Tribunale, sondern in rechtsstaatlichem Respekt vor den Entscheidungen des Gesetzgebers, [...] weil es um die entsprechende politische Diskussion, Publizität und Aufklärung und in dieser politischen Diskussion um die Konstruktion des Vergangenen und seine Integration in die Biographie [geht]. [Der spezifische Beitrag des Rechts] zur Bewältigung von Vergangenheit sind seine Formen und Verfahren. Sie sind ein Beitrag zur politischen Kultur überhaupt.“

The publication at hand, which was made possible through the financial support of the Konrad-Adenauer-Stiftung's Rule of Law Program South East Europe (RLP SEE), is the result of a conference of regional experts entitled "Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe" which was organized by the Political Science Research Centre Forum, Zagreb in cooperation with the RLP SEE on May 24, 2007. The conference title implies one – and perhaps the most important – of the many goals of lustration. The Council of Europe, in a report about the measures to dismantle the heritage of the former communist totalitarian systems, has appropriately described this aim as follows:

> *Lustration is meant to create a breathing space for democracy, where it can lay down roots without the danger that the people in high positions of power will try to undermine it. [...] The aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly-emerged democracy.*[3]

I would like to express my thanks to all of the authors who have dedicated their time and energy to this important project. I hope that the publication will make a valuable contribution to European deliberations on means to cope with the past, in particular through lustration, and that it provides important scientific material for discussion, in particular in the countries of South East Europe. After all, the important endeavor of coping with the past is not just the responsibility of academics – it is also the task of national political, legislative and judicial authorities, and the society at large.

Dr. iur. Stefanie Ricarda Roos
Bucharest, November 2007

3 Severin, Measures to dismantle the heritage of the former communist totalitarian systems, Doc. 7568, 3 June 1996, p. 12, para. 16.

Vladimíra Dvořáková

Introduction

Introduction

Three terms that define the topic of this volume "lustrations, consolidation of democracy and the rule of law" raise the important question: Are they really compatible or is there a strong tension or even contradiction present? Do lustrations help the consolidation of democracy and is the practice used in the processes of lustrations compatible with the rule of law? The answer is rather complicated and in particular case, studies presented in this volume, we can find pros and cons in dealing with this problem.

There is another term often used in this context: transitional justice. Although the term is broadly accepted by scientific community, the question is whether there is really the justice that we can refer only to period of transitions (and consolidation of democracy). It is clear that the period of transition, and to some extent also the period of consolidation, is specific and the problem of justice (both from the point of view of the victims and their relatives and of the values on which "new" democracy is to be founded) is very important, on the other hand the basic approach to the procedures (rule of law) that are used in the processes connected with the transitional justice, shapes the future framework in which democracy will operate.

The problem is also pragmatic one, because the decision on lustrations can influence the further development of transition and/or consolidation of the society. We have to take into consideration the role of particular actors and their ability to de/stabilise the process

of democratization; we have to take into consideration also the fact whether particular actors that are important for consolidation of democracy have even been formed (political parties, civil society, etc.); we have to ask whether "transitional justice" is not only the "dummy symbol" misused for political competition. To which level some group can be excluded from the participation on the life of the society and what would be the form of exclusion (political activities, economic activities, state administration, moral denouncement, sentence), on which bases exclusion can be done (individual or collective guilt), who decides?

There are many such questions to be asked. Maybe, the way to approach the problem is to ask the basic one. What is the goal, what is the purpose of lustrations?

The arguments speaking in favour of introducing some form of lustrations concentrate mainly on these topics:

1. Security reasons
2. Justice
3. Coping with the past

Security reasons

Just in the beginning of the process of transition the main argument was that it is necessary to prevent the destabilization of the newly formed system by the activities of hidden agents of secret police and high rank members of nomenclature who could use their network and contacts to influence decision making process or they could be blackmailed because of their past and forced to some anti-state activities. The fear was to some extent understandable because of the personal experience with secret police of the dissidents and, to a certain extent, of common citizens (the extent depended on the situation of particular country and also the historical period). On the other hand, the lustration laws are applied mostly on the activities connected with the posts in state apparatus, not on the private economic activities. With the

deep property transfers that happened during the processes of privatization and high scale corruption in the region, there could be more dangerous forms of direct influence of these former networks.

The question is how strong these arguments are seventeen years later, not speaking about the fact that a great part of the former communist countries became members of NATO, which means that those who could influence security and have the access to secret information have to go through specific screening process in which their activities during communist regime are also analyzed.

Justice

Justice, as always, is more complicated, mainly if we think about this phenomenon in the context of consolidation of democracy and the rule of law. Transitional justice is to deal with two basic aspects: rehabilitation of the victims of the regime and punishment for those who were behind the crimes that happened during the non-democratic regime. The basic redress of grievances is very important and in some sense underestimated in "new" democracies. This redress of grievances includes financial compensation to the victims and/or their relatives (mostly on very low level, if any, in particular countries) and also the "moral" rehabilitation that is even more important for the society. To know and disseminate the "personal stories" of the victims to broader public, to honour those who actively participated in the dissident movement, could be the best prevention against authoritarian temptations of those in power and it is important in creation of the liberal and democratic values in new democracies. There is a lot to be done in this field in most of the post-communist countries.

Punishment represents the other side of justice. From the point of view of the retroactivity of law the punishment of basic crimes (murders, torturing, misuse of power, corruption etc.) does not represent deep problem (these were the crimes even in the communist regime). The problems are mostly connected with the amnesties that were de-

clared during "old" regime, negative prescription of the crimes and, above all, with the evidences and witnesses. Nevertheless, even in the case where there is no possible due process of law, it is important to carry out the investigation and to inform the public about the crimes that happened.

The main challenge dealing with the rule of law are the lustrations that are mostly based on the principles of collective guilt that sometimes blur the difference between the victims and the offenders, between those who were forced to some form of collaboration with secret police (and mostly the collaboration was more or less formal) and those who were active, or even paid collaborators and whose activity led to the persecution of their fellow-citizens. To find individual guilt is very important for any form of justice, but probably technically very difficult to be done due to long period of the communist regime and the amount of people that are listed in the files of secret police in particular countries, not speaking about the fact that part of the files were often destroyed in the beginning of transition or even later.

Coping with the past

There is a broad consensus that it is very important to "know" the past, to understand it to prevent the repetition of the past. There are different sources and different scientific methods that can help us articulate scientific (nevertheless pluralistic) view of the past. The files of secret police that form the main source for lustrations and, as it seems, for official interpretation of the non-democratic past, present the only one of many sources that can be exploited in scientific research. At the same time it is the source that has to go through very careful and accurate process of the both internal and external critical analysis, and in some cases the files are even to be reconstructed. This is very important task for the experts; nevertheless the public is mostly informed about the files through journalists or even politicians that do not have any such skills and knowledge. Files are not enough to give

us the full-fledged picture about the past, the methods of oral history are to be used, as well as the methods connected with other social sciences. What is more dangerous seventeen years after revolution - the personnel connected with the communist regime or the reproduction of the political culture, the structure and decision making of the state administration, corruption...? Why there has not been almost any investigation or even trial connected with the corruption during communist regime? Wouldn't it be important to carry out such investigation and to send a message to the public that corruption is not acceptable in the new systems?

* * *

In this volume one can find lot of examples how lustrations, transitional justice and coping with the past has been solved in particular post-communist countries. These are not black and white stories; the papers reflect both the search for justice and the misuse of lustrations for political competition. We cannot get away from the past, it is part of our everyday life, whether we like it or not, it is part of our way of thinking, decision making. We have to learn from the history to prevent its reproduction, to be able to change the behaviour and culture of the society. To learn from history means to study it, to do independent research to which mainly younger generations are to be included. And there is a question whether the key term for consolidation of democracy can be "lustrations"; maybe the main break-down of the past represents the term "accountability". From this point of view there is a lot of work to be done in all post-communist countries.

I.

Theoretical and Conceptual Approach

Gábor Halmai

Lustration and Access to the Files in Central Europe

Post-communist approaches to transitional justice

Transitional societies necessarily face the past in general, and the legacy of human rights violations in the previous regime in particular. The way of dealing with the past very much depends on the power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; then there is a clear victory of the new forces over the old order.

Democracy can also arrive at the initiative of reformers inside the forces of the past, or as a result of joint action and the negotiated settlement between governing and opposition groups. Samuel Huntington studying thirty-five so called third wave transitions that had occurred or appeared to be underway by the end of the 1980s, calls the overthrow replacement, while the two less radical types of transition, between which the line is fuzzy, are named transformation and transplacement (Huntington, 1991: 124-125). The problem with this kind of categorization starts when we try to put different countries, representing unique solutions of transition, into one of the categories. Evaluating the East-Central European transitions, which are the subject of this study, Huntington for instance puts Hungary into a category of transformation, while the events in Poland and Czechoslovakia are characterized as transplacements.

In his book, the Magic Lantern, Timothy Garton Ash (1990), keeping alive „the revolution of '89" as he witnessed in Warsaw, Budapest, Berlin and Prague, has coined the term „refolution" for the events in Warsaw and Budapest, because they were in essence reforms from above in response to the pressure for revolution from below, though he uses revolution freely for what happened in Prague, Berlin and Bucharest. The changes in Hungary and Poland were not triggered by mass demonstrations like in Romania, in the former GDR or in Czechoslovakia, and reforms of revolutionary importance interrupted the continuity of the previous regime's legitimacy without any impact on the continuity of legality. Ralf Dahrendorf (1990: 8) another Western observer, argues that „the changes brought about by the events of 1989 were both extremely rapid and very radical (which is one definition of revolutions), at the end of the day, they led to the delegitimation of the entire ruling class and the replacement of most of its key members, as well as a constitutional transformation with far-reaching consequences".

But for the purposes of our topic, the more important question is how the differences in the type of transition affect efforts to deal with the past. Huntington gives the following guidelines for democratizers dealing with authoritarian crimes: a) If replacement (revolution) occurred and it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year coming into power) while making clear that you will not prosecute middle and lower-ranking officials. b) If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations, because the political costs of such an effort will outweigh any moral gains, c) Recognize that on the issue of „prosecute and punish vs. forgive and forget", each alternative presents grave problems and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive and, above all, do not forget (Huntington, 1991: 231).

Similarly, Ruti Teitel argues that trials „are well suited to the representation of historical events in controversy" and are „needed in peri-

ods of radical flux" (Teitel, 2003: 6). András Sajó (2003: xix) observes that, if Teitel is right, then perhaps there was no radical flux in East-Central Europe, at least not radical regarding the past. But whatever legal choices of transitional justice a state may or may not choose dealing with the past, the overwhelming majority of academics argue that, in one form or the other, it is a state's obligation both under domestic constitutional and international law. But of course, there are also arguments against every kind of post-communist restitution and retribution. The most radical among them concludes that one should target everybody or nobody, and because it is impossible to reach everybody, nobody should be punished and nobody compensated (Elster, 1992: 15-17).

The main complementary rationale for defending a transitional justice policy by new democracies is to provide recognition to victims, as right bearers on one hand, and to foster civic trust on the other (Greiff, 2005: 524). To formulate it differently, the new states must strive to fulfil different obligations that it owes both to the victims of human rights violations and to the society (Méndez, 1997: 11-12). These possible obligations are the followings:

1. To do justice, that is to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature;

2. To grant victims the right to know the truth; this implies the ability to investigate any and all aspects of violation that still remain shrouded in secrecy and to disclose this truth to the victims of justice, to their relatives and to the society as a whole;

3. To grant reparations to victims in a manner that recognizes their worth and their dignity as human beings; monetary compensation in appropriate amounts is certainly a part of this duty, but the obligation should also be conceived as including nonmonetary gestures that express recognition of the harm done to them and an apology in the name of society;

4. States are obliged to see to it that those who have committed the

crimes while serving in any capacity in the armed or security forces of the state, should not be allowed to continue on the rolls of reconstituted, democratic law enforcement or security-related bodies.

Not all of these four obligations are necessarily fulfilled in every transition. As it was suggested by Huntington, in cases of transformations and transplacements, to prosecute is not well advised. The way „justice" is defined depends wholly on who holds effective political power. As Roger Errera (1992) puts it: „Memory is the ultimate form of justice." In this sense truth-telling can be an alternative to prosecution and punishment. But there are also other legitimate grounds for failing to prosecute. One of the legitimate reasons why a successor government may be unable to prosecute those responsible for human rights abuses during the tenure of the prior regime is, if the security forces under the control of, or loyal to the previous regime, may be so powerful that any attempt to prosecute them or their political allies could lead to events dangerous to the transition. Another reason can be, if the state is facing insuperable practical difficulties that make it impossible to punish: absence of evidence, a dysfunctional criminal justice system, economic crisis, enormous amount of time to prepare (Zyl, 2003: 54-60). Also, disqualification as a penalty, which can serve the means of decommunization, is not a necessary element of the transition. Many academics argue that decommunization is based on the incoherent idea of collective guilt, and it is not a process which a sovereign nation willingly inflicts upon itself, but rather an elite power game (Holmes, 1994: 33-36). With very few exceptions, ordinary citizens in Central Europe care more about personal security and day-to-day survival, so popular clamouring for revenge was very rarely to be heard.

But the new governments answered these calls for purge, „lustration", or at least for information about those who had committed human rights violations differently. Under pressure from former Eastern dissidents, the German government responded by opening the files and purging the past through public trials. Then Czechoslovak Repub-

lic, with perhaps the harshest approach, required nearly everyone to be checked against the records of the secret police and to be presumed guilty if listed there. Poland wrestled with the question and in the end did not ask it too loudly in public. Hungary has adopted the view that the best way to deal with the past is to do better now; in other words, for the new Hungarian state, „living well is the best revenge" (Halmai, Scheppele, 1997: 155-184).

Fulfilling their obligations the successor states seemed to find two ways how to demonstrate a clear break between the old regime and the new order: a) dealing with those who participated in, or benefited from; b) adhering to the new governments pronounced commitments to principles of democracy and the rule of law (Kritz, 1995: XIX). The first way is about the repression of the past, while the second one is focusing on the future.

In different sections of this paper I will concentrate on different approaches dealing with the past, or as Timothy Garton Ash puts it, using the German words, which are impossible to translate: Geschichtsaufarbeitung and Vergangenheitsbewältigung. Ash differentiates among „four ways to the truth": a) legal procedures, court trials; b) vetting and lustration of public officials; c) truth and reconciliation commissions; d) access to the files of the previous secret police (Ash, 1997).

This list of approaches is completed by many authors with a fifth way of dealing with the past, namely restitution of property or material compensation to the victims. Although I will not elaborate this approach further, it is clear that there is a growing consensus in international law that the state is obligated to provide compensation to victims of egregious human rights abuses perpetrated by the government, and if the regime which committed the acts in question does not provide compensation, the obligation carries over to the successor government (Kritz, 1995: XXVI-XXVII).

Since historical commissions of inquiry, which were set up in South-Africa, Latin-America, and in some cases performed by wholly international bodies, such as the truth commission for El Salvador or the UN war crimes tribunal for Rwanda, were not used in East-Cen-

tral Europe, I will not deal with this approach here.[1] But of course, most of the functions of these commissions, establishing a full, official accounting and acknowledging of the past are fulfilled by the provided access to the files of the previous regime.

Lustration as administrative penalty

Similarly as great a challenge to transitional democracies and the rule of law represent the different kinds of non-criminal administrative sanctions, the joint aim of which is to purge from the public sector those who served the repressive regime. The idea behind these processes is the prevention of human rights abuses through personnel reforms by excluding persons who lack integrity from public institutions, or at least by informing the general public, especially the voters, about the past of those who run for a public position. In the latter cases (milder forms of lustration), the only sanction is the publication of the data on the involvement of the public officials in one of the repressive institutions, for instance the secret police of the previous regime. Besides lustration in former communist countries the processes to exclude abusive or incompetent public employees in order to prevent the recurrence of human rights abuses and build fair and efficient public institutions is a general characteristic of countries emerging from conflict or authoritarian regimes. Recent examples include UN vetting efforts in El Salvador, Bosnia and Herzegovina, Liberia and Haiti, but also the „Debaathification" process in post-war Iraq. As the Secretary General's Report on The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies puts is: „Vetting usually entails a formal process for the identification and the removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."[2]

1 Several variations of the truth commissions are covered at length in each of the three volumes of (Kritz, ed., 2005).

2 UN Doc. S/2004/616, p. 17.

But we cannot forget that there have been many transitions in which there was no vetting or lustration, not even of most important rule of law institutions (e.g. Spain, Chile, Argentina, Guatemala, South Africa), and also in East-Central Europe, besides the more extensive vetting and lustration procedures, as the one in the Czech Republic and East Germany (the former German Democratic Republic, GDR), there have also been transitions with very modest and sector specific vetting as in Poland and Hungary. During the revolutionary changes in East Germany, as well as in Czechoslovakia, after the 1989 Velvet Revolution, vetting and lustration had to be taken as a part of the broader politics of decommunization which targeted exactly the personal aspect of the whole process of post-communist political and legal transformations (Priban, 2007).

Vetting in the unified Germany took place in two different arenas: On one hand, elected representatives on the local, state and federal level were frequently asked about their "first life" in the GDR. In some states (Länder), persons who had worked for the secret police could not be elected mayors. But since members of parliaments cannot be recalled or impeached for prior non-criminal misconduct, any screening conducted in parliaments was not likely to have consequences beyond public expressions of indignation by the 'clean' political parties. The vetting of the East German public sector, in contrast, had profound impacts on the lives of many citizens, on the legitimacy of institutions and on the perceptions of culpability (Wilke, 2007).

The vetting of public sector employees was part of a larger process of downsizing the public sector. In 1989, there were 2.2 million public sector workers in the GDR. Through privatizations and layoffs, this number decreased to 1.2 million in spring 1991, long before the process of personnel reduction was over. Vetting was the first step in a large-scale process of restructuring and personnel reduction. The process of questioning and screening should identify all those employees who are not suitable for continued public sector employment in a democratic state. Upon the conclusion of the vetting process, employees would be screened for their professional qualifications for the

jobs they held or would hold after restructuring. And finally, those employees whose personal integrity and professional qualification were beyond legal doubt were matched with the decreasing number of jobs, resulting in even more layoffs.

Vetting was first proposed in autumn of 1989 and started, sometimes informally, in spring of 1990. At that time, vetting was conceptualized simply as a response to past misconduct, and not much thought was given to how a person's views and conduct changed after 1989. The legal basis for vetting, in contrast, framed the policy as an attempt to assess the employee's current and future reliability in a democratic public sector. Although the vetting process was regulated by one general norm in the Unification Treaty, the practice was uneven across sectors, states and administrative departments. Institutions that demand higher levels of popular trust in their moral authority, such as courts and universities, generally selected more demanding procedures. Their vetting commissions were composed by insiders as well as representatives of civil society or legal professionals who were expected to ensure the impartiality and integrity of the whole process.

In other parts of public sectors, such as in the municipal administrations, the vetting process was differentiated according to the employee's level of responsibility and public visibility. The commissions were formed from within the institution without elections. They viewed their work as purely administrative. The most significant category of misconduct examined by the vetting commissions was collaboration with the Ministry of State Security (MfS, popularly called Stasi). Available numbers suggest that average 30 to 45 per cent of those who were listed as MfS informers had to leave the institution. Many opted for ending the employment in mutual agreement, which saved them the embarrassment of having been dismissed, but also deprived them of an opportunity to challenge the dismissal in court.

Although vetting was meant to identify various forms of non-criminal misconduct, it was widely understood to be synonymous with the search for MfS informers. This identification is a result of narrowing the vetting focus in response to the availability of evidence and the

criteria introduced by the laws. The focus on the MfS does not reflect an initial judgement of the relative responsibility of the MfS, the communist party, the Socialist Unity Party (SED) and other organizations for injustices. However, the singular focus on unofficial MfS informers for pragmatic reasons implicitly cast this group of people as the main culprits. Other forms of MfS collaboration as well as the abuse of power by the SED, the trade union federation and other organizations receded in importance behind the character of the secret MfS informer (Wilke, 2007).

The *Czechoslovak lustration law*, as formulated in Act No. 451/1991 of the Collection of the Laws 'determining some further conditions for holding specific offices in state bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic' (commonly referred to as the 'large lustration law')[3] and Act No. 279/1992 of the Collection of the Laws 'on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Correction Corps of the Czech Republic' (commonly referred to as the 'small lustration law' because it only extended the lustration procedures to the police force and the prison guards service), was based on the idea that the post-communist Czechoslovak society had to deal with its past and facilitate the process of decommunization by legal and political means. It intended to specify a carefully selected list of top offices in the state administration which would be inaccessible to those individuals whose loyalty to the new regime could be justifiably questioned due to their political responsibilities and power exercised during the communist regime.

The law provided two lists of offices and activities to which it applied: the first list contained offices requiring a lustration procedure before individuals could take them, while the second list enumerated power positions held and activities taken during the communist regime which disqualified candidates applying for the jobs listed in the first list. Despite a wide range of public offices subjected to the lustra-

3 English translation see (Kritz, ed., III., 1995: 312-321).

tion procedure, positions contested in the general democratic elections had not been affected by the law. Offices protected by the lustration law included: civil service, senior administrative positions in all constitutional bodies, the army positions of a colonel and higher, police force, intelligence service, the prosecution office, the judiciary, notaries, state corporations or corporations in which the state is a majority shareholder, the national bank, state media and press agencies, university administrative positions of the head of academic departments and higher, and the board of directors of the Academy of Sciences.

The disqualifying positions and activities during the former regime were: political; those within the repressive secret police, state security and intelligence forces; and linked to the collaboration with these forces. Political disqualifying positions included: Communist Party secretaries from the rank of district secretaries upwards, members of the executive boards of district Communist Party committees upwards, members of the Communist Party Central Committee, political propaganda secretaries of those committees, members of the Party militia, members of the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968, graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between January 1, 1968, and May 1, 1969, that is during the democratization period of the 'Prague spring '68' terminated by the invasion of the Warsaw Pact armies in August 1968.

Regarding the security, secret police and intelligence service positions, the following ones had been enumerated by the law: senior officials of the security police from the rank of departmental chiefs upwards, members of the intelligence service and police members with political agenda. Nevertheless, the law originally allowed the Minister of Interior, Head of the Intelligence Service and Head of the Police Force to pardon those members of the former secret police whose dismissal would cause 'security concerns'.

The most controversial part of the law listed activities of citizens related to the secret police. They involved the secret police collaborators of the following kind: agents, owners of conspiratorial flats or individuals renting them, informers, political collaborators with the secret police and other conscious collaborators such as trustees and candidates for collaboration. This complicated structure corresponded to the system elaborated by the communist secret police. The main issue was whether a person consciously collaborated with the police, for instance by signing the confidential 'agent' cooperation, or was just a target of the secret police activity and possibly non-intentional source of information gathered during police interviews.

The Constitutional Court of the Czech and Slovak Federal Republic upheld the law's constitutionality in general and stated that the lustration in principle did not violate the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Political Rights, and the Discrimination Convention (Employment and Occupation) of 1958. Furthermore, the Court declared unconstitutional and therefore void those sections of the law, which legislated specific powers to the Minister of Defence and the Minister of Interior to exempt individuals from the lustration procedure if it was in the interest of state security. According to the Court, these sections contradicted the principles of equality and due process of law guaranteeing that the same rules apply to those in the same position.[4]

The law did not affect Communist Party members in general and, among communists, targeted only the Party officials and the Party Militia members. Individuals who ended up with the 'positive lustration' record stating that they had collaborated with the secret police could still be active in politics because the statute did not apply to any office and position contested in the general election. However, the overwhelming majority of political parties introduced a self-regulatory policy demanding all candidates to submit the 'negative lustration' certificate before being listed in the parliamentary election. The only

4 Decision of the Constitutional Court of the Czech and Slovak Federal Republic on the Screening Law. November 26, 1992. English translation (Kritz, ed., III, 1995: 346-365).

parliamentary political party refusing to internally apply lustration rules was the Communist Party. The law thus created a situation in which members of Parliament and local councils could have a secret police record while, for instance, heads of different university departments had been subjected to the lustration procedure.

Lustrations also did not apply to the emerging private economy sector. Private companies did not have access to the secret police files of its employees and therefore could not apply 'private lustrations'. Regarding the procedure, an individual has to apply for the lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and the Ministry has a duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organisation can apply for lustration of employee only if its job is subject of the lustration law. In the case of the 'positive lustration' result, an applicant can submit an administrative complaint to the Ministry and, if the original finding remains unchanged, file a civil suit against the Ministry demanding the protection of 'personal integrity'.

Available figures show that around five per cent of all lustration submissions resulted in 'positive certificates' disqualifying the applicant from his/her office in the mid 1990s. The most recent figures indicate a decline in 'positive lustration' results of the screening down to approximately three per cent of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. The Ministry currently receives between 6,000 and 8,000 lustration requests per year and the total number of lustration certificates issued between 1991 and 2001 was 402,270 (Priban 2007). Although the law had been originally enacted for a limited period of five years, but was subsequently extended by Parliament several times and still is being enforced in the Czech Republic.[5]

5 Slovakia is an example of the opposite approach because, after the split of the Czech and Slovak Federal Republic, Mečiar's populist Movement for Democratic Slovakia and other parties of his coalition government ignored the lustration law.

The *Polish lustration law* adopted by the Polish Parliament in April 1997[6] formally became valid law in August 1997, but could not be enforced without the creation of the V Department (Lustration Court) in the Warsaw Appellate Court in December 1998. A Commissioner for the Public Interest was nominated by the Chief Justice of the Supreme Court in October 1998 and formally took office on January 1, 1999.

The statute imposes a duty on people born before May 11, 1972, which means all who were adults according to law before the transfer of power in 1989 took place, who hold or are candidates of enumerated public positions in the state, to make a statement regarding their work or collaboration with secret services (organs of the state security) between 1944 and 1990. The obligation of making a positive or negative lustration statement is imposed on a broad category of people holding executive positions in the state or important positions in the state administration, including the President of the Republic, members of the Parliament, senators, judges, procurators, advocates and people holding key positions in Polish Television (public), Polish Radio (public), the Polish Press Agency and the Polish Information Agency.

Lustration statements consist of parts A and B, as stated in the annex to the statute. Part A is simply a declaration that a person did or did not work or collaborate with organs of state security. Part B (not made public) includes details of work or collaboration in the case of a positive statement. Information of a positive statement is published in the official gazette "Monitor Polski," or in the case of the candidates for the presidency and the lower or upper houses of Parliament, in electoral proclamations. That means that names of all who return positive declaration are published in the government gazette, but without details of the type of collaboration. In the case of candidates for seats in the Sejm and Senate and presidency, next to their name on the electoral proclamation with the names of all candidates is mentioned that they returned a positive lustration declaration. In that way those who declared that they were members of the secret services or consciously

6 Uniform text Dziennik Ustaw, 1999, Nr 42, poz.428.

collaborated with secret services can still be candidates to the office and the decision about their future is left in the hands of the electorate. Polish lustration law penalizes only a lie about collaboration with secret services, not the collaboration itself.

Verification of a negative lustration statement is done by the Commissioner for the Public Interest. If there is suspicion of a lie in the lustration statement, the Commissioner for the Public Interest initiates a case before the Lustration Court. Court rulings confirming a lustration lie are made public. The legal effects of such court rulings are different depending on the position held by the person involved. MPs or senators will lose their seat, but they can stand as candidates in the next election. In the case of judges, an additional ruling of the disciplinary court is required.

In the years 1999-2004 about 27,000 people have filled out lustration declarations and according to the Lustration Law all of these declarations are subject to the Commissioner's scrutiny. Altogether 278 people declared work or collaboration with state security organs. Their names were published in "Monitor Polski". The Commissioner filed only 126 cases for the Lustration Court. By April 30, 2004, the Lustration Court made judgements in relation to 103 persons. Among those 103, in 52 cases the Court confirmed that the declaration was not true (Czarnota 2007).

The *Hungarian lustration law* was also adopted after a long hesitation early in 1994, toward the end of the first elected government's term in the office and, similarly to the Polish case, included a compromise solution to the issue of the secret agents of the previous regime's police. The law set up panels of three judges whose job would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of Parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in state universities or state-owned companies, as well as a specified list of other high government officials). Each of these people would have to undergo background checks in which their files would be scrutinized to see

whether they had a lustratable role[7] in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgement in the specific case. If the person accepted a judgement against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of Parliament was already underway, the law was challenged by a petition to the Hungarian Constitutional Court. The Court handed down its decision in December 1994[8], in which parts of the 1994 law requiring "background checks on individuals who hold key offices" were declared unconstitutional. In its decision the Court outlined key principles of the rights of privacy of the individuals whose pasts are revealed in the files as well as the rights of publicity for information of public interest. The most important declaration of principle in the decision of the Constitutional Court is the following: "The court declares that data and records on individuals in positions of public authority and those who participate in political life - including those responsible for developing public opinion as part of their job - count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same". Article 61 of the Hungarian Constitution provides an explicit right to access and disseminate information of public interest.

7 The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being member of the (fascist) Arrow Cross Party.

8 60/1994 (XII. 24) AB.

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the state-party regime),[9] but also constitutionally, because it represented the clash of two constitutional principles: the rights of informational self-determination of individuals (in this case, the spies) and the rights of public access to legitimately public data by everyone (including those who were spied on). Before the lustration case, both principles had been upheld in strong form. The lustration case, however, pitted the two principles against each other.

Taking the whole range of issues, from the constitutionality of the lustration process to the continued secrecy of the security apparatus files, the Constitutional Court attempted to balance a range of interests. First, the Court held that the maintenance of this vast store of secret records was incompatible with the maintenance of a state under the rule of law, since such records would have never been constitutionally compiled in the first place in a rule-of-law state. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as agents. Disclosing the files to an interested public would also mean disclosing information of great personal importance to the individuals mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state. As a result, more information about such public persons may be disclosed from the security files than it would be permitted in the case of persons not hold-

9 For example, the Prime Minister and the Speaker of the Parliament in the term between 1994-98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly got informational briefings from the secret police.

ing influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of persons. With this, the Court placed the problem back in the hands of the Parliament as a "political issue," with the instructions that the Parliament is free neither to destroy all the records nor to maintain the absolute secrecy of them, since much of what they contain is information of public interest.

The Court also found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional muster. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionally arbitrary. In particular, the Court found that the category of journalists who were lustratable was both too broad - by including those who produced music and entertainment programs - and also too narrow - by excluding some clearly influential journalists who worked for the private electronic media. Both all journalists and other public figures that have as part of their job influencing public opinion must be lustrated or none may be, the Court held. Parliament could choose either course. The Court did not, however, find the extension of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, "participate in the shaping of the public will" are acceptable candidates for lustration, as long as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority state-owned businesses was declared unconstitutional, however, since these persons "neither exercise authority nor participate in public affairs," according to the Court. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons because the procedures to be applied to the clergy did not include as many safeguards as those applied to others.

The decision of the Constitutional Court shows correctly that a lustration law can have two goals, depending on the historical moment. At the beginning of the transition, full lustration might have served to

mark the irreversibility of the change and the ritual cleaning of the society. But more than five years after the "rule-of-law revolution," the better constitutional goal may be found in specifying the circle of freedom of information through a rule-of-law lustration. The behaviour and the past of those people who are now prominent in political public life are appropriate for the public community to know. The lustration of the prominent representatives of the state is constitutionally reasonable, but the publicity of the full agent's list is not, the Constitutional Court argued.

The new lustration law, LXII/1996, which was approved by the Parliament in July 1996 specifies that only those public officials who have to take an oath before the Parliament or the President of the Republic, or who are elected by the Parliament, are to be subjected to the lustration process. This takes care of the problem outlined by the court of an excessive scope of lustratable officials. According to the amendment ordinary court judges, public prosecutors and majors are excluded from the lustration. After the change of government in 1998, the centre-right conservative governing parties adopted Act XCIII in 2000, which significantly extended the list of those who should go through lustration compared to the modification in 1996 and the original law of 1994. The amendment extended the scope of vetting of the media beyond the level of editors, to "those who have the effect to influence the political public opinion either directly or indirectly", and was also applicable to commercial television, radio, newspapers and Internet news agencies (Barrett, Hack, Mukácsi, 2007).

Soon after the change of the government in 2002, it was disclosed that Péter Medgyessy, Prime Minister at the time, had served as a top secret officer of the former III/II directorate (counterintelligence) of the communist-era Ministry of Interior. The scandal showed that the legislation in force was inadequate to ensure the purity of post-transition public life, since it concentrated exclusively on the domestic surveillance unit of the Hungarian secret police (former III/III directorate). But there were also other units that engaged in spying on Hungarians living abroad, or on foreigners living in Hungary, or on

those who served in the military, and those secret police units are not covered by the law, despite a public protest by a number of leading figures insisting that the lustration law cover all spying activities. This problem was subject of a complaint before the Constitutional Court, but it was rejected in 1999. Under the weight of intense press coverage of the Prime Minister's case and opposition pressure, in 2003 the government tabled an amendment of the lustration law involving every former directorates, and also planned to extent the lustration to the churches, by arguing if media representatives are liable for lustration, there is no constitutional reason why the leaders of churches are not. But finally the draft of the law was rejected by the Parliament.

Access to the files of the previous secret police

As the case of the Hungarian statutory regulation has shown, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. In other countries these issues were regulated separately. Concerning the wideness of accessibility one can detect different models within the countries in Central Europe. Poland, as well as the first Hungarian solution, provided limited access to the victims. The most important limit is the name of the spy, which in these models is not disclosed for the victims. The unified Germany, which was the very first country in the history opening the state archives of the secret police, provided unlimited access to the victims concerning the data on the agent as well, and to government agencies to request background checks on their employees. The law enacted by the Hungarian Parliament in 2003, besides following the German way by providing access to victims on their spies, also opened the files for the general public concerning the data of public figures. But the widest access is provided by the similar statutory regulation of the Czech Republic and Slovakia, where – with the necessary protection of third person's personal data – the secret police files are accessible for everyone.

The *Hungarian* Constitutional Court's mentioned decision on the constitutionality of the 1994 lustration law also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.[10] The new law enacted in 1996 did create a "Historical Office," responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose is to put into effect the prior decisions of the Constitutional Court.

As a consequence of the Hungarian Prime Mister's mentioned scandal, in December 2003 the Parliament adopted the Act V of 2003, which established a new Public Security Services History Archive, and brought together all the documents of all of the security service directorates in this one location. The new law creates the opportunity to reveal the personal past of individuals in public office. Anyone can request the files of those people who are currently in public office or had been in public office. The category of public office is not well defined in the law, but has been taken to include anyone who serves (or served) in positions of executive power or the media. Indeed, it can be interpreted very broadly. In the case of those in public office, some very limited information found in the Archive about an individual's relationship to any of the security service directorates (not just III/III) can be published. Only since 2003 it was possible for individuals to

10 Since this is an unusal power of the Hungarian Court, it deserves a bit of explanation. The Court can declare the Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

request that the identity of the agent (i.e., the real person behind the codename) can be revealed.

In May 2005 the Hungarian Parliament passed an amendment to the Act V of 2003, which intends to open all files of the former secret police, including the names of the agents not holding any public office. Another provision of the enacted law entitles the Archive to make a lot of information public through its website without any personal request. The President of the Republic before promulgation sent the law to the Constitutional Court for preliminary review. In his application the President used the argument of the Court in its 60/1994 AB decision, saying that only the past of public officials represents a data of public interest, which can be published even without the consent of the person, but to disclose information of ordinary people not holding public offices, would violate their right to informational self-determination. In its 37/2005 AB decision, the Constitutional Court using its previous arguments declared the law as unconstitutional, which therefore did not enter into effect.

In *Poland* the issue of access was also discussed in 1997 in connection with the lustration law, but finally the Sejm in December 1998 passed a separate Act on the Institute of National Memory – Commission for the Prosecution of Crimes against the Polish Nation.[11] The law regulates access of those persons about whom the organs of the state security collected information between 1944 and 1989.

In 2007 the Polish Parliament adopted a new vetting act drafted by the conservative Law and Justice (PiS) party, in a move that seems to take out a large number of groups of professions from the vetting obligation without completely derailing the ruling party's anti-communist screening plans (Ash, 2007). Compared to the vetting act of 1997, the latest lustration law sought to increase the number of people required to submit a truthful vetting declaration before May 15, 2007. Failing to submit such declarations would result in dismissal from certain positions or legal consequences in case of submitting a false declaration. About 300,000 to 400,000 people in Poland would have to undergo a

11 Journal of Laws, December 19, 1998.

compulsory vetting process if the law was fully executed, according to the Institute of National Memory. The opposition argued that the law was vague and unclear, introducing dubious definitions of individuals who would be required to submit statements, whether they collaborated with the communist secret services before 1989 or not. In a legally complex ruling in mid-May, Poland's Constitutional Tribunal decided to partially overthrow crucial parts of the act. The tribunal said the law violated a number of articles of the constitution, but the lawmaker's definition of a collaborator, which was one of the most disputed provisions of the new law, does not violate Poland's constitution provided that the collaborator was fully aware of their status during the time of cooperation with the secret services. The Constitutional Tribunal also ruled that the vetting of university professors, all journalists, executives of publishing houses and rectors of state-run schools violated the constitution. The tribunal ruled that it would not be legal for the Institute of National Memory (IPN) to publish lists of past communist collaborators, which was one of the goals of the legislation. The tribunal also ruled that the bill's annulment of the right to file cassations to the Supreme Court in vetting cases violated the constitution.

Interestingly enough, Prime Minister Jaroslaw Kaczynski previously said that if the Constitutional Tribunal overthrows the bill, his party would draft a law opening up IPN archives completely, in order to reveal all classified information on past communist collaborators.

Even before the German unification, the East Germany's Parliament passed the law in summer 1990 at the urgent request of members of the civil rights movement to facilitate "the political, historical and legal reckoning with the activities of the former Ministry for State Security".[12] The West German negotiators for the Unification Treaty were opposed to giving this law validity under the Treaty, but after a hunger strike by members of the citizen's movement it was agreed that the unified German Parliament should pass a law on the Stasi files that

12 Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit/Amtes für Nationale Sicherheit, August 24, 1990. GDR Official Gazette, I, 1419-1421, URL = http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_08_1.gif. (October 25, 2007)

respects “the basic principles” of the August 1990 law.[13] This was the Law on the Records of the State Security Service of the former German Democratic Republic (Stasi Records Law, Stasiunterlagengesetz, StUG).[14]

The law establishes a Federal Office administrating, sorting and reconstructing the files. The Federal Commissioner for the Stasi Records is elected for five years. During the first two terms, Joachim Gauck, a pastor from Rostock, served as a commissioner. The office soon came to be known as the Gauck Authority (Gauck-Behörde). The Stasi Records Law established an elaborate system of making parts of the Stasi’s files available to restricted and specified audiences. There are different access rights for the Stasi’s victims, the Stasi informers, researchers and public sector employers. Some people’s past is more public than that of other people. Those who were spied upon can petition to see “their” files. From 1991 to 2003, more than two million petitions for access to individual records have been filed.[15] Hundreds of thousands have accessed the Stasi’s knowledge about their personal lives. After seeing their file, people could decide whom to tell about what they read: their family, their friends, or the general public? The law had empowered them to decide with whom to share the secret knowledge created by the Stasi (Wilke, 2007). The law stipulated, however, that journalists could be penalized for using information from the files they received from unofficial sources (Kritz, ed., II, 1995: 596).

In 1996, Parliament of the *Czech Republic* enacted The Act of Public Access to Files Connected to Activities of Former Secret Police.[16] The law originally granted access only to persons potentially affected by secret police activities. Nevertheless, the statute was amended in

13 Agreement on the Implementation and Interpretation of the Unification Treaty, September 20, 1990, Bonn. URL= http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_19_1.gif. (October 25, 2007)

14 Available at www.bstu.de/rechtl_grundl/stug/ in German and English.

15 Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, Sechster Tätigkeitsbericht (Berlin, 2003), 21, 71.

16 No. 140/1996 of the Collection of Laws of the Czech Republic.

2002,[17] so that the main registers of secret police collaborators could be made available to the general public.[18] According to the current regulation, any adult person who is a citizen of the Czech Republic can file a request to access the secret police files and documents collected between February 25, 1948, and February 15, 1990.

The access, which is provided by the Ministry of Interior, therefore is not limited to the person's data and files. Nevertheless, the Ministry protects the constitutional rights of personal integrity and privacy of other individuals who might be mentioned in the files demanded by the applicant. The Ministry therefore must make all information possibly affecting those constitutional rights inaccessible to the applicant, unless it is related to the activities of the secret police and its collaborators. The applicant can access any details regarding the identity of secret police agents, but would not be able to see information related for instance to their marital life or health problems. This shift of the state policy naturally resulted in a number of legal cases in which individuals demanded their names to be removed from the registers and moral reputation re-established.[19]

In August 2002 the National Council of the *Slovak Republic* enacted the Act on Disclosure of Documents Regarding the Activity of State Security Authorities in the Period 1939-1989 and on Founding the Institute of National Memory.[20] Besides the procedure of disclosure of documents upon the request of victims and state institutions, the law also regulates the disclosure of data by the Institute *ex officio*.

17 See The Act No. 107/2002 of the Collection of Laws of the Czech Republic amending the Act No. 140/1996.

18 These registers are available on www.mvcr.iol.cz

19 One of the most publicised and high profile cases has been the case of Jiřina Bohdalová – a top celebrity actress. She filed a lawsuit against the Czech Ministry of Interior and demanded her name to be removed from the register of secret police collaborators. The trial revealed how she was psychologically tortured by secret police at the age of 28 in the 1950s, but never agreed to collaborate with it. In January 2004, the municipal court of Prague ruled that the actress has never been a secret police collaborator, yet failed to oblige the Ministry of Interior to remove her name from the register, although Bohdalová did not aspire to a political career or positions subject of the lustration procedure. See: Priban, 2007.

20 553/2002 Coll. National Memory Act. Amendments: 110/2003 Coll, and 610/2004 Coll.

According to the law, subject to being disclosed and made public shall be preserved and reconstituted documents, which were created as a result of the activity of the State Security and other security authorities in the period from April 18, 1939, to December 31, 1989. Excluded are only the documents whose disclosure might harm the interest of the Republic in international terms, its security interest, or lead to a serious endangerment of a person's life. In order to exclude a document being disclosed and made public, a proposal of the Slovak Information Service or the Ministry of Defence is necessary, which was approved by an appointed committee of the National Council.

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Alan Uzelac

(In)Surpassable Barriers to Lustration: Quis custodiet ipsos custodes?

Summary

Lustration is in many aspects connected to certain legal procedures. However, there are a number of legal barriers that bar the success of this process. Some of them are procedural (e.g. statute of limitations), and some are organizational – e.g. the legitimacy of those who are supposed to be the implementers of the lustration practices. In relation to judicial practices, the particular situation in Croatia points to very weak chances that a judiciary, that is itself arising from an intransparent process of appointment, be an appropriate tool for a sensible lustration practice. On the other hand, lustration in the judiciary now appears not only as belated, but also as highly improbable.

Key words: lustration, justice system, judicial independence.

I. Introduction

The society that aspires to establish a modern democracy based on the rule of law must adhere to several primary principles of the orderly legal system. Indeed, the distancing from the heritage of the past practices and their protagonists is important. So far, the concept of lustration has a strong political and social meaning, above all as a symboli-

cal departure from the past totalitarian practices and those who were instruments in their enforcement. The ultimate purpose of lustration is to demonstrate discontinuity, the change of a paradigm in the practices of government. In various forms, the concept of lustration[1] was utilized in various jurisdictions, most prominently in Poland, Czech Republic and Hungary.[2] In a different context, it was undertaken in former German Democratic Republic.[3] In a non-European space, parallels were often drawn with the practices in South Africa after the period of apartheid.[4]

Yet, the very principles of the rule of law may be one of the important barriers to the success of lustration. In this contribution, I would like to distinguish some procedural, organizational and personal barriers to lustration, which arise from the attempts to implement lustration regulations and practices in the legal sphere.

II. Lustration Procedure and the Rule of Law – some compatibility issues

a. Lustration and retrospective application of laws

First assumption is that lustration as a process can only be imaginable as at least remotely compatible with the rule of law if it is done by legal means.[5] A purely political and informal removal of all those who are supposed to have links with the past regime does not differ

1 Generally on the concept of lustration see: Kritz, 1995; Elster, 1998; Tucker, 1999; Teitel, 2001.

2 More on lustration in these countries see: Williams, Fowler, Szczerbiak, 2005; Szczerbiak, 2002; Szczerbiak, 2003; Williams, 2003; David, 2003; Dornbach, 1992.

3 See: Adams, 1997; Kommers, 1997.

4 See e.g. David, 2006.

5 On understanding of the origins of the term “lustration” see: Cepl, 1992:24. In this text, we will consider lustration in the broader sense, e.g. not only lustration as limited to “ascertaining whether an occupant or candidate for a particular post worked for or collaborated with the communist security services” (Williams, Fowler, Szczerbiak, 2005:24) but as every attempt to disqualify by legal means a person holding (or aspiring to) public office (or other post, position, service or employment) on the grounds of its co-operation or belonging to the former regime.

at all from the totalitarian practices of the past. In this sense, direct dismissals or martial courts are as much the practices of lustration, as the *chistkas* in the times of Stalin. Therefore, we take as granted that lustration must, in a civilized environment, be undertaken by legal practices.[6]

Now, if lustration is supposed to be a legal process, the next element that has to be discussed is the nature of substantive rules and standards that have to be applied in this process. The sheer membership in a particular organization (say, a Communist party or in a secret police) is generally, by most democratic standards, not sufficient to constitute individual responsibility.[7] Even if, from contemporary perspective, we can evaluate some of such memberships (e.g. belonging to or collaboration with Stasi or KGB) as a membership in a criminal organization, it is undisputable that, at the times when such membership existed, participation in it was not deemed to be a crime. On the contrary, it was viewed as a desirable, and sometimes even as a required or compulsory activity.[8]

If we apply, however, our contemporary understanding to the practice of the past, we are in fact running against one of the fundamental principles of the rule of law, i.e. the prohibition of retrospective application of the law. The principle *nullum crimen, nulla poena sine*

6 Although this statement may be taken as self-understood, and generally is not disputed, it may be indicative that in social sciences lustration has been a process largely debated and analysed by political scientists and sociologists, and only marginally by lawyers.

7 In the same sense, the Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems stressed that, for a lustration to meet standards of a democratic state under the rule of law, several criteria have to be met. As first, it was stated that "guilt, being individual, rather than collective, must be proven in each individual case - this emphasizes the need for an individual, and not collective, application of lustration laws" (at 12).

8 The exclusion of "compulsory" or "required" activities was therefore provided even in the most rigid versions of lustration laws. E.g. in Section 4 of the Polish 1997 Lustration Act, it is provided that collaboration (defined as intentional and secret collaboration with operational or investigative branches of the State's security services as a secret informer or assistant in the process of gathering information) does not include an action which was obligatory under the law in force at the material time (par 1. and 2). Yet, the term "obligatory" may be interpreted in different ways, and the factual difficulties in establishing whether somebody collaborated "voluntarily", or was recruited under pressures or blackmails, may be great.

lege is today understood as one of the fundamental human rights.[9] To violate that fundamental human right in the name of the protection of fundamental human rights sounds at least contradictory, if not absurd. Therefore, in many countries that have enacted lustration laws, such as Poland, Hungary, Czech Republic, Slovenia or Slovakia, the point of retrospective (retroactive) application was often invoked in the constitutional review, and these laws were often facing the real risks of being pronounced as unconstitutional. The more radical variants of lustration legislation that provided possibility of raising criminal charges against members of former regime were rejected on constitutional grounds already in early 1990s.[10]

Some practices, such as torture or murder, can still, without much twist in legal imagination, be construed as the practices which were, or at least should have been, prohibited also at the time when they are committed, notwithstanding that they were committed in the service of the old regime. Such practices, indeed, can and should be prosecuted. Now, the question is whether such prosecutions should have any special shape and rules as those that are undertaken in the "regular", "non-lustration" circumstances. Applying double standards for the same crimes may again, at least apparently, run the risk of violating the principle of non-discrimination that demands the same offences are treated in the same way. It seems that this was in fact the insurmountable difficulty for Central and East-European legislators,

9 On application of this principle in international criminal law see Werle, 2005: 32. This principle is also embodied in Art. 7 of the European Convention on Human Rights (no punishment without law). In the practice of the European Court of Human Rights in Strasbourg, it was held that Art. 7 has not confined only to prohibiting the retrospective application of the criminal law to disadvantage of the accused. "It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to a detriment of the accused, for instance by analogy." Kokkinakis v. Greece judgement of May 25, 1993 (Series A no. 260-A, p. 22, par. 52).

10 E.g. in 1992 the Hungarian Constitutional Court overturned the Act on the prosecutability of crimes not prosecuted for political reasons. The main argument was derived from the rule of law doctrine: the certainty of laws requires that the legislative authority should make laws which are clear, comprehensible and have a predictable (= non-retrospective) effect. See Constitutional Court Decision No. 11/1992 (III.5) AB. More in Dornbach (1992) and Dillemmas (1992). More on this decision see infra, in the context of the statute of limitation difficulties.

because virtually no serious attempts to organize some kind of special post-communist Nuremberg-style trials were noted. On the contrary, the "lustration" was largely experienced as a surrogate for full-fledged criminal condemnation – it was limited to attacking the ability of current and possible office-holders to discharge their jobs (or apply for office).

A typical model of a relatively successful method, by which a system of "transitional justice"[11] attempted to evade the pitfalls of retrospective application, was the one originally developed by the Polish Helsinki Committee in 1992[12], and subsequently adopted by several Central and Eastern European countries. According to this method, the public officials and the candidates for public offices would be required by law to state in a solemn written declaration whether they were, in the past, the members or collaborators of secret police or other oppressive communist services. If the declaration would be affirmative, there would be no direct legal sanctions; however the political responsibility would most likely have sufficient negative impact for those who would admit it. If the lustration declaration would deny the past collaboration and if, subsequently, it would be proved that the declaration is untrue, this would – as a finding of a current, and not of a past offence – be a reason for moral and/or legal disqualification of the office-holder.[13] But, even if such an approach does effectively respond to the objections of retrospective application, there are further barriers to the success of such a procedure.

11 For various concepts of "transitional justice" see: Teitel (2001); Kommers (1997); Kritz (1995).

12 See: Rzeplinski, 1992:33.

13 This procedure more or less corresponds to the provisions of the 1997 Lustration Act (Poland).

b. The burden of time – issues relating to statute of limitations

Distancing from the past rarely happens in very short period of time, and the very fact that lustration is still a hot political and legal issue now, almost two decades after the fall of the past regime, demonstrates that we often have to deal with the events and offences that happened quite a long time ago.[14] In this connection, two types of difficulties are arising.

The one difficulty is connected to the statute of limitation rules. Here, again, we have to deal with the issue of retrospective application of norms, but in a different form. Namely, the "pure" retrospective laws invent new crimes and allow criminal charges for actions that were, at the time when they were committed, not criminalized. But, a lot of offences (e.g. murder, fraud or theft) were, at the time when they were committed, described as criminal, but in the course of time the prosecution for them was time-barred, because the prescribed statute of limitations periods have expired. Now, if somebody was, for political reasons not charged for a murder committed several decades ago (e.g. because they were political activists of Communists party who crushed the 1956 Revolution in Hungary), most likely the "normal" legal rules would not allow the prosecution for such a crime any more.

Although statute of limitation rules are not something that is regarded as sacrosanct, in modern legal orders they have an important place, in particular because they contribute to legal certainty. They are also regarded to be an element of substantive law. When statute of limitation period expires, it cannot generally be revived and even the extension of the limitation period can be viewed as an attempt to retrospectively change the law. In any case, ignoring the statute of limitations is something that violates the fundamental principle of the rule of

14 In Hungary, e.g. the historic events that triggered most of the lustration efforts that happened almost 50 years ago, imminently after the crash of the Hungarian Revolution of 1956, during the wave of oppression by the Soviet-installed government. In the post-Yugoslav states and some other post-communist countries, the animosities have sometimes even deeper roots, and are connected to the affiliation during the World War II.

law: the principle of legality. This was exactly the point for which the Hungarian Constitutional Court found the 1991 law that attempted to restart the expired Statute of Limitations for selected crimes committed between 1944 and 1990 to be unconstitutional.[15] The Court stated that extension of the statutory limits were unconstitutional in various forms, because it violated the requirement of certainty and predictability of legislation.[16]

c. The burden of time – evidentiary difficulties

The other difficulty that arises when we deal, exceptionally, with the crimes that were committed before several decades, is connected with the taking of evidence. The rules of evidence in legal proceedings are usually quite strict, and demand high standard of proof for the demonstration of guilt. If these high standards of proof are not met, regularly the result should be dismissal: *actore non probante, reus absolvitur.* The further we are from the disputed events, the higher is the likelihood that it will be extremely difficult, if not impossible, to reach the high evidentiary requirements, such as e.g. "beyond reasonable doubt" standard required for convictions for crime.[17]

One might ask why in such cases other legal procedures, with lower thresholds for evidence, but also with lesser consequences (e.g. dismissal from public offices or a ban from holding a public office) are not an option. Indeed, some of such attempts were noted. Yet, it might not be compatible with the principles of the rule of law if we are not

15 See Hungary: Constitutional Court Decision on the Statute of Limitations No. 2086/A/1991/14 (March 5, 1992), reprinted in 2 Transitional Justice, at 629.

16 Admittedly, in a later decision the Court approved the amended legislation, but only insofar it dealt with the prosecution of the crimes that would, under international law, not fall under statute of limitations, such as war crimes or crimes against humanity. See Decision of the Constitutional Court No. 53/1993 (X.13) AB. See also: Ellis, 1996:183-184.

17 It is also important to observe that the evidentiary standard „beyond reasonable doubt", developed in the Anglo-American jurisprudence as the concept of criminal law, in the Continental Europe (as a standard of „certainty") applies also to civil litigation. See more in Shapiro, 1993.

able to prove the guilt of the accused, and therefore attempt to punish the same crime in another process by lesser sanctions. The fundamental principle of the criminal procedure since the times of Roman law was the presumption of innocence: nobody should be held responsible for committing a crime until that was conclusively proven in the court of law. Thus, regular result of the inability to prove the guilt, in spite of some potential remaining doubts, should be full exculpation of the accused, and not a sanction that is reduced proportionally to the inability to prove the crime.

d. The challenges of a fair trial

The final, procedural challenge to the lustration procedures lies in the fact that the finding of the links with the past (be it collaboration with secret services or other individual actions) has to be established in a procedure that complies with the requirement of procedural due process of law. The standards of procedural due process of law in Europe are today encapsulated in Art. 6 of the European Human Rights Convention as the standards of a fair trial. As all of the transition countries in Europe are now members of the Council of Europe, they are all signatories of the EHRC and are submitted to the jurisdiction of the European Court of Human Rights.

In recent times, the Strasbourg Court had ruled in several cases on the human rights violations regarding lustration processes in Poland[18], Slovakia[19] and Latvia[20]. In most of these cases (with the notable exception of Ždanoka case) the Court found violation of the Art. 6(1), insofar the concrete procedures of lustration did not warrant equal treatment and equality of arms (e.g. because of the protection of "state secrets" the applicants did not have the same right of access to documents, the

18 Case of Matyjek v. Poland (38184/03), judgement of April 24, 2007; Bobek v. Poland (68761/01), judgment of 17 July 2007.

19 Turek v. Slovakia (57986/00), judgement of February 14, 2006.

20 Ždanoka v. Latvia (58278/00), judgement of March 16, 2006.

proceedings were mainly closed to public, and even the reasons of the judgements were only partially available to the applicant).

One line of argument was common to all of the cited Court decisions: although the court did not attack the legitimacy of lustration efforts as such, it has tried to define strict limits for lustration practices. The Court recognized the historical need for lustration at the end of the 1990s: "the State had an interest in carrying out lustration in respect of persons holding the most important public functions." However, was emphasized that, "if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures." Regarding the secret nature of the proceedings: "The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally".[21]

In all cases the Court again evaluated the impact of time. Arguing that considerable time has elapsed since the events at stake (and the evidence by which such events have to be proven), the Court held that, „unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services".[22]

Even in the Latvian case, in which the grand chamber did not find violation (but with numerous dissenting opinions), the conclusion of the Court was almost the same. On one hand, the exceptionality of historical circumstances was taken into account. The restriction was found to be neither arbitrary nor disproportionate at the particular place and point in time: "While such a measure [i.e. the exclusion of

21 Matyjek v. Poland, at 62.

22 Bobek v. Poland, at 57.

candidates belonging to pro-communist parties from standing as candidates to the national Parliament] may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historic-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime."[23] On the other hand, the Court has specifically pointed to the limited nature and time concerns of such measures, thereby directly warning the Latvian authorities that it may soon change its mind: "It is to be noted that the Constitutional Court observed in its decision of August 30, 2000, that the Latvian Parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian Parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration. Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court".[24]

23 Ždanoka v. Latvia, at 133.

24 Ibid. at 135.

III. The Organizational and Personal Barriers - Lustrating the Lustrators

a. Courts as lustration bodies

From the legal barriers to lustration in the field of substantive and procedural law and the law of evidence, we will continue to the organizational difficulties. One of such organizational difficulty is related to the composition of bodies that are supposed to be responsible for the conduct of the lustration practices. As lustration practices are related primarily to those who hold the high offices, the first issue that arises is about the guarantees that the process will be conducted by competent, independent and impartial bodies.

Such bodies, as proclaimed by the Art. 6 ECHR, should regularly be courts. However, in transition countries courts were not isolated from the rest of the society. The holders of judicial functions were (and still are) appointed in the process that was not guaranteeing the appointment of the most proficient candidates. Therefore, the issue of lustration was also regularly raised in respect of the judges who have developed their career in the times of the past regime. One of such examples is, e.g. the lustration paragraph[25] that declared that those who were involved in the violations of human rights are incapable to become judges.[26]

If judges themselves are suspects of the links with the past regime, it is highly doubtful how a process in which they would have the final word in the matters of lustration would reach the goal of full legitimacy. *Quis custodiet ipsos custodes*?[27] The integrity of those who are "lustrating" can be warranted if they are impeccable; if they are not, the vicious circle of "lustrating lustrators" appears, as one of the

25 Art. 8. par. 3. of the Law on Judicial Office of the Republic of Slovenia, Uradni list 19/94.

26 This provision was subject to constitutional review, whereby the Constitutional Court approved it, setting however further guidance for its proper application. Constitutional Court of Slovenia, Decision U-1-83/93 of July 14, 1994.

27 Who watches the watchman? A Latin phrase from the Roman poet Juvenal, Satire 6, 346-348.

fundamental paradoxes that are related to the personal element of the lustration practices.

b. Judiciary and "wild lustration": the example of Croatia

From this point on, we would continue with the further organizational difficulties that are related to the current trends in the implementation of the constitutional principle of the separation of powers. The main arguments will be related to judicial branch of government, and will develop both on the general level, as well as on the level of the concrete example – the example of judicial reform in Croatia.

As Franz Neumann claimed, independent and impartial judiciary is the irreducible minimum of democracy (Neumann, 1974:53). Therefore, the lustration among legal professionals, above all among judges and state prosecutors, should have a special significance. But, such a process is particularly difficult and sensitive. In this process, the same instruments that are designed to be protectors of the rule of law may become their opposite.

This happened, e.g. with the constitutional process of appointment of judges and prosecutors in Croatia in the 1990s, what is particularly visible on the practice of the body that was due to appoint and dismiss judges, the State Judicial Council. Designed in the Constitution as a body of professional autonomy in 1991, this body was not appointed for five years, and started to operate only in 1996. In the preceding five years, a process of "silent lustration"[28] was happening, and many of the judges and prosecutors were forced to leave their judicial posts, but rarely for legitimate reasons, and rarely with a clear explanation. However, more importantly, when the new body, the State Judicial

28 The term of "silent lustration" implies, unlike the concept of "wild lustration" which happened in other Central European countries (Williams, Fowler, Szczerbiak, 2005:32) that dismissal of those who were regarded "inappropriate" happened without clear explanations, sometimes even without any explanation. Common to both is that they were "based on dubious evidence and seen to be politically motivated and deeply disruptive and damaging to public life".

Council, overtook the process of appointment, it became instantly apparent that it would not change the course of events. On the contrary, the State Judicial Council, a body composed by a majority of judges, yet those appointed by political majority of the national Parliament, proved to be even more disastrous in its activity than the preceding silent political *chistka*. Already its first appointments confirmed the judicial posts of several controversial judicial figures with a history of political subordination, while dismissing some of those who were the true heroes of judicial competence and independence. [29] As a topical example, the judge who had the most of public trust, and was the best candidate for the President of the Supreme Court, the late judge Vladimir Primorac, was at that point dismissed from the Supreme Court. Judge Primorac, who had a history of straight and upright decisions in the times of socialism, for what he was then forced to leave the judiciary, was again "lustrated" precisely for his overly independent and upright stature and opinions.[30] His uncompromising standing and independence was viewed as a threat to the monolithically unity of powers required at that point by the President Franjo Tudjman. It is only too paradoxical that his dismissal was undertaken by the body that was alleged to be the body of professional autonomy and independence of judicial branch of government, and that he, while banned again from judicial ranks, was forced to be involved in politics and subsequently was appointed as oppositional MP in the Croatian Parliament (Sabor).

After the death of President Tudjman and restoration of the balance of political powers, the political elites started to take judicial independence more seriously, not because they liked it, but because centers of political powers were not any more as strong and influential as in the 1990s.[31] This affected also the operation of the State Judicial Council. This body, slightly reformed, now is less directly interlinked and sub-

29 See in more detail in Uzelac, 2000; Uzelac, 1995.

30 His opinions can be best evaluated from his own works - see Primorac, 2000; more on Primorac in Kolo, 2001.

31 On initial attempts to reform the process of appointment of judges see more in Uzelac, 2002.

ordinated to particular political parties or holders of political powers. However, it has not radically improved the process of appointment, in particular the criteria for professional competence and ability. As a body of professional autonomy, which represents the judicial officials that are the result of the intransparent appointment process of 1990s, the State Judicial Council now operates as a lobbying machine and an instrument of *status quo* in judiciary. Instead of the telephone calls of particular politicians, the appointment of judges is now influenced by telephone calls of colleagues and relatives, and the success of lobbying and links to particular members of State Judicial Council. On the side of the responsibility, the State Judicial Council was so far not able to establish any clear and resolute criteria. On the contrary, by its very slowness and irresoluteness, it had sent a message that it conceives judicial independence as the lack of their responsibility. This has contributed to the public criticisms of judiciary, and ever louder voices that speak of the current judges in Croatia as "holy cows", "protected animals", or, even worse, "the war profiteers".

The final paradox in this context is the fact that malfunctioning of judiciary is nowadays in Croatia the topic no. 1 in the accession process to the EU.[32] The chapter on judiciary and human rights is among all chapters the one which is at the earliest stage, and the one that will most likely be closed last.[33] Therefore, the reforms, including the reforms of the process of judicial appointment and discipline, are now sorely needed. But, every move to improve the personal composition of the judicial professionals in Croatia is now being viewed within the members of the judiciary as an attack on the judicial independence and the rule of law. And, even the international community, including the EU bodies, is sending the twofold signals, advocating at the same time judicial reforms, but also judicial independence, including the support

32 See more in Uzelac, 2006.

33 Opening the accession negotiations, the European Commission found that "citizens rights in Croatia are … not yet fully protected by the judiciary" (Opinion, 2004:16); two years later, it was found that "reform is at an early stage and the judicial system continues to suffer from severe shortcomings" (Progress report, 2006:8). It is expected that this finding will not be considerably altered in the report for 2007.

for professional bodies such as the State Judicial Council.[34]

IV. Concluding remark

Therefore, in such a constellation, it is difficult to imagine what can come next in the context of lustration. Now, just as in the 1990s, there are moments when, in Central and Eastern European countries, lustration seems desirable, but elusive. To use the words of Immanuel Kant, lustration seems to be “indispensable, yet impossible mission”. Maybe we should continue to be realistic, and therefore continue to demand the impossible. Or else – in the quest for justice, the time elapsed might remain as only cure for the injustices of the past. In the words of popular culture: “The answer is blowin’ in the wind”.

34 On judicial councils in Europe see Voermans, Albers, 2003.

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Raluca Ursachi

In Search of a Theoretical Framework of Transitional Justice Toward a Dynamic Model

Introduction

Coming to terms with the past after the fall of a dictatorship has become a theme of study for an ever-growing literature, which coined the term "transitional justice"[1]. The classical question which most studies tried to answer is: "Which are the relevant factors that influence the initiation and the successful implementation of transitional justice policies?" Why does it "work" in some countries, and in others it does not? The classical works analysing democratic transitions (Huntington, O'Donnell, Linz and Stepan), as well as the best-known studies of transitional justice in the '90s, have shown the relevance of a series of factors (and established classifications of countries according to these variables): the nature of the dictatorial regime and of its crimes, its longevity, the extrication path and the nature of the transition that followed (the "negotiated transition" or the violent overthrow).

Relevant as they are, these factors and classifications do not explain the subsequent evolution of the policies: countries that were considered unwilling or unable to deal with their past (typically Romania, but also Poland and some Latin American countries) have moved in recent years towards the most radical forms of transitional justice;

1 Perhaps the single most important contribution towards consecrating the term was the impressive 3-volume compilation by Kritz (1995).

other countries, that have already attempted such policies, go through a second wave of resurgence, and what was not considered possible or desirable 10 years ago, now can be implemented. The old deterministic categories are contradicted throughout. I sustain that with the passage of a generation, the old constraints loose their relevance for the policy choices - and propose an updating of the transitological model with a more dynamic, diachronic and more nuanced approach of the relevant factors.

In the next section, a cursory review of transitional justice developments in several countries will bring proof to the statement that transitional justice got a new impetus in recent years – a development in need of theoretical explanation. Possible explanatory factors, as offered by relevant literature, will be examined in the following sections, to see if recent development confirm or invalidate the theoretical approaches this literature uses.

A second wave of transitional justice

In recent years we are undoubtedly witnessing a "second wave" of transitional justice policies, in Eastern Europe and in Latin America. Countries that, in theory, did not have the will or the power to deal with their past start to do so now; countries that started earlier (like the Czech Republic or Poland) renew their efforts – all this marking a trend towards the hardening, not the softening, of these policies.[2]

Thus, the Latin American countries that initiated truth and justice policies in the previous decades have renewed their efforts with the turn of the century. The trigger to this reopening of the debates (which, as I shall argue, were never truly closed) was the arrest in 1998 of Agusto Pinochet in London, under an international arrest mandate on accusations of crimes against humanity during his 25 years rule. Though never followed by a trial, this unprecedented arrest of a former head

2 For a detailed treatment of recent changes in truth and justice policies in these regions, see: Ursachi, Grosescu, 2008.

of the state in a foreign country, without extradition mandate from his country, marks a crucial moment in the application of international law, arguably the most significant one since the Nuremberg trials. In Chile, this event set off a host of judicial inquiries on the human rights violations of the previous regime, which caused the breaking down of the whole system of immunities built around the armed forces. This development was made possible not only by the "Pinochet factor", but also by the build-up in Chile of one of the strongest human rights movements in Latin America, uniting victims associations with political parties, the Church and international organizations. International investigations on the Operation Condor made possible other developments throughout the region. In Brazil, a country where the truth and justice policies were in the previous decades systematically hindered by a "pact of silence" between the military and the civilian governments, the issue of the human rights violations was reopened in the year 2000 when new evidence on Operation Condor came about in trials outside Brazil. Parliamentary commissions were created to investigate disappearances and political assassinations during the military dictatorship, and military archives were opened to bring to light the role of the state in the Operation Condor. In Argentina, the amnesty laws, as well as the laws promulgated by the democratic governments to prevent prosecution of the generals, were abrogated in 2003 and 2005 respectively, by the new president Nestor Kirchner, which can make possible future prosecutions of the military. In 2006, an Argentinean tribunal has for the first time qualified the human rights violations during the military dictatorship as state-organized genocide – which can have important consequences for the trials to follow. Again, these developments were made possible in the context of the continuous development in Argentina of a very strong human rights movement, benefiting the support of political parties, international human rights organizations as well as of an important part of the judiciary. Over the last two decades, even in the context of a relatively hostile legislative environment, judges and human rights activists took advantage of any possibility of action allowed by the law to bring to light the crimes of the generals' regime.

Countries of Eastern Europe also witness a renewal of efforts concerning the coming to terms with the past through truth and justice policies. Countries that had shown little enthusiasm in this sense in the 90s engaged in important measures of condemning or exposing previous collaboration with the communist regime. The most relevant example is Slovakia, a country generally considered "immobile" from the point of view of dealing with the past. However, Slovak successive governments have advanced on the road of dealing with the past: in 1996, the Parliament adopted a law condemning the communist regime as "immoral and illegal". By government decision, in 1998 was created the Department for the Documentation of the Communist Crimes within the Ministry of Justice, to gather proof and lodge complaints to criminal courts. At the end of the mandate a law was adopted allowing access to the files of the former secret police, and the creation of the Slovak Institute of National Memory. Since then, this Institute has performed important gestures, like publishing the list of the files made up by the former secret police in 2004, as well as the list of its members. In 2005 it published the complete list of the secret police collaborators and of their victims (revelations that led to the termination of the public careers of several politicians and high Church figures). These actions and the intense public debates accompanying them place Slovakia among the countries with the most active process of dealing with the past.

Another country whose truth and justice policies have changed the rhythm since the year 2000 is Poland: the actual implementation of the lustration law only started in 1999, and since then revelations about the past collaboration of public figures continuously appeared. The Polish Institute for National Memory also started to actually function in 2000, but the first files were opened to the public in 2001; in 2005 a journalist published a stolen list of names of collaborators, military spies and candidates to collaboration mixed indifferently, which sparked new heated debates. The new conservative government elected in 2005 on an anti-communist platform prepares laws declaring the communist secret services criminal organizations with anti-Polish

activities. All who worked for these services would be exposed and excluded from public life. The existing lustration law was modified to include 53 categories of professions to be verified for collaboration with these services.

The existing lustration law was hardened also in Hungary after the right-wing coalition won the 2000 elections: the positions to be lustrated were extended to about 8,000. Since then, the press exposed many politicians, as well as hundreds of Church figures, as secret police collaborators. In 2003 the lustration law was replaced by a new one, granting people access to their personal files and establishing the Historical Archives of State Security Services – an institution that controls the files and facilitates access.

Bulgaria is another case of a country whose truth and justice policies were ignored or minimized in the literature. The Bulgarian case is mostly noted for ex-president Zhivkov trial for charges of corruption; it is less widely acknowledged that Zhivkov was also tried for his funding of leftist movements in Nicaragua, Cuba, Afghanistan or Palestine, as well as for his policy of forced assimilation of Turkish minority and the creation of forced labour camps. These trials have investigated criminal acts perpetrated by state organisms and criminal policies designed by the communist state; their significance goes beyond the person of Todor Zhivkov, to incriminate a whole regime. In 2000 the Parliament voted a law that symbolically condemned the communist regime as illegal, and the communist party as a criminal organisation. In December 2006, at the wake of adhesion to European Union, the Bulgarian Parliament voted the long-expected law of access to the archives of the former political police. All the files of the informers currently occupying public positions will be made public.

The Romanian case is also illustrative of this belated, but effective wave of truth and justice policies. Dealing with the past in the sense used in this study only started in 2000, with the implementation of the law of access to the files of the former secret police and the creation of the Council for the Study of Securitate Archives. While the institution slowly functioned during the left-wing government mandate, with the

coming to power of the right-wing coalition in 2004 these policies gained new momentum. In 2005, archives of the secret police were finally passed into the Council's custody, which made possible a wave of revelations of collaboration of many public figures. An Institute for the Investigation of the Crimes of Communism was created, as well as a Presidential Commission for the Analysis of the Communist Dictatorship in Romania. Based on this Commission's Final Report, president Basescu solemnly condemned the communist regime as illegal and immoral. A project of lustration law has been voted in 2005 by the Senate and awaits Chambers of Deputy's approval.

Even in Albania, the Parliament in 2006 adopted a resolution denouncing the crimes of Enver Hoxa and of the communist regime, as "the wildest communist system in Eastern Europe, isolating Albania and bringing it to extreme poverty". The resolution also demanded the opening of the secret police files and the lustration of public figures. At the end of 2006, three law proposals were studied by the legislative commission of the parliament. This brief account shows the emergence of a "second wave", a revival of the policies and politics of transitional justice. This development challenges the theories currently used to render intelligible such processes, theories that grant explanatory and predictive powers mainly to the recent history of the country in question. In order to show the shortcomings of these factors taken on their own, I shall examine some of the most frequent answers to the question: "Which are the factors that explain the success (or lack thereof) of the transitional justice policies?" I will start by invoking the most commonly-cited factors: the nature of the past regime, the mode of exit, recent and more distant history and other "cultural" factors, all being facets of an analytical approach that can be summarized as "the legacy of the past". A very good critique of this framework of analysis is to be found in the excellent study of Williams, Szczerbiak and Fowler (2003). I shall then move to other, less all-embracing factors, like the development of political life, election results, coalition-buildings and the evolution of discourses domestically and internationally – factors that we group under the heading of "politics of the present".

The Legacy of the past

1. The nature of the past repression

According to Linz and Stepan (1996), but also Kitschelt (1999:40), Moran (1994) and many other subsequent studies, the main factor influencing the fate of transitional justice is the harshness of the repression inflicted by the old regime. Linz and Stepan categorize countries according to the degree of repression they had to bear. Thus, these authors characterize the Hungarian communist regime as "mature post-totalitarianism", whereas Kitschelt calls it a "national-accommodative" regime that tolerated some dissent, just as the Polish case. Linz and Stepan argue that Poland was the only communist state that never experienced true totalitarianism, so they place it in the milder 'authoritarian' category. However, despite the theory stating that after the fall of a harsh regime there would be higher pressure to settle scores than after a milder one (Moran, 1994), both in Poland and Hungary there were immediate demands for lustration, and the subsequent developments confirmed the tendency to serious transitional justice policies. According to this theory, Romania, with its "sultanistic" regime, should have shown a very strong tendency to apply transitional justice – however, no significant policies were implemented until 2005. This point was made by Williams et al. (2003), who also show that it is only the Czechoslovakian case (characterized by Linz and Stepan as "frozen post-totalitarianism" and by Kitschelt as "bureaucratic-authoritarian") that fits the explanation focusing on the nature of the previous regime. The problem with this assessment is that Moran and others consider as highly relevant the degree of tolerance to dissent of the repressive regimes: Moran predicted the less dissent was allowed, the more pressure accumulated in society, and thus in these societies transitional justice measures would be harshest; respectively, if a certain measure of dissent was allowed, like in Poland or Hungary, there would be less pressure for transitional justice. The fallacy in this reasoning is that the degree to which dissent actually existed did not entirely depend

on the degree of tolerance of the regime: the Czechoslovakian and East-German cases, where a strong and organised opposition existed despite the harshness of the repression, are a proof to this. The relevant criterion should be thus the degree to which dissent existed and was able to come together in organised movements – as these movements were subsequently able to determine an active revisiting of the communist past.

This is not to say that the nature of the repression is not a highly relevant factor for determining the nature and the success of the transitional justice measures. What seems to be truly influential in determining transitional justice is not so much the harshness, but the actual nature of the crimes committed by the regime: the cases of murder, assassination, extermination in labour camps are more easily prosecuted and less easily forgotten than, for example, abuses of power, mass surveillance or political policing. Thus, in Eastern Europe the political trials were concerned with the Stalinist crimes in the 1950s (present in every country in the region), as well as with the episodes of overt repression specific to each country: in Germany – the Wall shootings, in Poland – the martial law repressions of the strikes, in Hungary – the 1956 Revolution, in Bulgaria – the labour camps. In Romania, the only episode of overt opposition and repression was the 1989 Revolution itself – the trials there were concerned almost exclusively with this episode. One significant dimension is the time elapsed since the worst abuses were perpetrated: allegedly, the more distant an event, the less probable would be its prosecution. Practice shows that all post-communist countries have at least attempted trials of Stalinist crimes, even more so than the more recent ones; it may be harder to try these crimes, but their force as remembrance and incentive for transitional justice policies does not seem to simply fade away with time.

Ruti Teitel (2000) has shown how publics will demand those transitional justice policies that counter the socially perceived injustices: thus, in Hungary, the Constitutional Court preferred not to annul the status of limitation for prosecuting the repression of the 1956 Revolution, because, they said, the characteristic of the old regime was law-

lessness, and the only way to mark the departure from this regime is to scrupulously respect the law, even if this means letting guilty people go free. This social perception of the nature of the injustice should be thus considered more relevant than "objective" factors, as they would be assessed by external observers.

2. The exit mode

Another very influential theory, the one belonging to Huntington (1991: 211), shows that the determining factor would be the **exit path** from the repressive regime, and the type of transition that is conditioned by it.

According to Huntington, the elite bargains are the ones deciding whether the old regime will be tried or punished. Thus, he established a classification of countries according to their exit from communism: countries where the regime was violently defeated (Romania), where it was demitted (like Czechoslovakia or Germany), countries where there was a coup d'état (Bulgaria), or where there were negotiations taking place (Poland is the only case). In his "guidelines for democratizers" (Huntington, 1991:231), he recommended desirable courses of action according to the trajectory of old elites: in cases of transformation or transplacement, like in Hungary, Poland or Czechoslovakia, transitional justice measures should not be attempted: "the political costs of such an effort will outweigh any moral gains". Only in cases of elite replacement, like in East Germany or Romania, transitional justice measures should be implemented, and even then, in a swift and limited manner.

Practice invalidated this theory, as I have seen since 1991. The Romanian case defies not only its definition (Romania was no case of elites replacement by any account), but also the prediction: transitional justice was not implemented for 10 years, but it eventually came to be pursued long after the revolutionary moment of 1989. The more recent developments in the Argentinean or Chilean cases, detailed at

length in Huntington's demonstration, also contradicted this framework of comprehension and prediction.

The exit mode does not determine the final outcome of transitional justice policies. While being without a doubt a very relevant factor, it is only decisive at the very moment of the transformation. The "transition mode" as conceptualised by Huntington is used in a rather static and almost deterministic manner: he showed the overarching importance of the situation existing at the very moment of exit. However, transitions are by definition dynamic processes, and the path dependent approaches can only have so much precision in predicting future policy outcomes. Transitional justice is a peculiar domain, and while I agree with Huntington that it is chiefly determined by politics rather than moral or legal issues, it seems to be so according to different dynamics than the balance of power at the beginning of transition alone.

We shall return to analyse the explanatory power of national transition processes, taken precisely as processes, rather than a static picture of the situation at the moment zero. But before I move towards more dynamic or diachronic types of explanatory factors, I shall analyse yet another "static" one, the determinist explanation *par excellence*.

3. The political culture

The political culture of a country or of a region is an oft-encountered explanation for the transitional justice policies adopted by the society in question. Particularly the South African solution was considered to be intrinsically linked with the strongly religious frame of mind not only of the initiators of transitional justice policies, but of the South African people as a whole. Concerning Eastern Europe, differences are often made between Catholic countries and the Orthodox ones. Another way of assessing "culture" is by using such anthropologic categories as Ruth Benedict's "shame culture" versus "guilt culture" (Benedict, 1946), to explain why in certain countries transitional

justice measures can go deep into people's consciousness, while in others it remains a question of façade and losing face. Tempting as they may be, the problem with such approaches is common to most socio-historic and cultural modes of explanation: it is overly deterministic, leaving little room for development or change, and therefore almost invariably wrong when it comes to predictions.

Again, the "cultural" factor does have a good explanatory power, not on its own, but rather as a background-setting conceptualisation. More pertinent facets of "culture" in this respect are the respective histories of the countries analysed: past democratic traditions (as shown by Huntington), past experiences of transitional justice (the emblematic case here is Germany), and more generally the historic events having marked the country in question. In the case of former Yugoslavia this was considered a determining factor for the development of the transition and of transitional justice. The Balkans generally is an area considered to be heavily influenced by its history and the resulting political culture (the very term "Balkans" being a cultural construct). Remarkable in this regard is the study of Diamandouros and Larabee (2000), explaining the different transitional trajectories in Eastern Europe by the cultural frames developed since the times of the Ottoman Empire versus the Austro-Hungarian one.

With all its enlightening value, the cultural explanation can hardly constitute a reliable prediction instrument. Transitional justice measures in Eastern Europe were less the expression of a deeply ingrained political culture or of the recent history of the countries in question, than the result of politics, bargaining, balance of power and other such factors. Even if we include the recent repressive regime in the category of "historical legacies", as we saw earlier, this factor alone does not fare well in explaining transitional justice policies and outcomes. The nature of the old regime may determine the contents of the policies (trials, lustration, opening of archives), but it will not determine outcomes.

Another approach, encountered in more recent studies – mostly in individual country studies, those that get into the specific context

of each transition – underline another set of factors, such as the development of the transition, the development of institutions such as legislation, judiciary or parliaments, or the development of political identities of relevant actors. The characteristic of this approach is that it recognizes the dynamic nature of these developments, and the fact that it is an open-ended process, difficult to predict based on macro-variables only.

The politics of the present

4. The development of the political transition

The transition is recognized as a fundamental factor influencing transitional justice – and indeed, impossible to dissociate from the very concept. Ruti Teitel (2000), a scholar with a major contribution to the consecration of the term, has expressed it most clearly: "Transitional justice is constituted and constituent of transition", as it is part and parcel of the transformation.

The evolution of the political life is one key factor influencing transitional justice. As was recognized by Huntington, the balance of forces existing at the moment of exit from the old regime is of a great importance for the transitional justice at that time: how strong is the old elite, how discredited it became? The opposition forces and the civil society (which initially seem to be one and the same) – what is their force, their unity and legitimacy? This situation, a direct legacy from the old regime, reflects itself in the results of **the first elections**, a factor highlighted notably by Helga Welsh (1996). It is true that the result of the first free elections and the balance of forces that ensued were good predictors of transitional justice in Eastern Europe in the first few years. It cannot however constitute a determining factor for the whole fate of the project. In fact, Welsh's approach merely takes the Huntington model a step further, replacing one static image (the elite situation at the moment of exit) with another (the elite situation

after the first elections). Election results do influence greatly transitional justice, and in our opinion it can be singled out as the most important factor of all, but it must be recognized that election results change with every election cycle in Eastern Europe. In analysing transitional justice, one should not see things short-term, nor predict great trends; one proof of that error would be the "ex-communists return to power" frenzy in academic and daily press headlines in the mid-90's (Zhelev (1996), Sikorski (1996), Applebaum (1994), Rupnik (1995)). The characteristic of transitional political life is precisely its volatility: in Eastern Europe power changes hands from left to right on each election. Electoral dynamics, and not simple generalizations from the results of the first elections, have explicative and predictive powers.

Transitional justice in many of these countries became an issue of political identity, one that defines and justifies the political polarization of that society. Before examining, in a subsequent section, the issue of identity and motivations of actors, we should consider how transitional justice can and is used as a weapon in **political games** between parties. Studies based on the game theory, like Nalepa's recent study (Nalepa, Kunicova 2006), have shown, beyond mere contextualization, trends that can be valuable hypotheses and predictions. For example, given that in almost all countries in the region the political right wins power as a coalition, coalition constraints are instrumental in the promotion of transitional justice measures. This explains why in many countries transitional justice policies were voted at the very end of the rightist mandate, when coalition constraints and agreements lose their binding force. Negotiation and compromise determine the passing and implementation of legislation, much more so than deterministic macro-variables:

The passage of each lustration bill […] reflected not the country's political history, but rather the parliamentary arithmetic of fluid party systems […]. The story of lustration, therefore, is one of post-communist political competition and legislative coalition-building, and should be told with emphasis on the rhetoric, moves and compromises that competition and coalitions require (Williams et.al., 2003).

However, the fate of transitional justice does not fluctuate entirely based on election results. The actual politics of transition, the development of privatisation and reform, are also important factors. It is often said that transitional justice is an elitist project, a weapon for inter-party politicking rather than a policy to answer a genuine popular demand. However, the second wave of transitional justice in Eastern European countries can be largely explained by a change of hearts of the public opinion on the matter. A public that initially showed little enthusiasm for transitional justice (like in Poland or in Romania) have changed over time, as they perceived failures of transition as a result of the perpetuation of old networks of the old regime. This was reflected in the public discourse of the right-wing parties: in Romania, the anti-communist ethos of the early 1990s has muted into an anti-corruption discourse in the 2004 elections. Thus transitional justice, particularly lustration, started to appear indispensable for the politics of the present and not merely for coming to terms with the past.

One political factor that has not been analysed to the extent of its real importance is the **international factor**. The development of the human rights discourse and ideology was duly mentioned by Huntington as a determining factor in the successive waves of democratization; recent developments in international law were thoroughly analysed and duly acknowledged as fundamental factors influencing transitional justice. However, as far as post-communist countries are concerned, I believe that insufficient attention has been paid to the dynamics of Western perceptions of the issue of transitional justice (notably resolutions on lustration) and the influence it had on domestic policies. The Western attitudes were of a great importance, as the perspective of accession to NATO and to the European Union was a major factor influencing all policy decisions of East European countries in the past 20 years. Another international issue that has been under-analysed is the effect of the 1991 failed coup in Moscow, and the impetus it gave to transitional justice demands in satellite countries. It is peculiar that explanations of the fall of communism rely so heavily on international factors and foreign policy, whereas transitional stu-

dies (and transitional justice studies inspired by them) all but ignore such factors.

5. The quest for identity

A cursory perusing of transitional justice studies reveals that political science approaches were privileged, in the detriment of sociological approaches (with the possible exception of individual country studies). The discourses and motivations of **actors** are, however, instrumental in understanding how transitional justice was implemented in specific countries. A very good explanation of actors' motivations was given by Nino (1996), and Elster (1998; 2004) attempted a model of the dynamics of these motivations.

A sociological approach is preferable in comprehending actors' motivations, as it privileges the analysis of political interest rather than of the ideological or moral concepts. Moral motivations alone are unable to account for changes in discourse or policies over time. Identity is a valuable resource in politics, and as transitional justice is a clear identity-defining issue, it is used according to political needs by parties and other actors. Anti-communism, for instance, is a simple, clear-cut and powerful discourse, thus a resource that is disputed by many actors across the political spectrum. One should not presume that transitional justice measures arise directly from an anti-communist discourse or identity.

The above-mentioned "cultural factors", as well, gain their entire relevance on the level of discourse analysis. Distant or recent history, repression and injustice perpetrated by the old regime, these are all rather discourses and representations than mere facts. The simple "revealing of the facts" does not equate with "truth"; truth is intersubjective, and the facts only receive meaning when they are interpreted. Of course, one should look at who interprets the facts, and what purpose and interests the interpretation serves.

The same goes for other contents of transitional justice discourses.

A classic philosophical debate is often invoked by transitional justice scholars: moral discourses requiring substantive justice versus discourses defending the rule of law. Beautiful analyses and parallels with the Fuller-Hart debate are made (Hart, 1958; 1997; Fuller, 1958; 1969), and we see to what extent the issue of transitional justice is an excellent case study of political philosophy and of philosophy of law. Lists of arguments for and against lustration are drawn (like the very good one by Huntington). Illuminating as they may be, such abstract analyses do not fare well as far as explanation of actual turn of events is concerned. One should look for the tenants of these discourses, the web of various interests they are embedded in, at the events that preceded or triggered these discourses – and discover the reasons why often, advocates of these immutable truths actually change positions, and discourses and principles mutate.

A dynamic approach is much more relevant and explanatory for precise cases than a static image, however satisfactory it may appear on a conceptual level. Motivations change, events occur and, above all, people grow old and are replaced by other generations that change the composition of collective actors. Personal loyalties, for instance, a capital explanatory factor in the Chilean case, also wither away: when Pinochet invoked in his own defence alleged disobedience of the military, the pact of loyalty between him and the Army was broken, which triggered a wave of confessions from betrayed generals. Likewise, cases of militant attitudes in institutions like the judiciary can make decisive breakthroughs (many cases of judges in Argentina, or in Romania the military prosecutor Dan Voinea, almost single-handedly dealing with the most sensitive cases of transitional justice).

Conclusions

Transitional justice is a very challenging concept, trying to render intelligible unprecedented and often controversial phenomena. The capacity of social sciences to offer a satisfactory explanatory frame-

work, one that would account as well for subsequent evolutions of the situation, is put to the test. This complex issue can be approached from a variety of points of view: from linguistics and discourse study, to political and moral philosophy, to social psychology, party politics and coalition making analysis. Each type of approach has its advantages and its shortcomings. In this paper I argued against commonly encountered fallacies that stem from political science models: the tendency to over-simplify descriptions and contents, to treat countries as homogenous units, and to draw models subject to a too-limited number of variables. The hope to build grand theories, at the same time parsimonious and generally applicable, is defendable as the major goal of all social science. It is particularly tempting as transitional justice is concerned, as the field of study offers the unique opportunity to observe similar phenomena in various countries simultaneously.

But such theories, at best, do not explain all relevant facets of the observed phenomena and, at worst, are invalidated by the occurring developments. They are of little use when it comes to understanding the intimate resorts of decision making, implementation or results of particular transitional justice policies in particular countries. Detailed, sociological-type studies are often better suited to account for transitional justice. A fallacy that threats such studies is the confinement of the analysis to the overly-detailed and the overly-specific. It is a flaw of most studies on the Romanian case, studies that rarely attempt comparisons with other countries in the region. Such studies both intimately informed on the specificities of each country and at the same time attempting comparisons and modelling are still lacking in the ever-growing field of transitional justice studies. Hopefully, as specific country studies emerge (and with the passage of time, the chance of a dispassionate analysis increases), and the community of scholars in the region grows ever more integrated, such ground-breaking approaches will emerge – for the advancement not only of transitional justice studies, but of political and social sciences as a whole.

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Anđelko Milardović

Elite Groups in the Waves of Democratization and Lustrations

1. The approach

In the following lines, I want to bring forth the problem of models *of transformation and the creation of elite groups* in the 20th century with regard to the waves of democratization and with special reference to the transition in the Central, Eastern and South-Eastern Europe after 1989, and different experiences of *lustration*. The question is about the **first aspect** of this short discussion.

By method, I distinguish **elite** and **nomenclature**. I define elite as a highly positioned and selected groups of people in a society, that exercise certain **virtues**, such as organizational skills, military knowledge, financial power, affiliation to a political group, knowledge and skills in operation with symbols. There are, therefore, managerial, military, financial, political, scientific and cultural elite groups. Pareto says that "each area has its own elite". In democratic societies, the set up of **elite** is based on electoral procedures, and their permanence and tours are expressed in their rotations. The change of elite is a presumption of social changes. In totalitarian regimes, versus in democratic ones, upper social classes are **appointed or nominated** within the political system. Holders of totalitarian regime or nomenclature, according to Linz and Stephan, are members of the military-political-police segments who lead and supervise the whole repressive state apparatus.

The criteria are not the knowledge, skills and procedures, but the

moral, political and ideological devotion within the totalitarian regime.

The **second aspect** of this discussion is the relation of the new democratically elected government towards the old social pillars in the new democratic environment. That relation goes into the field of politics, rights and ethics. Political dimension of relations towards the former social pillars is based on the political will and decision whether to **implement lustration or not**. It is the question of assessment: what good does the lustration bring, and what can be achieved by it in the end? **Ethic dimension** of relations towards the 'ancient regime' after 1989 is contained in the necessity of correcting old injustices. **Legal dimension** of relations is expressed only after the political decision to implement lustration is made, which is colored by ethic motivation to process massive violators of human rights in the regime of the leftist totalitarian dictatorship. That understands that procedures should be put into the frame of legal statehood, and further injustices should be avoided.

The **third aspect** of this discussion is, in fact, the time frame and place where lustration is taking place. We are talking about the time between 1989 and 2007 in the countries of the Central, Eastern and South-Eastern Europe, countries with the open, completed and uncompleted **transitions**. Lustration has to be observed in the broader context of transitional process, from the point of different historical experiences in particular countries, as well as the practicing and abandoning lustration in the mentioned European regions.

2. Transformation of the European elite groups between 1918 and 1945

Liberal and conservative elite had the key role in the processes of democratization and reversion. Within the theory of transformation of different kinds of elite in the 20th century, societies of the Central and Eastern Europe have faced different models of transformation and creation of new elite groups.

By the collapse of empires after 1918-1933, the model of elite continuity has prevailed. Parts of the old imperial elite in Germany and in the territory of the K&K Monarchy have nested into the new (liberal) democratic regimes.

The Bolshevik revolution in Russia has radically eliminated parts of the old elite (lustration model), while the new Bolshevik elite/nomenclature has remained in power until 1989, the time when the third wave of democratization in Europe began. We are referring to the state party elite or the 'position holders', versus the liberal opposition and nationally oriented elite.

Radical conservative elite has participated in reversion waves of democratization in Europe. Between 1933 and 1945, the radical conservative, fascist and Nazi elite have physically fought with the liberal democratic elite, who, under the terror or modern tyranny, kept vanishing at nights, or emigrated to the U.S.A. The old Nazi/fascist elite was lustrated or purified by the defeat of Fascism and Nazism in 1945.

3. Nomenclatures or communist elite and their fate in transition: between continuity and lustration of elite groups 1989-2007

3.1. Transition and the problem of the "old cadre" – nomenclature or the "position holders"

I define transition as a crossing from a non-democratic to democratic regimes. Therefore, it is a transition from authoritative, totalitarian and post-totalitarian orders to the order of consolidated democracy. Transition can be initiated in different ways: sometimes by rebellion of civil society, sometimes by internal destruction of totalitarian society. It can start by military coup or can be initiated by the communist nomenclature reformists. Transition is preceded by the democratization phase and liberalization of society.

The **first phase of transition** is preparatory, the **second** is the phase of decision or transition to democracy and the **third** is the phase of ha-

bitualization or transition completion. As for transition, according to Linz and Stephan, there are various experiences, such as the stipulated transition, as we see from the examples of Poland and Hungary.

In Czechoslovakia, transition was carried out by the "collapse of frozen post-totalitarianism". Then, in Romania, it was carried out as a "controversial transition" by defeating the sultan regime of N. Ceausescu, who was inspired by Kim Il-sung, and finally there was a transition that was obstructed by war as in the USSR and ex-Yugoslavia.

In the process of transition and introduction of democracy, the elite groups carry the relevant roles. Harrop writes: "The important revelation of transitology is the key role of political elite or the reformed parts of nomenclature. If democracy is indeed created for people, it is rarely that people really create it" (Hague, Harrop and Breslin, 2001:181).

According to him, it is simply imposed from "above". Therefore, the old reformist nomenclature cadre imposes and guides the process of transition. (Bulgaria, Romania, Croatia, Serbia, Ex-USSR) (Compare Beyme, 1994:94).

Due to erosion and implosion of the old leftist totalitarian regime, under the pressure from "beneath" by the masses, and from "above" by the outside protagonists, a confrontation is taking place between the reformists (soft-liners) and the conservatives (hard-liners) of the nomenclature. The lack of support by masses, or the "Tocqueville factor", in other words, the "lack of determination of the ruling elite to rule" implies disinterest, the giving-up of using force in preserving the erosive and implosive order. This situation is described by Ash: "Several boys went out to the street and shouted certain words. The police came and beat them. The boys said: You have no right to beat us! And the arrogant rulers in fact responded: Yeah, we have no right to beat you. We have no right to preserve the power by force. The end doesn't justify the means any more" (Ash, 1993:108).

3.2. The concepts of creation of elite groups in transitional societies

One can speak about various concepts of creations of elite in societies that went, or are going, through transition in the period of 1989-2007.

• *Concept of pact between elite groups*

This concept can be described as oral or written agreements between transition protagonists – soft-liners of the nomenclature - and the opposition elite, about the rules of initiating, leading and managing of the transition process up to democracy consolidation and creation of the new plural elite **without the model of lustration**.

• *Concept of convergence of elite groups*

This one implies closeness of the old nomenclature soft-liners, representatives of democratically elected rulers and the rest of the nomenclature hard-liners who, after the established multiparty elections, accept the new reality and continue to rule in the new pluralistic conditions. **This concept excludes the possibility of lustration of the old regime human rights violators.**

• *Concept of continuity of elite groups*

• *Democratic – revolutionary concept of creation of elite groups by the method of lustration, with some experiences*

Besides, one can speak also about democratic revolutionary model with lustration or removal of the old parts of the nomenclature from public life, the part that massively violated human rights. The concept of transformation of elite groups by lustration should be observed on examples of some particular countries such as Czechoslovakia, DDR and Poland, while the parts of the Western Balkan nomenclatures have remained **non-lustrated**.[1]

1 For the outline of conditions in Eastern and Central Europe and former USSR please see: Democracy and De-communization: Disqualification Measures in Eastern and Central

4. Some experiences related to the lustration practice

Czechoslovakia adopted the Lustration Law in 1991, in order to protect state institutions. By peaceful division of Czech Republic from Slovakia, the *Law on access to documents of the communist police intelligence* was passed in 1996, and in 2002 the law was passed by which the 'range of accessible documents of the secret intelligence' was broadened. One type of lustration that applied to the members of the communist secret intelligence in Slovakia was passed by the *Law on public access to documents related to activities of state security intelligence* 1939-1989. This country also introduced a type of lustration in which one had to sign a paper which confirmed that the candidate for a public duty had not violated any human rights in the old regime.

As stated by Operes Maurius, in Romania "lustration is still only a dream", and in Bulgaria it is "focused to the security sector and its group of agents and intelligence operators", as pointed out by Emil Tankov. In the Eastern part of Germany, a quiet lustration was carried out over citizens who had connections with the former regime intelligence. They used to get a paper with their own past on it and the employer was to decide what to do with them and their fate.

By victory of the Kaczynski brothers in Poland, active lustration is being carried out in civil, as well as in church structures. The representative of the Polish Bishop Conference, Rev. Jozef Koch says in an interview: "We have started the church lustration". Where the lustration is carried out, it was done for the sake of the massive violators of human rights in the old regime, which does not represent the political elimination of opponents, but the legal point-out of massive violators of human rights at the time of the leftist totalitarian dictatorship. The backbone of lustration should be the **Lustration Law.** It has to be understood as a part of "**transition justice**".

Regarding the Western Balkan countries, the lustration laws were

Europe and Former Soviet Union, Venice, Italy, November 14-15, 1993, in the context: The project on justice in terms of transition, source: http://www.pjtt.org/past%20programs.htm, access realized June 14, 2005.

passed in Albania (1993) and in Serbia (2003). The difference between these laws is that in Albania it referred to the executives of the extinguished political roles, and in Serbia to the massive violators of human rights. The rest of Western Balkan countries have not passed lustration laws. Lustration was the topic of many professional and scientific discussions in Greece, Albania, Serbia and Croatia. Several discussions have taken place within CDRSEE, and in 2004-2005, a scientific project was initiated.[2]

As far as the lustration laws passed in Albania and Serbia are concerned, they referred to the state bodies' officials, i.e. security intelligence, public institutions, diplomatic representative bodies etc. At passing the laws, two criteria were taken into account. The **first criterion** was the position in the nomenclature hierarchy, and the **second** was the responsibility in case of massive violation of human rights. In spite of the lustration laws passed in Albania and Serbia, nothing serious happened. In Serbia it remained a dead letter, and in Albania it had some sort of effect.

Some 250 persons were considered to have lost or were prevented from executing certain positions. At passing the Lustration law, the civil society participation was left out.

The access to documents produced by secret intelligence is possible in Croatia, Macedonia and Bosnia and Herzegovina, but in Serbia and Albania the access is denied. As opposed to **public discussions on lustration** that never took place, public discussions about history are vivid more in the form of conflict lines from the WW II, rather than tolerant dialogues about violence of the leftist totalitarian and post-

2 Center for Democracy and Reconciliation in South-Eastern Europe (CDRSEE) organized a scientific project on the theme of lustration. The project title was: Disclosing Hidden History: Lustration in the Western Balkans. The project took place between February 2004 and January 2005. Dossier Conclusions and Recommendations (Thessaloniki, July 2005) is important for understanding of the project. In the project summary it is stated: The process of facing the past and clear cut with it is a very sensitive issue in all post-authoritarian countries. The project Disclosing Hidden History: Lustration in the Western Balkans was initiated in order to evaluate changes on that platform. The aim was to encourage a discussion about the past. The conclusion was that there was no lustration in the Western Balkans. Several seminars and workshops took place: a) the Past and Today: Democracy's consequences. The results can be found on www.lustration.net and www.cpi.hr topics «lustration».

totalitarian dictatorships in the Western Balkans. That, of course, also refers to the condition in the Republic of Croatia.

5. Case study: The Republic of Croatia

5.1. Facing the past in Croatia in the context of relations between nomenclatures and lustrations

By the fall-down of leftist totalitarian regimes in the Central, Eastern and South-Eastern Europe, as well as by establishment of democracy and multi-party systems, the issue of facing the past has emerged. **Facing the past** for totalitarian communist regimes doesn't run smoothly and without new ideological conflicts. Conflict lines related to the facing of the past are being open on the ideological grounds. One can speak about opposition, conflicts and new political splits in transitional and post-transitional societies. In facing the past, at least in the case of Croatia, there is insufficient political eagerness to analyse all the dark sides of totalitarian ideologies and its subsequent derivative regimes in the 20th century.

In the process of facing the past, the protagonists and sympathizers of the fallen totalitarian ideologies and regimes are still in conflict, with no desire to end the stories of the WW II and the communist totalitarian period, and from the Homeland war 1991-1995.

Sometimes it seems that the **WW II in Croatia** has never ended, because it "opens in May" and closes "in June". In fact, it still keeps on going as a continuation of ideology clashes from the 20th century.

The question of facing the past is mostly instrumented among the political parties for political purposes on a daily basis. Or, by pulling out some contents from the periods of different totalitarianisms in the 20th century Croatia, there exists an intention to cover up for some current political failures, by re-directing the attention to some past topics. The past becomes an instrument and the actors don't want to face the problems and solve the questions of the past, so that the society could

go on and turn to development, democracy and the future. A special aspect of facing the past in Croatian society is, in fact, the open **question of unprocessed lustration of the highly ranked officials of the communist nomenclature** with the thesis that lustration was not possible due to model of transition interrupted by the war.

The high ranked officials of the Croatian nomenclature, who had violated human rights by prosecuting and killing their political opponents for the so-called "contra-revolutionary activities", have remained untouched, unpunished, moreover, they are still on their high ranked positions in the secret police, army, companies, media, universities, diplomacy, as the "old figures in the new context".

A model of continuity and transformation of elite groups can be considered as the evolutionary model. It was carried out in the majority of transitional countries, in which the old figures, after the first multi-party elections, found themselves in the new context. Linz and Stephan's remarks have confirmed that fact, and it refers to Croatia as well. Linz and Stephan: "In the sphere of motivation, communists (or ex-communists) from the former nomenclature, after being defeated in the free and transparent elections, will continue to occupy many significant positions in the state apparatus, especially in state institutions. Through their nets of directors, management and even secret intelligence, the members of the nomenclature can safely keep their privileged positions in the emerging capitalist economy and, by that, a significant political influence. However, they will primarily act in their own interest. In the majority of post-communist countries, former officials don't intend to overthrow the regime, or directly establish the new one, but they only want to make profit out of it."[3]

It is characteristic for this model that it excludes the possibility of lustration of the parts of the old nomenclature; the part that is responsible for violation of human rights, abuse, violation and caption of the opposition members or of the "internal enemies".

3 Linz, J., Stephan, A. (1996): Problems of democratic Transition and Consolidation in Southern Europe, South America and Post-Communist Europe, Hopkins University Press; According to Linz, J., Stephan, A. (1988): Demokratska tranzicija i konsolidacija, Beograd: Filip Višnjić, page 92.

The mentioned citation is not quoted without reason. It shows exactly what happened in the majority of transitional countries. The nomenclature has mostly remained unpunished and emerged as a transitional profiteer, and in case of Croatia, its parts are directly involved in transitional economy business such as the "**legalized robbery of the century**".

5.2. Transition from the nomenclature into the plural political elite and the issue of lustration

In Croatia, under the "pressure from above", under the Milošević factor, and the fall of communism on global level, there was a stipulated transition agreed between the soft-liners of the communist nomenclature and the oppositionists, who were greatly a part of the old totalitarian regime and who were in conflict with them, specially at the period of "Croatian Spring", in 1971.

Transition of the nomenclature into the plural elite was taking place peacefully, according to the rules of transitional game. The old nomenclature, now the "pluralized elite", was deeply rooted into the communist totalitarian regime in Croatia. Parts of the military/police and civil-military intelligence system of the old regime, as well as parts of the state administrative structure, continued their life within the democratically elected government. There were massive violators of human rights among them, for whom, at the beginning of the new government rule, lustration was demanded by the Croatian society.

Lustration was never carried out due to the fact that the majority of the ruling party, HDZ, (the rightist center), which ruled between 1990-2000, belonged to the right wing of the Alliance of Communists of Croatia (SKH), and to the various military/police and intelligence structures. After the first multi-party elections in Croatia in 1990, people from the old regime were again found on leading positions in police and secret intelligence, because they offered their mandates to serve to the new democratic government. It was not so much because

they adored democracy and the Croatian Republic, but rather because they wanted to keep their life-styles and status. Some of them were the leading violators of human rights in the old regime. Lustration didn't touch them!

The leaders didn't want to execute lustration over themselves. Furthermore, they couldn't, due to the model of Croatian transition. The issue was about the "model of transition interrupted by the war". Immediately before the war and during the 1991-1995 war, the opening of lustration process would have been a deadly act. The war was a perfect way of abandoning and postponing lustration, not only in Croatia, but over the whole ex-Yugoslav territory. The communist nomenclature has, by the fall of Yugoslavia, caught an excellent opportunity for survival by offering their services to the newly elected democratic governments in the new ex-Yugoslav states, including Croatia. That fall of Yugoslavia was predicted by the American CIA, back in 1973. The process of lustration was indeed impossible in Croatia due to the war and the aggression on Croatia, as well as due to Tuđman's concept of the "reconciliation of all Croats", although that idea originally belongs to some other authors of the Croatian political emigration.

Politicians from that period claim that the strong communist cadre inheritance in HDZ, as well as taking over of the State Security intelligence, was a barrier for passing the lustration law.

Passing such a law at the time of aggression on Croatia in 1991 would have meant the opening of the inside front, and a type of a new conflict within Croatia. That would have been too much! In such circumstances the anti-lustration concept was promoted under the parole of "reconciliation of all Croats", regardless of ideologies that have greatly generated Croatia vs. Croatia conflict in the 20th century.

The concept of reconciliation vs. lustration meant giving up lustration and the intention of establishment of peace within Croatia, which was so important due to the aggression on Croatia. The war ended in 1995.

At the moment of establishment of the new democratic Croatian state, members of the Croatian department of Secret police (UDBA)

and the members of political emigration with ambivalent characteristics found themselves in the same circle. Ambivalent, because one part of it was hooked on the structure of Yugoslav police intelligence, and it was, like, "on the side of defense of Croatian interests". The other part of Croatian political emigration belonged to the wing that fought against Yugoslavia and for independent Croatia, by democratic and revolutionary organizations and methods.

President Tuđman, who himself belonged to the top Yugoslav military structures, logically, didn't arise the issue or encourage the Lustration law, same as his Croatian Democratic Union. The question of lustration was not closed, but it was strongly actualized in 1998 by the Croatian Party of Rights (HSP - populist rightist) who submitted the bill of Lustration law. Close to the end of his life, Tuđman had nothing against such a law, but insisted that distinction should be clearly stressed between people of the old regime from the police/military intelligence, who violated human rights, from those who didn't.

In spite of the Lustration law bill by the Croatian Party of Rights in 1998, the ruling Croatian Democratic Union strongly banned its passing.

The concept of reconciliation of all Croats was greatly relativized in 1995. The old ideological conflicts between "Ustashi" and "Partisans" went on with all the force, with the ground that fierce enemies from the WW II, together with their sons, could not be reconciled. That meant the continuation of the WW II, but with other means. Polarization by ideological line was incited again. Ever since 1998 when the Lustration law bill was suggested, till 2007, discussions in media continue, as well as in different internet forums on lustration, "*pro et contra*".

Demands for lustration can be heard, not only for human rights violators from the period of 1945-1989, but also for violators of the period of 1990-2000, emphasizing the thesis that in that period lustration was carried out over the majority of judicial apparatus.

5.2.1. Lustration advocates in the 'facing the past' context

5.2.1.1. Political parties

5.2.1.1.1. Croatian Party of Rights (HSP)

On the ideological left-right continuum, political parties appear to be more rightist as advocates of lustration, than the rightist center itself. Radical and democratic left wing rejects such a concept of facing the past, and the **liberals have never advocated for the Lustration law**. It is not to be expected from them in relation to liberalism towards totalitarianism, in the sense of Hayek's criticism of all totalitarianisms. The right center (HDZ) also rejects the concept of Lustration law, so the **lustration is advocated by parties and civil society associations of the populist right orientation.**

Out of all parliamentary fractions in the Croatian Parliament, only the Croatian Party of Rights (HSP) (parliamentary populist right) submitted the **Bill No. 396**, that is, the **Bill of Law on elimination of consequences of totalitarian communist regime**, directed to the Representatives of the House of Representatives, to the presidents of working units of the House of Representatives of the Parliament, and to the Government of the Republic of Croatia, *dated February 11, 1998*.

The following is a presentation and analysis of the lustration documents in Croatia.

A) Croatian Party of Rights and the Bill of Law No. 396 (1998)

The following is the overview of the structure of the Bill of Law No. 396.

Section I deals with reliance on constitutional grounds in the process of creation of the Bill of Law. The basis for the Bill of Law No. 396 was found in constitutional provisions i.e. in the **Original provi-**

sions of the Constitution of the Republic of Croatia, in which its democratic structure is stressed out, and in which the "communism, as totalitarian system, is completely rejected". Further, it was stressed out in the "Article 2, item 4, sub-item 1, of the Constitution of the Republic of Croatia, by which it is determined that the Parliament independently decides about the structure of legal political relations in the State of Croatia".

Section II, **"Evaluation of status and basic issues that have to be regulated by law, as well as the consequences that will follow the law"** speaks about the conditions as they were "up to then", that is to say, about the character of the totalitarian regime, danger of communism, about crimes, prosecutions, victims. It gives the "evaluation of the current status", speaks about violation of human rights, "criminal structure" and the responsibility of the "party nomenclature", which demands the facing with the past, **decommunization**, lustration.

At some point it says: "Due to the extremely bad experiences in former socialist countries, a justified idea has emerged that the distinguished members of the former communist regime be systematically prevented from being engaged in the new, free positions, in the new democratic countries that have been built on the ruins of the communist totalitarianism.

That interesting movement has had different names, like decommunization, lustration and similar; in our country, it has never been consequently processed in a legal practice".[4]

Further it says, that the Croatian state "has never interrupted the continuity with the totalitarian communist regime whose ideologists have described their regime as "socialism with social responsibility".

The third level (**Issues that should be determined by that Law**) speaks about target groups to which this Law applies and about the "consequences". The target groups include members of secret intelligence at the time of communist Yugoslavia (OZNA,UDBA, SDS, KOS), tops of the party nomenclature both in the police and the army, judges of the High Courts and others, and as far as the "Consequences

4 Croatian Party of Rights and the Bill of Law No. 396, 1998.

of passing and applying that Law" is concerned, it should **stop the old members of the nomenclature**: "Removal of consequences of the totalitarian communist regime by **preventing that the state officials of the old regime still occupy the high ranking positions in the new Croatian state** is not and cannot be the consequence of discrimination of these persons in relation to their possible political or ideological beliefs".[5]

According to that, the criterion of preventing the activity of the high ranking parts of nomenclature is not the communist ideology, but violation of human rights: "Therefore, their prevention of being positioned on high ranking functions in the new state would be the consequence of their violation of human rights in the previous regime and their opposition to democratic establishment."[6]

In Section III "Evaluation of means necessary for the execution of Law", accumulation of financial resources is assessed, in order to execute the "lustration process". *The outlines of articles 1-18 follow*.

Article 1 defines "ways and procedures" and time for removal of consequences of the communist totalitarian regime that took place between "May 15, 1945 and May 30, 1990".

Article 2 speaks about "the victims of control and prosecution by the totalitarian regime".

Article 3 speaks about the "beneficiaries of the totalitarian communist regime that is about different persons related to the police/civil/military intelligence system that **violated human rights** and therefore should not "occupy particular high ranking positions in the Croatian state".

Article 4 defines who the „active operators of secret police intelligence and who the "part-timers" were.

Article 5 speaks about the beneficiaries who were not "the victims of control".

Article 6 deals with the issue of "exemption" from that Law.

Article 7 speaks about the design of a data base from the "archives"

5 Croatian Party of Rights and the Bill of Law No. 396 (1998)

6 Croatian Party of Rights and the Bill of Law No. 396 (1998)

of the Party and various secret police intelligences, for execution of that Law.

Article 8 determines the person who will create the archives. So it says that it should be a state confidant for the archives of the totalitarian communist regime, or shorter, the State Confidant".

Articles *9, 10, 11 and 12* describe in detail the activities of the **State Confidant**, establishment and operation of the independent office, rehabilitation of the "deceased and the convicts", "solution of the unsolved and the dubious death cases", "compensation for damage as a result of communist totalitarian regime."

It is said in *Article 11* "that the duty of the State Confidant is to check if particular persons were beneficiaries or active employees in the sense of the article 3 or 4.

Article 12 describes the process when the State Confidant finds out that this or that candidate for a new position in the democratic political system was a beneficiary or an agent of the communist police intelligence. In that case the State Confidant has to demand that this person should retreat within the next eight days.

Articles 13, 14, 15 and 16 deal with the issue of constitution and function of the "Lustration Court": it would consist of five judges who should be elected by the Croatian State Parliament". The judge of the Court could not be the one that was a member of the communist judiciary nomenclature. A mandate of a judge is foreseen for the period of "ten years". All decisions of the Court should be published in the Official Gazetteer (Narodne novine) and the *Article 18* says that the Law will be valid only after the announcement in the Official Gazetteer.[7]

After the Parliament session, the majority of representatives headed by the leading HDZ (right center) banned that Law. Since **lustration can only be carried out by law**, by banning the Bill of Law No. 396 **any possibility of lustration processing in Croatia has failed same as in the majority of the Western Balkan countries**.

7 All statements of this interpretation are taken from: Croatian Party of Rights and the Bill of Law No. 396 (1998)

B) The Bill of Declaration on condemnation of the totalitarian communist regime (1998)

On February 18, 1998, the Croatian Party of Rights, on the grounds of the Article 116 of the Rules of Procedure of the House of Representatives of the Parliament, and the Article 79 of the Constitution of the Republic of Croatia, submitted *The Bill of Declaration on condemnation of the totalitarian communist regime* to the President of the House of Representatives of the Parliament. The Declaration consists of five Articles and Explanations.

Articles 1 and 2 speak about the continuous violation of human rights by the totalitarian communist regime. Methods and procedures of crime and violation of human rights are described.

Article 3 stresses out the responsibility of the Croatian Communist Party (SKH) and its successors in violating human rights and committing political executions.

Article 4 condemns the communist ideology and regime that derived from it.

Article 5 hails the **resistance to totalitarian order** and all persons that participated in it.

Between 1998 and 2006 the issue of lustration within the Croatian Party of Rights has at times been raised. On the occasion of media announcement the list of "those who collaborated with the communist intelligence service," the Croatian Party of Rights announced the opening of the issue of lustration within the Croatian Parliament. That is: „Croatian Party of Rights (HSP) will demand that the Croatian Parliament, in accordance with the resolution of the Council of Europe by which crimes committed at the time of communist totalitarian regimes, puts on the agenda the discussion on lustration". That was announced by Anto Đapić, the President of the Croatian Party of Rights and the Major of Osijek, at the occasion of Tomislav Marčinko's statement that former KOS and UDBA informants still occupy positions on the Croatian TV. It is indicative that none of the political parties, or HTV

leaders, Đapić said, ever reacted to Tomislav Marčinko's statement about former employees of KOS and UDBA still working on the TV. Instead of requesting a thorough investigation of such a serious accusation, some of the current employees of the Croatian TV demanded immediate discharge of Tomislav Marčinko".[8]

The discussion for passing Lustration Law is pushed by little parties, movements of populist right wingers of the rights orientation.

5.2.1.1.2. Other parties, movements and civil society associations that support lustration in Croatia

Parties of the rights orientation have emerged as a result of clashes inside the Croatian Party of Rights, and those, together with the ones of the broader populist spectrum, advocate for passing and implementation of Lustration Law.

In the **Conclusions of the VI General Assembly of Parliament in 2006**, the Croatian Pure Party of Rights (HČSP) advocates for implementation of Lustration Law, which they see as the presumption of social changes and termination of rotation of the old communist cadre in the new social environment.

In the original of the Conclusions it states: "Lustration Law is a presumption to any serious change in social, economic and political life which would, finally, remove cadres of criminal communist system from all key positions. Without lustration, the whole Croatian political scene is a game between the leftist and the rightist wings of the Communist party. Croatia needs a change in politics and not the rotation of the old communist cadres through various parties".[9]

In the **Election platform** of the party-movement **Only Croatia-movement for Croatia** from 2007, due to distortion of historical truth and due to glorification of the old regime, and in accordance with the

8 See: Hina, February 6, 2006

9 Conclusions of the VI General Assembly of Parliament, 2006

Resolution of the Parliamentary assembly of the Council of Europe, the authors **advocate for lustration and decommunization**. The authors of the Election platform say: "Nowadays, media and political elite in Croatia distort the truth, deceive citizens, glorify Yugoslavia and Tito and they diminish the Homeland war, sovereign Croatia and Tuđman. That is why **lustration and decommunization** have to be implemented on the grounds of the Resolution of the Parliamentary assembly of the Council of Europe. People, whose dossiers are archived in Belgrade, cannot guide the state or occupy important positions. They are subject to blackmailing and therefore are dangerous for independence and sovereignty of Croatia. The price on their heads or possibility to be blackmailed gives abundant reasons for corruption, criminal acts and abuse of position".[10]

Members of the Croatian Cultural Movement (Hrvatski uljudbeni pokret), in their **Lustration statement No. 1** dated January 14, 2007, exposed their viewpoint on implementation of lustration in Croatia, based on the Resolution 141 (2006) of the Parliamentary assembly of the Council of Europe. After that, the **Society for marking of burial sites of victims of war and post-war killings passed the Croatian Declaration on Lustration, in 2007.**

The Declaration speaks about suffering of people under the communist regime. The original states: "It is assessed that more than 27,000 people were directly or indirectly involved in some form of collaboration with the communist intelligence, the infamous UDBA, KOS and others" (Croatian Declaration on Lustration, 2007).

The authors of Declaration are of the opinion that the old nomenclature have, in transition process, i.e. in crossing over from totalitarian into democratic regime in Croatia, kept their positions in the new circumstances: "After the so-called 'democratic changes' and the fall of the communist dictatorship in 1990, nothing has changed in that sense. Tens of thousands, literally, of the former communist administration officials have continued to occupy their positions and have kept their respectable social, political and financial duties. Many of the former

10 See: Election platform of the Party-movement Only Croatia-movement for Croatia, 2007

totalitarian, infamous communist intelligence services have continued to work in government institutions, or have become high ranking state officials, and they are still on politically powerful positions within the government system of the Republic of Croatia.

The army, police, intelligence, state administration, Parliament and the Government, as well as the President's Office, are crowded with employees who worked for UDBA, SDB, KOS, and were a part of Yugoslav, communist repressive intelligence network“. (Croatian Declaration on Lustration, 2007).

Based on the said, the authors and the signatories of the Declaration demand that the Lustration law is passed immediately.

Within the heterogeneous network of the civil society in Croatia, Croatian Helsinki Committee, organization for protection of human rights, of a different orientation in relation to other parties and associations of civil society of the right populist spectrum, advocates for lustration for violators of human rights at the time of totalitarian communist regime as well as at the time of Tuđman's era.

The Croatian Helsinki Committee has, as it is seen on their pages, participated in the project "The History Disclosure: Lustration in the Western Balkans", February 2004 – July 2005.

Fierce discussions "pro et contra" lustration in Croatia are on various internet forums. The conflict is shifted to the virtual Croatia and it is a topic of particular portals and blogs. Therefore lustration, as a public issue, penetrated into the **blogo-sphere** of Croatian politics.

6. International community, Parliament representatives on lustration and condemnation of crimes of totalitarian regimes

Program declarations that deal with the issue of lustration in Croatia, and the Croatian Parliament representatives refer to the **Resolution 1096** (1996) of the Assembly of the Council of Europe as well as the **Resolution 1481** (2006).

Resolution 1481 (2006) condemns totalitarian regimes of the 20th

century that have violated human rights. Those crimes were to be justified in the name of "**proletariat dictatorship**" whose "**opponents**" were taken as "**class enemies**" and who had to be eliminated. It has been stressed out that those crimes were not investigated in the period that followed the fall of totalitarian regime in Eastern Europe: „After the fall of totalitarian communist regimes in Central and Eastern Europe, not all crimes were submitted to international investigations. Moreover, international community did not subject those offenders to trial, as it subjected those who committed horrible crimes of national-socialism (Nazism)". (Resolution 1481 (2006).

Further, it is said that awareness of crimes of totalitarian regimes is not built up. Parties are invited to distance themselves from crimes of totalitarian regimes, to sympathize with victims of those regimes and to strongly condemn violation of human rights.

In the end, historians are invited to define objective historical truth in relation to the crimes of totalitarian communist regimes and their nomenclatures, and it is expressed that this kind of standpoint and relation towards the past should lead to "reconciliation".

In July 2006, representatives of the Croatian Parliament passed the **Declaration on condemnation of the crimes committed by totalitarian communist regime in Croatia 1945-1990**, which also condemns totalitarian communist regimes in the Central and Eastern Europe that committed massive human rights violations.

The Declaration is based on key items and standpoints of the **Resolution 1481** (2006) of the Council of Europe.

One of the key items that refer to the totalitarian communist dictatorship in Croatia and Yugoslavia, states:" Debates and condemnations that have been in process on the national level of some member countries of the Council of Europe, as well as condemnations of crimes of totalitarian communism expressed in the Resolution of the Parliamentary assembly of the Council of Europe about the international condemnation of crimes committed by totalitarian communist regimes – should bind the Croatian Parliament to condemn any and all crimes that had been committed over Croatian citizens within and

outside Croatia, in the name of totalitarian communism". (Croatian Parliament, 2006).

Further on, Croatian Parliament supports decisions of the Council of Europe as a discussion forum in relation to condemnation of crimes on the international level: "Croatian Parliament supports decisions of the Council of Europe to be the institution and the forum for discussion and condemnation of communist crimes on the international level. Almost all former European communist countries are its members, and the protection of human rights and the rule of rights are the essential values supported by the Council of Europe. At the same time, the Croatian Parliament is of the opinion that it itself should become the key national institution that would condemn crimes of Yugoslav and Croatian totalitarian communism. Scientific and judiciary institutions must systematically investigate the history of those crimes". (Croatian Parliament, 2006).

By that Declaration, the Croatian Parliament expressed its standpoint towards totalitarian regimes during the period of communist rule in Croatia, but any legal form of decommunization and lustration in Croatia is not the issue of parliamentary parties: it is pushed to the margins of political non-parliamentary **populist right wing**.

7. Conclusion

In this text, I have raised the issue of models of transformation and creation of elite in the waves of democratization and the question of lustration in the context of transitional justice. I have made a distinction between elite and nomenclature; **I described various models of creation of elite in transitional period including also the democratic revolutionary model supported by lustration. I was focused on that model. By studying the issue, I came to some politological conclusions:**

First conclusion: Transition from nomenclature into pluralist elite, in transitional period, takes place by different models, with and with-

out lustration. Before all, it depends on historical conditions within particular transitional societies, transitional model of course and political culture.

Second conclusion: The issue of lustration has to be observed only in the context of transitional justice.

Third conclusion: If lustration is implemented, it must not be the fight with political and ideological opponents, but has to have a legal form. That is to say, Lustration law has to be passed, by which all violators of human rights in totalitarian communist regime should be lustrated. The law must prevent new violations, political voluntarism that would later lead to new lustrations.

Fourth conclusion: It relates to the ethical dimensions of lustration. In the ethical sense it would be necessary to punish the violators in order to satisfy the victims and to prevent possibilities that violators from the old regime keep occupying leading positions in the new democratic regime, face to face with the victims of the old totalitarian communist regime.

There are such examples in all current democratic, i.e. ex-communist totalitarian regimes.

Fifth conclusion: It relates to the experiences with lustration, especially in the Western Balkans, where lustration has not been processed and where facing the past leads to the new conflicts and complications regarding the WW II issues and the communist history, and 1991-1995 wars.

Sixth conclusion: It relates concretely to the experience of transition and transformation of nomenclature into political and other elite in the Republic of Croatia in the context of discussion about lustration. The ruling HDZ (right center) 1990-2000 has banned lustration because that would have meant lustrating its members, since the toppers of the nomenclature entered into the state administration and took over all other institutions of the democratically elected government and HDZ. Furthermore, they could not process lustration due to the model of Croatian transition. The issue is about the model of "transition interrupted by war". Immediately before the war and during the

1991-1995 war, the opening of lustration process would have been a deadly act. The war was a perfect way of abandoning and postponing lustration, not only in Croatia, but over the whole ex-Yugoslav territory.

The process of lustration was indeed impossible in Croatia due to the war and the aggression on Croatia, as well as due to Tuđman's concept of the "reconciliation of all Croats", although that idea originally belongs to some other authors of the Croatian political emigration.

Discussions "pro et contra lustration" in Croatia are not the issue of parliamentary political parties, but of non-parliament populist right-wing "*special portals and blogs"*. Therefore lustration, as a public issue, penetrated into the blogo-sphere of politics and from the real one, it also shifted to virtual Croatia.

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Ivan Markešić

The Catholic Church in Croatia: From Tending to Lustration To Lustration Crisis

Summary

As one of the social sub-systems, the Church had often in the past tended vigorously to carry out lustration in other social sub-systems, especially in the field of education, culture and politics. This tendency was advocated at the end of the eighties and the beginning of the nineties, until it was discovered that many people were, not only common Christian believers, but also the top church dignitaries (as it is the case now in Poland), collaborators of the communist secret intelligence. After that, the *lustration crisis* happens in the church, and nobody in the church advocates for it, or, if someone does go for it, it is demanded that it be carried out far from the public eyes.

Key words: lustration, UDBA, Church, Catholic clergy, collaboration with secret intelligence

Introduction

The topic of possible relations between clergy, as well as the high ranking Roman Catholic dignitaries in Croatia, with members of the former Yugoslav secret intelligence UDBA, raised great interest in the country, as it did in other former communist countries.

Although this topic was not publicly discussed in Croatia for some

time, the interest, however, appeared after the news on the Polish Archbishop Wielnus's collaboration with secret intelligence was published. The public noted with interest the process of lustration in Poland, which tended to questioning, but also to final supremacy over the recent communist past. The whole process was based on Lustration law which led to anarchy while being carried out, resulting in interference by the Constitutional Court which confirmed, by its decision, the violation of basic human rights in practical implementing of the Law.

Collaboration with one part of clergy and high ranking Roman Catholic dignitaries of the Church in Croatia and Bosnia and Herzegovina, with the members of the Yugoslav secret intelligence UDBA is especially intriguing, not only as a social but also as a political issue, because many Croatian citizens could not believe, and many still don't, that some Catholic priests and bishops could, at all, be collaborators of the former Yugoslav secret intelligence UDBA, because they were convinced that the UDBA agents spied on and even murdered Catholic priests, monks and nuns.

In that sense, any sign of the fact that there were priests and bishops who collaborated with these intelligence, generated disbelief so there is a logical question how these people could collaborate with persons and institutions that, during the last fifty years of the former socialist system, tried to do anything to destroy the normal operation of the Catholic church.

In order to discuss this topic appropriately, it is necessary to consider some facts which to certain extent explain the contemporary situation of that time:

- § The meaning of the term lustration, in general and in the stated context
- § The spirit of time before, during and after the Homeland war in Croatia, (1991-1995)
- § The position and meaning of the Catholic Church in Croatian society before and after democratic changes
- § Croatian Parliament and the Lustration law?
- § The standpoint of Roman Catholic Church in Croatia in rela-

tion to lustration

§ Would lustration in Croatian society and in the Catholic Church add to democratic development in Croatia?

The meaning of the term lustration – in general

At the end of the 20th century, immediately after the fall of the Berlin wall, the idea of lustration begins to be one of the most frequent issues in the former socialist countries, Croatia being among them.

In these countries, the term was understood as a process of breaking any ties with the recent communist era. However, this term will soon, at the beginning of the nineties, get another meaning: opening of archives and document files of the former secret intelligence in order to see and go public with information on who were the persons that collaborated with the infamous intelligence of the former communist regime, with the aim to prevent those persons from keeping their positions in the new democratic environment and having any social, public or political impact.

In Croatia, it meant going public with documents on collaboration with the secret intelligence service UDBA[1].

According to Mayer's lexicon, lustration, "with old Romans, was a term that described solemn purification and conciliation that was very important part of their religious cult, and which were necessary to implement in impure situations such as hemorrhage, menses, touching the dead etc"[2]. On the other hand, archeologists use the term lustration also for "rituals of other cultures and relevant institutions if they

1 The term UDBA is an acronym for Uprava državne bezbjednosti (Interior security) which was a former secret Yugoslav police established in 1946, and formally recalled by the break off of Yugoslavia at the beginning of 1990s. There are strong evidences that UDBA is responsible for many assassinations of Croatian politicians and economic emigrants, as for instance the assassination of the Croatian journalist and emigrant Bruno Bušić, on October 16, 1978 in Paris, for which UDBA is directly responsible in: URL = http://de.wikipedia.org/wiki/UDBA. Access realized on May 15, 2007

2 URL = http://susi.e-technik.uni-ulm.de:8080/Meyers2/seite/werk/meyers/band/10/seite/1020/meyers_b10_s1020.html#Lustrum. Access realized on May 21, 2007

serve for such purposes. In Minoan culture from Bronze Age, on the island of Crete, there were famous pools for purification.[3] In order to better understand that term, Mayer's lexicon directs us to the idea of ***lustrum*** and says that this term describes the sacrifice in name of the Roman people at the close of the taking of the census, that sacrificial animals, a pig (sus), a goat (ovis) and an ox (taurus), were sacrificed (out of which a term *suovetaurilla* appeared), after they passed three times around the people gathered on the field of Mars". Since *lustrum* with census took place after a period of five years, the name came to denote a period of that length.[4]

After the WW II some Western European countries started to implement methods similar to lustration, such as France (*epuration* or purification), Italy (*de-fascism*), Germany (*de-Nazification*). At the same time, communist countries started a "profound" purge. Lustration is carried out over those very implementers of such "profound" and "intensive" purges in the former communist countries.

This paper is focused on a more specific meaning of this concept, that is, it speaks about the former *political sins*. Therefore, the starting point here is that lustration in Croatian society should be a "method of inquiry" (control) of persons who pretend (especially former employees) to high ranking positions in politics, justice, army, police, at universities etc., that is, if they were active members of secret intelligence of the communist regime at the time that preceded the war (1991-1995) and if they were associated with their collaborators. In that case, the concept of lustration should be translated as "elimination of democratic process opponents (in Croatia), and elimination of those that systematically violated human rights in the former regime". When we speak about collaborators of UDBA within the Catholic Church in Croatia, then the situation is a bit different. There is a question; who would implement lustration in that case and what good would it bring?

3 URL = http://de.wikipedia.org/wiki/Lustration. Access realized on May 21, 2007

4 URL = http://susi.e-technik.uni-ulm.de:8080/Meyers2/seite/werk/meyers/band/10/seite/1020/meyers_b10_s1020.html#Lustrum, Access realized on May 21, 2007

The spirit of time before, during and after the end of the Homeland war in Croatia (1991-1995)

After the fall of the former Yugoslav regime at the beginning of the 1990s, a bloody war begins in Croatia. Great-Serbian occupation policy intended on the open, with no regard to the means, to define the border of the so-called “Great Serbia” on the line of Virovitica – Karlovac – Karlobag and realize it to the full, together with the former Yugoslav National Army (JNA). The whole Croatia stood up in the battle against realization of that idea: all together – communists and non-communists, believers and non-believers. Croatian collaborators of secret intelligence UDBA, established the Croatian secret intelligence at that time. Same people just changed symbols on their hats, or better to say, they just changed the name of the office. Everything else remained the same, although many people believed that those UDBA employees are neither willing nor acceptable to work on democracy building in Croatia, but rather believed that those same people would carry on being loyalists of the Yugoslav secret intelligence.

For understanding the circumstances in Croatia, the following is nevertheless important:

The Catholic Church played the crucial and, without doubt, a very positive role. It gave support to people that created it, with no regard to the fact that those creators had nothing to do with the Church, as it was the case with Dr. Franjo Tuđman, who, although being a Yugoslav general and a member of the Communist Party, was elected to be a president of the newly founded political party - Croatian Democratic Union (HDZ). The same was with the majority of the HDZ leaders, and accordingly, with the newly founded Croatian state. Therefore, with no regard to their communist and UDBA past, (some of the state top leaders were former UDBA associates, as for instance, Josip Manolić), they still got full support from the majority of the Catholic clergy.

Under the circumstances, all people participated in defense of the country against a Great-Serbian aggression, and in building of the new democratic national institutions, with no regard whether they were the

Communist party members, fervent Catholics or agnostics, and with no regard whether they were descendents of partisans, Ustashi or Domobrans (Home Guards).

Therefore, at the time of defense of the Homeland against a Great-Serbian aggression, there was neither time nor necessity to carry out any lustration in politics, army, police or Church, but it was more important to participate in defending the attacked country, in spite of the fact that there were many loud advocates of lustration who held that it was desirable and necessary and good if there was the intent to build a new and healthy Croatian society. When these lustration advocates had a chance to process it, they really implemented it, especially in justice, army, police and secret intelligence services.

Today, seventeen years later, there are more and more of those who ask: what happened with lustration? The war is over, Croatia is liberated, is there a political will to implement lustration?

What happened to the bill of Lustration law in the Croatian Parliament?

Although the Croatian Party of Rights (HSP) submitted the bill of Lustration Law (Bill of Law on elimination of consequences of totalitarian communist regime) to the Parliament back in 1998 and 1999, the law remained only a bill. Namely, the aim of that law was to lustrate (inquire) particular persons that have already occupied high ranking positions in justice, army, police, Foreign Service and else, i.e. those who pretended to those positions, and (yet) were holders of high ranking position in the former Communist Party or held positions in the state service (especially intelligence, army and police) in the period between 1945 and 1990.

According to that bill of Lustration law, lustration should be implemented, in future, for: the State President, President of Government and Government members, Parliament representatives, Foreign Service members, Heads of State Offices, University lecturers, editors

and journalists, judges, members of managerial and supervisory committees in state companies, intelligence offices and holders of high ranking positions in the army.

However, no other parliamentary political party wanted to give support to the HSP's bill of Lustration law, not even the ruling Croatian Democratic Union (HDZ), whose representatives claimed that this law would be against the concept of national reconciliation, and would be a source of many conflicts and clashes within Croatia, and that passing such a law would not be in the interest of the Croatian state.[5]

That was the reason for not opening the public discussion on passing the Lustration law in Croatia, since there was no bill submitted or Law passed on the access to secret files or documents. However, it is necessary to mention that the Law on Security and Intelligence System of the Republic of Croatia was passed in 2002, which, in principle, allows access to documents and materials of the former secret intelligence.

Many people feel that passing of that Law came too late, and the implementation of lustration after such a long period would be inefficient.

Social and political role of the church before and after democratic changes in Croatia[6]

The role of religion and religious organizations is present in various societies, in various countries and at various times, always in different ways. The Catholic Church has had, through Croatian national history, a special role and a crucial impact on Croatian people, so in Croatia as in Bosnia and Herzegovina.

5 URL = http://www.vjesnik.hr/Html/1999/10/14/Default.htm, access realized in May 21, 2007

6 Based on my paper published in: Markešić, I. (1998). Gesellschaftlicher und religiöser Wandel in Kroatien. In Pollack, D., Borowik, I., Jagodzinski, W. (eds.): *Religiöser Wandel in den postkommunistischen Ländern Ost- und Mitteleuropas* (pp. 395-408). Würzburg: Ergon Verlag.

By the fall of a single-party communist system and its ideology, by establishment of the new, multi-party democratic system, the old values, which were proclaimed for fifty years, so important for that society because it was based on them, vanished all of a sudden. On the other hand, values that have been suppressed by the communist regime came out to the surface. It was expected, of course, that the position and the role of the Church should be changed.

The Church, one would say, has come out from the private sphere into the public one and took very significant positions. Ivan Cifrić, Professor at the Faculty of Philosophy in Zagreb, in his research study *Congregation Structure in Transitional Context of Croatian Society*[7] refers to three dimensions of the Church which were suppressed, but in 1990, after democratic changes, became socially relevant. All of that speaks about significant social changes that happened in the sphere. We are dealing with the following:

7 See: Cifrić, I. (1995): Vjernička struktura u tranzicijskom kontekstu hrvatskog društva, in: *Društvena istraživanja*, Annual 5 (1995), No. 6 (20), p. 819-836.

	Before 1990	After 1990
1	The Church is politically insignificant factor. It is limited in space, socially and politically. It was reduced to the spiritual role only. Clerical dignitaries had no possibility for public appearance to present the Church and religious science on the TV and radio. For the Communist politicians, the Catholic clergy was like a red rag to a bull. Church people could influence on believers only, within parish and during church celebrations and ceremonies. Priests could make decisions and influence them only in that environment.	The Church becomes a very respectable political factor. Politicians want to hear what the clergy say about particular political problem. They want to go public together at various events. The Church dignitaries now have the possibility to act in public, on the TV and radio, and present the Church and religious science. They have the opportunity to evaluate current social, political and cultural reality. This is now even expected from them.
2	The Church is limited to pastoral service. It was not allowed to transfer spiritual values and could not determine the cultural criteria. It could not achieve, and had no opportunity to find the appropriate place in the family. It was not present in schools. It had no its representatives in the Parliament. Politicians had a standpoint that the Church could exist in socialist society, they respected its power, but they were of the opinion that no agreements should be made with it regarding any social problems.	The Church remains in the pastoral. However, the pastoral is not the main vocation and not the main service. The Church is now the main transferring channel of basic spiritual values of the society; what is not good for the Catholic Church, is not good for the society and therefore not good for the contemporary ruling party (HDZ).The Church begins with public appearance. Its priests become members of the Croatian government and representatives in the Croatian Parliament. The Church is present in almost every Croatian family: the number of those that baptize their children increases, but also the number of adults who want to be baptized. The number of those who want confirmation or church marriage increases… Politicians become closer to the Church. They feel safer in the company of priests, because they take that common people, the voters, would recognize them as politicians who are trusted and respected by the Church.
3	The Church has a diaconal and caritative role. There is no institutionalized social function on the state level. Religious institutions are passive and have no right to public activities.	The Church keeps its diaconal and caritative role. However, it also takes over other social functions established by the state (especially in the field of education of youth). Religious institutions acquire quite new and different role in the society.

Namely, by the end of the 1980s, the opinion prevailed, that the Catholic Church in Croatia has a negative impact on the Croatian, and therefore on the overall Yugoslav socialist society and its development. For that reason it could not participate in full in the social and political life of the current Croatian, that is, Yugoslav society, because it had no access to the mass media and the public life of the former socialist society.

Standpoints of the Catholic Church in Croatia about lustration

The Catholic Church in Croatia has never submitted an official request for lustration processing in the Croatian society, although many Catholic priests were of the opinion that it is indispensable.

Catholic bishops, who were themselves victims of the communist regime, were aware of all the unfortunate events in the 20th century that Croatian people had to go through (especially during and after the WW II) and the profound and insuperable splits within the Croatian nation as a result.

For that reason they thought that lustration might lead to the new and even more severe divisions and splits within the Croatian nation. At that time, at the beginning of the 1990s, it was never publicly mentioned that anyone among the Catholic clergy and bishops could be an UDBA collaborator, although it was mentioned in private conversations, even some names among the high Church dignitaries came out, together with their dishonorable collaborationist roles. However, the contemporary but also the recent studies show that citizens still have trust in Church as institution the most, and in its priests. Therefore, it was impossible to believe in the thesis of collaboration of priests with the intelligence of the former communist regime.

However, after the case of bishop Wielnus went public in Poland, the question was raised in Croatia as well: has the time come to process lustration and finally tell to Croatian citizens who, among high ranking Church dignitaries, were associates of the secret Yugoslav po-

lice, that is, intelligence?

Several interviews with former UDBA associates, published in the Croatian dailies (for example Jutarnji list[8], Zagreb) and weeklies, show that UDBA had a very much outspread network of collaborationists, also among the members of the Catholic Church in Croatia. UDBA wanted to control everyone: its agents spied on almost all priests during the Sunday sermons, and especially in the catechism lectures, and that control was carried out on two levels:

1) Federal secret police (with the headquarters in Belgrade), and

2) Local state secret police (with the headquarters in Zagreb).

Zagreb UDBA headquarters was interested in opinions, attitudes and activities of Croatian bishops and their clergy as well as priests and nuns, especially those that acted publicly and traveled frequently to foreign countries. For that reason, the headquarters took all actions to spy on them. In that sense they managed to put buggers for eavesdropping even Bishops Conference meetings, but also other bodies of the Catholic Church. They sent their reports to the Belgrade headquarters, mostly by planes, because it was the safest and the fastest way of sending messages.

It should not be strange then, that some of the UDBA members claim that they had good relations with the Catholic clergy not only in Zagreb, but also in Vatican, and that Međugorje itself with Marian apparitions is not other thing but UDBA's spy game, especially because, according to confessions of UDBA members, many Bosnia and Herzegovina priests were in the net of the Yugoslav intelligence. Namely, it is indispensable to stress out several important issues in the work of UDBA intelligence, especially in its behavior with religious communities in former Yugoslavia, Catholic Church being number one, so in Croatia as in Bosnia and Herzegovina. That work was carried out in three phases:

8 See: *Jutarnji list*, Zagreb, January 18, 2007.

1) *A Phase of fierce atheism* (1945-60). That period is marked by the case of the Archbishop Alojzije Stepinac
2) *A Phase of diplomatic approach of SFRY to the Holy Chair*. That period is marked by activities of Cardinal Agostino Casaroli (1960-80)
3) *A Phase of normal relations between clergy and intelligence (1980-90).* In that period, the strong tensions between the Party and the Church eased up.

The attempt to standardize collaboration of some priests with the UDBA members

The following standardization pretends to be neither general nor final. It only tries to find out the answer to the basic question: what was the motive that made Catholic priests and bishops to collaborate with UDBA?

1) They did it out of love for Yugoslavia and the tendency to preserve it

It is difficult to believe that this answer is true. The Catholic Church in former Yugoslavia has accepted the reality of the communist state, but not also its ideology. Therefore, it did nothing to preserve such a state, especially because many priests were persecuted, imprisoned and assassinated. The case of Archbishop A. Stepinac has shown the distance between the two worlds: the Catholic and the communist one.

2) They did it because they had no information about the crimes executed by UDBA members over the Catholic priests and also Catholic believers.

It is difficult to believe it either. They must have known about it, because they were connected to those who disappeared or were imprisoned.

3) They did it without being aware that through the informative conversations with UDBA they in fact became UDBA collaborators.

That presumption is possible! It is true that all the informative conversations with priests were led by the qualified, well educated UDBA agents. They had code names for their victims, priests and other believers that they sought information from. After the "informative conversation" they would write their reports without participation and knowledge of the ones they had interviewed, and they would send reports that suited to the Intelligence, to their superiors.

4) They did it because they were blackmailed and forced to collaborate.

It could be claimed that this is the closest to the truth. Namely, many people think that private affairs in the lives of some priests (women, children, money and homosexuality) were the most frequent reasons for their consent to collaboration. In fact, they were forced to do that, to prevent that their sexual affairs with women, or that they had children with them, or that they had sexual relations with other priests or males, fact that they dealt with financial issues etc., be publicly announced. Since the priests and bishops were under constant surveillance by intelligence agents, it was not difficult to find discrediting information.

5) Catholic priests were not collaborators of UDBA at all. Their so-called collaboration is made up by UDBA agents.

According to the opinion of the well informed people who knew the policy of the Yugoslav intelligence, many UDBA members forged their reports after "informative conversations" with Catholic priests and bishops. Many of them did it because of hatred for Church and its members, especially for Catholic priests who were the strongest opponents to the socialist regime, so they had to be reported in the worst possible way. Besides, they forged their reports by their superiors' demands, who were "convinced" and "practical" communists, and who considered that Catholic priests should be under control at any time, because with them, as religious people, it was impossible to build self-management and socialist society. Forgeries were done out of their own, private reasons. They knew, namely, that if they achieved good collaboration with some of the important and significant (for the

Service) “Church sources”, they would climb up the hierarchy.

If one would want to have insight into process of that collaboration, several examples could be listed:

1. *A meeting in the agent’s premises,* that is, in the official environment, by the agent’s invitation. It was the first and the most important step in the collaboration procedure. The agents wanted to show the power to their victims, by working for the Service.
2. *A meeting at some other place*, mostly in restaurants, or on travels, on the busses, trains, planes.
3. *A meeting at the parish office,* by the agent’s request.
4. *Regular visits by the agents and oral reports*. Those became customary after “mutual confidence” has already been acquired.
5. *Regular reports in writing, on information requested earlier* about the conditions within, not only the parish, but also the clergy and the whole religious community. Information was requested based on the position which a particular priest (bishop) occupied in the Croatian Church.

A conclusion could be made from all of the above, about the topics that were discussed at those interviews, i.e. informative conversations:

1. Situation in the local parish, religious community, mostly in the local Church, but also its connections with the foreign countries.
2. The life and activities of the members of the very own clerical, that is, religious community.
3. Croatian political and economic emigration – people, activities, relations with foreign intelligence.

In place of a conclusion:

In spite of all the above, many people within the Catholic Church in Croatia are of the opinion that lustration of ecclesiastic members at this time would be neither necessary nor useful. Even if it is neces-

sary, it should be carried out far from the public eye and it should be processed by church members only.

There are several reasons:

1. Lustration could bring de-balance to the Croatian Catholic Church, so in Croatia as in Bosnia and Herzegovina. In the period we are living through, and which must be directed to the future, and that means Croatian accession to the European Union, any lustration, this one as well, would lead to unnecessary dealing with the past, especially dealing with some past activities of particular persons that (activities) have nothing to do, or have no effect on current events. There are many of those who are of the opinion that things would go better if some persons that now occupy positions in the public service would be removed, even some priests, who collaborated with the intelligence.

2. In case of lustration, the victims of those informative conversations and forged reports would be exposed to shame and punished, while their interrogators, very often their persecutors, torturers and assassins would become heroes, that is, the only people to trust to. Instead of lustrating the UDBA associates, it would be lustration of persons who were their victims.

3. There is a question: Who is the one to be in a position, or to be able, to carry out an objective lustration? Who is the one to guarantee that essential human rights would not be violated, human rights of those that were forced to collaboration, and even those who did it voluntarily?

4. Lustration could, at this time and under current circumstances, enable revenge of individuals against other individuals, not for the disputes of the former communist, but the disputes of post-communist regime.

5. The UDBA documentation should be given to historians so that they could, by comparisons and scientific analyses, come to the relevant indicators of proportions of evil that was done during the communist regime. The UDBA ordering authorities are the only ones to be

processed, those authorities who are proven to have tortured not only priests, but also common citizens, only because they used their own minds and didn't agree with the contemporary communist regime.

6. Lustration is not necessary, because it is indispensable to look forward to the future. It is true; one should know what was happening in the past, in order to avoid same mistakes. However, by "digging" the past and administering justice out of the past, it is difficult to build a happy future.

7. One should not forget what was done, but forgiveness is the only way of reconciliation and personal catharsis.

8. Reinforcement of democracy in Croatia is the basic reason for refusing any request for lustration. Namely, UDBA agents and their victims, communists and non-communists, believers and agnostics, they all participated in creation of the Croatian state at the beginning of the 1990s.

Dragoş Petrescu

Dilemmas of Transitional Justice in Post-1989 Romania

"Good" vs. "Bad" Social Capital: Consolidating Democracy after a Bloody Revolution

As Claus Offe aptly puts it, a regime change implies two major tasks: (1) a forward-looking task, that of building a new political and economic order; and (2) a backward-looking task, that of eliminating the perilous remnants of the old political and economic order (Offe, 1997: 82). At the same time, it may be argued that the nature of the regime change determines the strategy of fulfilling the two tasks mentioned above. Scholars and laymen alike have tried to offer a viable causal explanation for the chain reaction that provoked the demise of communist regimes in East-Central Europe, in countries with very different cultural-historical and socio-economic backgrounds, and characterized by distinct political cultures.

In Romania, the communist regime simply collapsed, suddenly and unexpectedly, on December 22, 1989. An analysis of the causes of the sudden demise of the communist regime in Romania would go much beyond the scope of the present paper. Nevertheless, in order to better understand the intricacies of the process of applying transitional justice in post-communist Romania,[1] some elements related to the enduring communist legacy in Romania – in spite of the bloody 1989 revolution in that country – are needed.

1 On the "legal obligation" and the "moral imperative" to punish the human rights violations committed by the old regime see, for instance, Juan E. Méndez (1997: 1-26).

The sudden demise of Romanian communism took a majority of the elites and the population by surprise. No organized dissident networks existed in Romania before 1989. True, courageous individuals did raise their voices against the regime, but their gestures remained individual and did not lead to the structuring of an organized anti-communist opposition. At the same time, inside the Romanian Communist Party (*Partidul Comunist Român* – PCR) there were only a handful of "enlightened" apparatchiks dreaming of "socialism with human face" and they did not manage to establish a faction of soft-liners able to facilitate a negotiated transition to democracy. The popular uprising that was sparked on December 16 in Timişoara, a multicultural city in western Romania, eventually spread to the capital city, Bucharest. Thus, on December 22, large columns marched towards downtown Bucharest. Once arrived in the Palace Square, the crowds assaulted Party's Central Committee (CC) building. The time was approximately twelve o'clock. No one attempted to stop the crowds and not a single shot was fired at the protesters. Confused and frightened, Nicolae Ceauşescu, the supreme leader of the PCR, who had spent the night inside the CC of PCR building, flew by helicopter from the upper platform of CC building. Arguably, the moment when Ceauşescu and his wife, Elena, flew by helicopter from the building of the CC of the PCR was the moment when communism in Romania – suddenly, and at the same time unbelievably – collapsed. It was December 22, 1989, and the time was 12:08 p.m.[2]

Nevertheless, the nature of the newly established revolutionary regime – that was supposed to run the country until the first free elections – raised serious doubts regarding the inception of a democratic transition process. Actually, the power vacuum generated by the sudden collapse of the communist regime in Romania was not filled in by a united democratic opposition, but by second-and third-rank nomenclature members gathered around Ion Iliescu, a former communist

2 The corpus of literature on the 1989 events in Romania keeps growing. For an introduction to the problem see, for instance: (Preda, Retegan, eds., 1989; Milin, 1997; Milin, ed., 1999; Mioc, ed., 2002; Codrescu, ed., 1998; Pitulescu, ed., 1995; Nicolaescu, 1995; Perva, Roman, 1991).

official marginalized in the early 1970s and known for his pro-Gorbachev leanings, but who did not oppose openly Nicolae Ceaușescu's dictatorship. The National Salvation Front (*Frontul Salvării Naționale* – FSN) was established in the late afternoon of December 22, 1989, as the new ruling body destined to lead the country until the first free elections. It was an ad-hoc group with a very diverse membership, ranging from marginalized apparatchiks and technocrats close to the PCR to non-aligned critical intellectuals and radical dissidents.[3] Moreover, it became clear very soon that the group of former communist officials gathered around Ion Iliescu was the most active in occupying the top positions in the new power structures.

On January 23, 1990, it was announced that FSN decided to turn itself into a political party and enter the political competition. Consequently, former dissidents and critical intellectuals, unwilling to back such a maneuver destined to boost the second-and third-rank communist officials to power in post-communism, left the ruling body. A period of fierce political confrontations was thus inaugurated.[4] While the educated urban strata of the population perceived the FSN as the party of former activists and nomenclature members, a majority of the population continued to support the FSN, in which they saw the political force that put an end to Ceaușescu's rule. Having secured the support of a majority of the population, FSN won a landslide victory in the general elections of May 20, 1990. Quite naturally, Ion Iliescu and his associates categorically denied any continuity between the FSN and the former communist party, and emphasized consistently their role in the 1989 revolution. At the same time, the FSN could be identified with communism due to its membership that displayed a large concentration of former prominent PCR apparatchiks that in

3 See the English translation of the "Communiqué of the National Salvation Front of December 22, 1989" including the list of its members, which was presented by Ion Iliescu on the national TV in the evening of the same day (Daniels, ed., 1994: 345-346). When FSN decided to transform itself into a political party, in January 1990, its communiqué of December 22, 1989, became its political program.

4 In the following days, former dissidents or critical intellectuals such as Doina Cornea, Mircea Dinescu, Ana Blandiana or Ion Caramitru, resigned from the FSN (Stoica, 2005: 23).

post-communism brought their "habits of the mind" and, most importantly, their "bad" social capital with them.

Robert D. Putnam and Kristin A. Goss, describe social capital as "social networks and the associated norms of reciprocity" and observe that "some forms of social capital are good for democracy and social health; others are (or threaten to be) destructive" (Putnam, Goss, 2002: 8, 9). It was exactly the "bad" social capital represented by the intricate social networks and norms of reciprocity linking former communist officials, secret police officers and informal collaborators perpetuated by the Iliescu regime over the period 1990-1996 that made Romania's transition to democracy so tortuous and painful.[5] The fault, however, was not entirely their own. "Good" social capital proved to be scarce and frail. As already mentioned, dissident networks did not exist in communist Romania. The structural crisis of the 1980s, with its food shortages, everyday life miseries and surveillance by the Securitate, made people think in terms of biological survival and rely almost entirely on family. This created a social capital that was largely informal, inward-looking, bonding and based on strong kinship ties.[6] Such a situation protracted the strengthening of civil society, delayed the introduction of lustration and thus affected the process of democratic consolidation in post-communist Romania.

This paper discusses the attempts at introducing lustration legislation in post-1989 Romania, and my argument can be summarized in the form of three statements: (1) Due to the peculiarities of the democratic transition in Romania, criminal punishment has been applied selectively immediately after the regime change, but the lustration process, in the form of an overall dealing with the wrongdoings of the communist regime (1945-1989), was initiated quite late, i.e., in 1999; (2) Up to the present, the lustration process has been one-di-

5 An argument in favor of an immediate application of lustration after the regime change is that it contributes to the "dismantling of the post-communist clique and weakening its social/political/economic capital" (Letki, 2002: p. 540).

6 For a discussion on the distinctions between "formal" and "informal;" "thick" and "thin;" "inward-looking" and "outward-looking;" "bridging" and "bonding" social capital, see (Putnam, Goss, 2002: 9-12).

mensional, i.e., has focused solely on those persons who were either agents or informal collaborators of the communist secret police, the infamous Securitate; and (3) A project of a law destined to lustrate the former *nomenclature* members has been presented to the Romanian Parliament only in 2005; however, a law in this respect has not been adopted yet.

It should be mentioned from the outset that this paper is concerned with both legal and political sanctions taken against perpetrators, and not with issues related to reparation, i.e., restitution or compensation concerning the victims of the communist regime, which would deserve a separate exploration. Furthermore, the present analysis considers actions by both state institutions and bodies and prominent civic actors since in the case of post-1989 Romania civic initiatives led to major decisions by state institutions in dealing with the wrongdoings of the old regime.[7]

Confronting the Neo-Communists: Early Attempts at Introducing Lustration Legislation

Ion Iliescu and the FSN built their legitimacy on their involvement in the 1989 revolution and the removal of the ruling Ceauşescu couple from power. As a former communist official, Iliescu could claim at most that he was marginalized in the early 1970s, but he could not claim that he openly opposed the communist regime. The major argument on which Iliescu and his closest associates built their political legitimacy was their participation in the December 1989 revolution. Paradoxically, while the emerging civil society organizations and opposition political parties were claiming that the revolution was stolen by a neo-communist power, there were two camps that claimed that what happened in December 1989 was a true revolution: (1) the revo-

7 For more on the "retrospective relationship" in dealing with the wrongdoings of the old regime see Figure II.1. "Types of responses to past injustices" and Figure II.2. "A partial decision tree concerning wrongdoing under the old regime," (Offe, Poppe, 2006: 240, 242).

lutionaries that poured into the streets during the night of December 21/22 and faced the bloody repression; and (2) the main beneficiaries of the regime change, i.e., Ion Iliescu and his associates.

In terms of administering justice in connection with the wrongdoings of the old regime, the first step taken by the FSN was the trial of Nicolae and Elena Ceauşescu, communist Romania's ruling couple. After fleeing by helicopter from the upper platform of the Central Committee building in downtown Bucharest on December 22, 1989, at noon, the Ceauşescus were arrested the same day, in the afternoon, near the city of Tîrgovişte, which is located 74 km north of Bucharest. The two were detained for three days in a military garrison in Tîrgovişte. Then, on December 25, the national television announced that Nicolae and Elena Ceauşescu were sentenced to death by a special military court and executed by a firing squad (Marcu 1991: 92-123). The way justice was administered by the newly established power in the case of the Ceauşescu couple raised doubts about its adherence to the rule of law principles. Furthermore, many questioned the trial of the Ceauşescu couple, which was considered just a mock trial, a sort of cover-up meant to hamper the former general secretary of the PCR provide embarrassing details on the personal histories and the past deeds of the new ruling elite.

At the same time, the decision to proceed to the hasten execution of the Ceauşescu couple contributed heavily in legitimizing the FSN in the eyes of a majority of the population. During the 1980s, the communist propaganda managed to personalize Ceauşescu's power to such an extent that a majority of the population identified the supreme leader of the PCR with the communist regime. Thus, although many Romanians questioned FSN's decision to execute the Ceauşescus on Christmas Day 1989, they eventually supported the decision thinking that this would put an end to the guerilla warfare allegedly waged by Ceauşescu's loyalists against the new regime. Ion Iliescu himself argued that it was exactly because of the "terrorists," i.e., Ceauşescu's loyalists, that the FSN adopted the "revolutionary formula" of organizing a special military court within the garrison where the Ceauşescu

couple was detained. Briefly put, Iliescu has argued that a formal trial was not organized because there were no conditions at the time to keep the ruling couple in a safe place for a longer period and that "any hour of delay" meant more killings of innocent people.[8] However, a question remains: Why the Iliescu regime did not manage to arrest and put to trial a single "terrorist" that engaged in urban guerilla warfare against the FSN? In this respect, one should note that 1,104 people were killed and 3,321 wounded in the 1989 revolution; of them, 944 people were killed and 2,214 wounded after December 22, 1989 (Stoica, 2005: 19).

As mentioned above, criminal punishment has been applied immediately after the regime change, but only in relation to the repression of the demonstrators in Timişoara and Bucharest, and against those who were part of Ceauşescu's inner circle of power. Thus, a series of four other trials followed: the "Trial of the Four", the "Trial of the Twenty-Four Members of the Executive Political Committee (*Comitetul Politic Executiv* – CPEx) of the CC of PCR", the "Trial of the Twenty-Five" and the "Trial of Nicu Ceauşescu." Let us examine briefly these trials.

(1) The "Trial of the Four" involved Ceauşescu's closest collaborators: Manea Mănescu (member of the CPEx of CC of the PCR); Tudor Postelnicu (Minister of Internal Affairs and candidate member of the CPEx of CC of the PCR); Ion Dincă (Prime Deputy - Prime Minister and member of the CPEx of CC of the PCR) and Emil Bobu (member of the Secretariat of CC of the PCR and member of the CPEx of CC of the PCR). On February 2, 1990, the Bucharest Military Tribunal sentenced them to life in prison. However, after 1-3 years all four were released from prison for poor health reasons.

(2) The "Trial of the Twenty-Four Members of the CPEx" was initiated on September 17, 1990, and lasted exactly 248 days. On March 25, 1991, the defendants were sentenced to a total of 34 years and 3 months in prison, individual prison terms ranging from a maximum of 5 years and 6 months to a minimum of 2 years. It should be mentioned

8 See Iliescu's personal account on this issue in (Iliescu, Tismăneanu, 2004: 193-196).

that the charges brought against the former CPEx members were related solely to their involvement in the events of December 16-22, 1989. On April 20, 1992, the Supreme Court of Justice allowed the appeal formulated by the General Prosecutor of Romania and the members of the former CPEx were sentenced to a total of 255 years in prison, with individual prison terms ranging from 8 to 16 years. However, by the end of 1994 the overwhelming majority of those convicted were either liberated from prison on poor health reasons, or granted amnesty by President Ion Iliescu (Ştefãnescu 1995: 99, 134-136, 192, 219, 375).

(3) The "Trial of the Twenty-Five" involved 25 high-ranking communist officials, Securitate and Militia officers, including two civilians from the staff of the Bucharest Crematorium. On December 9, 1991, the Military Section of the Supreme Court of Justice found them guilty, among others, of repressing the demonstrations in Timişoara on December 16-18, 1989, and for organizing a cover-up operation involving the stealing of 40 corpses of assassinated demonstrators, which were transported to Bucharest and cremated at the Bucharest crematorium. They were given different terms in prison.

(4) The Ceauşescu couple had two sons, Nicu and Valentin, and a daughter, Zoe. Of them, only Nicu became involved in politics and there were consistent rumors during the 1980s that he was chosen as the supreme leader's heir. In the aftermath of the 1989 regime change, Nicu Ceauşescu was put on trial and, on September 21, 1990, the Bucharest Military Tribunal charged him with incitation to murder and sentenced him to 20 years in prison. Nicu Ceauşescu was released from prison in 1992 for poor health reasons and died in 1996.[9]

9 On the political careers of the CPEx members see (Dobre, 2004; Neagoe, 1995: 230-243). On the sentences pronounced in the "Trial of the Four" and the "Trial of Nicu Ceauşescu," see (Stoica, 2005: 23, 29). Valuable information on the trials related to the attempts at repressing the 1989 revolution can be found in (Mioc, 2004) and on the Internet at: www.procesulcomunismului.com.

From the "Proclamation of Timişoara" to the "University Square Phenomenon"

The unquestionable dominance of former communist officials in the early post-communist power structures led to strong reactions from the part of opposition political parties and the emergent civil society. It should be mentioned that the political opposition to the FSN was composed, in principal, by the three "historical" political parties, i.e., the three democratic political parties that epitomized democratic politics in interwar Romania: the National Peasant Party (*Partidul Național Țărănesc* – PNȚ, subsequently named *Partidul Național Țărănesc-Creştin Democrat* – PNȚ-CD); the National Liberal Party (*Partidul Național Liberal* – PNL); and the Romanian Social-Democratic Party (*Partidul Social Democrat Român* – PSDR).

However, civil society initiatives proved to be the most radical. In a historical perspective, the first attempt at introducing lustration legislation in Romania originated in Timişoara, the city that sparked the 1989 revolution and thus opened the way towards a regime change in Romania. That moment represented a historic moment since it was the first time that an articulated appeal by the civil society organizations to ban former apparatchiks and Securitate officers from public office was issued in post-1989 Romania. On March 11, 1990, in Timişoara, it was issued the "Proclamation of Timişoara," whose Article 8 requested the banning of all former nomenclature members, party activists and officers of the former secret police from running in the next three elections.[10] Therefore, it might be argued that the Article 8 of the "Proclamation of Timişoara," practically opened the debate over lustration in post-communist Romania.

Demonstrations against the FSN and its leader, Ion Iliescu, continued and culminated with the occupation of the center of Bucharest on April 22, 1990. The area occupied by the demonstrators was declared the first "area free of neo-communism" and the round-the-clock protest, which lasted for almost two months, has been known since as the

10 See Annex 2: "Proclamația de la Timişoara" in (Ştefănescu, 1995: 453-454).

University Square phenomenon (Gussi, 2002: 1060-1075). The main characters of that series of daily demonstrations were the public intellectuals, who delivered anti-communist speeches every afternoon from the balcony of the University of Bucharest.[11] In fact, the University Square phenomenon represented a desperate attempt by several independent associations – the kernel of civil society in post-communist Romania – to warn against the seizure of the anti-communist revolution of 1989 by Ion Iliescu and the FSN. Among the most important requests of the University Square demonstrators was the introduction of lustration, a principle formulated, as shown above, on March 11 in Timişoara. Time and again, the protesters requested the application of Article 8 of the "Proclamation of Timişoara."

As mentioned above, the first free elections of May 20, 1990, witnessed a landslide victory of Ion Iliescu and the FSN. Being in control of the national TV and radio, the FSN also took advantage of the distorted way in which history was taught under communism. The FSN propaganda machine managed to present the University Square demonstrators as enemies of the Romanian people, representatives of the former boyars who wanted their possessions back and former Iron Guard militants who sought criminal revenge. In time, the University Square demonstrations lost strength, but did not cease. The University Square phenomenon ended sadly, in violence and bloodshed, on June 13-15, 1990. Beginning with June 13, the police and special troops, as well as workers from Bucharest's industrial platform and Jiu Valley miners – brought to Bucharest by train, brutally attacked the remaining demonstrators to the astonishment of the entire country and the western press gathered in the nearby Intercontinental Hotel. The headquarters of the historical parties, those of the newspapers supporting the opposition, such as the daily *România liberă* or the weekly *Revista 22*, and the main building of the University of Bucharest, were devastated.

11 A famous song of the University Square demonstrations was entitled "Mai bine mort decît comunist" (I would rather be dead than a communist), which was interpreted by one of the most famous pop singers of the time, Valeriu Sterian.

Thus, immediately after the first free elections that legitimated the neo-communists in power, Romania started to depart from the path taken by the other post-communist countries in East-Central Europe, by adopting a protracted route towards establishing a democratic regime. After June 1989 many perceived Romania as lost for democracy. What made the situation truly appalling was that the violent miners, who distinguished themselves by beating everyone that looked like an educated person, also shouted: "Death to intellectuals!"[12] Nevertheless, the spirit of the University Square survived in the very idea that the anti-communist revolution of 1989 was not finished as long as former communist officials were still in power.

To conclude this section, it may be argued the period 1990-1996 was characterized by the efforts of Ion Iliescu and the FSN to legitimate their political power by emphasizing their role in the downfall of the Ceauşescu regime and by manipulating the fear of "capitalism" of a confused and frustrated population. While the emerging civil society, historical political parties in opposition and public intellectuals asked for the unmasking of the crimes of the defunct communist regime, the Iliescu regime confined itself to apply some selective legal sanctions. Thus, criminal punishment was applied selectively against Nicolae Ceauşescu's inner circle of power, as well as against some of those responsible for the bloody repression of December 1989 demonstrators in Timişoara and Bucharest.

One-Dimensional Lustration: The "Ticu Law" and the Establishment of the National Council for the Study of Securitate Archives (CNSAS)

The power shift of 1996 finally created the context in which by now the most effective instrument of lustration in post-communist Romania has been established. By 1992 it became clear that if the democratic opposition wanted to get to power, than it had to unite.

12 On the repression of the University Square demonstration by the post-1989 neo-communist power, see: Berindei, Combes, Planche, 1990.

Consequently, an alliance grouping the historical parties, other smaller parties, and civil society associations was formed under the name the Democratic Convention in Romania (*Convenția Democratică din România* – CDR). This coalition lost the 1992 elections, but eventually managed to win the 1996 elections under a famous slogan: "We can make it only together!"[13] After the victory of the (united) democratic opposition, the urban educated strata felt that an electoral revolution fulfilled the goals of the 1989 revolution. The former rector of the University of Bucharest, Emil Constatinescu, became Romania's first post-communist president that had not been a member of the former nomenclature.

In the year 2000, CDR broke apart and Ion Iliescu came back to power together with his party, which reinvented itself a year later as the Social-Democratic Party (*Partidul Social Democrat* – PSD), after its unification with the historical social-democratic party, i.e., the Romanian Social-Democratic Party (*Partidul Social Democrat Român* – PSDR) (Scurtu, 2003: 160-167). During the same elections of 2000, the most powerful historical party, the National Peasant Party, the key member of the ruling coalition between 1996 and 2000, did not gather enough votes to enter the Parliament. Instead, the extreme-right Greater Romania Party (*Partidul România Mare* – PRM) scored much beyond expectations. At the time, many talked about an "end of the ideology" era, because it was for the first time ever in a Romanian post-communist electoral campaign that anti-communism played a rather marginal role, while the main message of all parties involved was pro-European (Alexandrescu, 2000: 7).

Finally, in 2004, PSD lost power once again, and the country is governed by a coalition in which the senior partner is the "Justice and Truth" alliance formed by two parties that were in power between 1996 and 2000 as well. One is a party that emerged after the first major split within FSN, the Democratic Party (PD), which gave the current

13 For a detailed history of the rise and fall of the Democratic Convention in Romania, see (Pavel, Huiu, 2003).

president, Traian Băsescu.[14] The other party is the historical National Liberal Party, which in the meantime absorbed, in January 2002, a small party called the Alliance for Romania (*Alianța pentru România* - ApR).

Former political prisoners played a paramount role in pushing for a complex solution comprising *retribution*, *disqualification* and *restitution* in dealing with the crimes and abuses of the defunct communist regime.[15] It should be added that former political prisoners were prominent in all three historical parties mentioned above, the National Peasant Party, National Liberal Party and the Romanian Social-Democratic Party, which were reorganized immediately after the 1989 revolution.[16] At the same time, the former political prisoners organized themselves from the very days of the revolution in an association of the survivors of the Romanian Gulag. The Association of the Former Political Prisoners in Romania (*Asociația Foştilor Deținuți Politici din România* – AFDPR) worked in close association with the historical parties, especially with the National Peasant Party, and other civil society organizations. However, it also promoted a specific agenda related to restitution for all those who had been politically persecuted under communism.[17] Besides defending the rights of the members of

14 As already mentioned, PD originated in one of the factions that emerged after the first major split within FSN in April 1992. The other faction, led by Ion Iliescu, established the FDSN. As part of FSN, members of the current PD had been in power until 1992. PD run separately in the 1992 elections (as FSN) and remained in opposition until 1996, when it entered the CDR. As a political partner within CDR, PD was in government between 1996 and 2000, entering again in opposition afterwards. In 2004, PD allied with the National Liberal Party and established the Alliance "Justice and Truth" (in Romanian. *Dreptate şi Adevăr*, in short DA, which means "yes" in Romanian). Traian Băsescu, then mayor of Bucharest, was nominated candidate for the presidential seat on behalf of both parties. Although the DA alliance came second with 31.33% for the Chamber, and 31.77% for the Senate, Băsescu won the second round of the presidential elections against PSD's candidate, Adrian Năstase. President Băsescu nominated a person from the DA alliance – Călin Popescu-Tăriceanu, a member of the National Liberal Party – as Prime Minister and charged him with government formation, thus forcing PSD in opposition.

15 These concepts are employed in the sense given to them by (Offe, 1997: 82-104).

16 The prominence of the former political prisoners diminished dramatically after 2000, when the party of Ion Iliescu, re-baptized Social-Democratic Party, returned to power, while the hitherto most powerful historical party, the National Peasant Party, lost all seats in Parliament after defeat in elections.

17 AFDPR was established on January 2, 1990, and, by the end of the year, it enrolled 98,700

the association, it had a very active role in establishing memorials for the victims of the communist terror associated with all major places on the map of the Romanian Gulag. Honoring the memory of the victims of resistance to communism has been a major task of AFDPR.[18] According to the statutes of the association, its main goals are: "To continue fighting against communism and any form of totalitarianism, … to honor the memory of those who lost their lives fighting against communism, … to morally condemn communism and legally deal with all those responsible for genocide and crimes against the Romanian people."[19] As one could immediately grasp, to the former political prisoners the process of communism meant not only bringing the perpetrators to justice, but also restituting to the victims their proper place in society by acknowledging the injustice made to them by the previous regime. In other words, AFDPR's scope is to deal with the communist past both legally and morally.

The "Ticu Law" or Law 187/1999

From a legal point of view, AFDPR's greatest victory was the passing of the "Law regarding the access to the personal file and the disclosure of the Securitate as political police" by the Romanian Parliament in December 1999, after years of postponement and repeated modifications. Known to everyone as the "Ticu Law," after its main proponent, former senator of the National Peasant Party and president

members. AFDPR was an exemplary case of self-organization of interests, being the first group that succeeded in legalizing its existence and publicly advocating the interests of its members. The Decree-Law No. 118 of 1990 granted special rights to former political prisoners, including medical care and local transport free of charge, subventions for medicines, limited free railroad transport, etc. For the Decree-Law No. 118 regarding the rights of the persons politically persecuted by the dictatorship established on March 6, 1945, see *Monitorul Oficial al României* (1998: 5-7).

18 A recently published album includes photographs of all monuments commemorating the victims of communism in Romania that AFDPR succeeded to erect so far. See *Album Memorial* (2004).

19 This association does not have a website, but its statutes could be found on www.procesulcomunismului.com.

of AFDPR, Constantin Ticu Dumitrescu, it was voted only after years of debates. From its very title, one can see that the law is granting to Romanian citizens, as well as to present day foreign citizens that had been citizens of Romania after 1945, the right to access their Securitate files. Furthermore, it creates for the first time a legal framework for the study of the Securitate archives by any citizen interested in assessing "the political police activities of the former secret police in order to offer to society as correct as possible a picture of the communist period."

In order to achieve such an ambitious goal, a new institution was established, the National Council for the Study of the Securitate Archives (*Consiliul Național pentru Studierea Arhivelor Securității* – CNSAS), which has been destined to take over the files of the former secret police. The institution is led by a Collegium composed of eleven people. Of them, nine are nominated by political parties – in accordance with their representation in the Parliament, one is nominated by the President, and one by the Prime Minister.[20] The major function of CNSAS is to provide evidence for unmasking the former employees (agents) and informal collaborators of the secret police, and thus enabling lustration. In this respect, the Collegium was empowered to check holders of, and candidates for, public offices and assess if they were involved in the activities of "the Securitate as political police." The concept of "political police" (*poliție politică*) was defined by Law 187/1999 in order to apply lustration – understood as conditioning the access to public offices on certificates of morality based on the archives of the former secret police. Romanian Parliament decided that the pivotal idea at the basis of Law 187 has to be that of individual responsibility and by no means that of collective guilt – based on a simple association with the Securitate.[21] Thus, the Romanian law

20 The Law No. 187 of December 7, 1999, was published in (*Monitorul Oficial al României,* 1999: 1-5). For more on this institution, visit its website at www.cnsas.ro.

21 Václav Havel and Adam Michnik, coming from two countries that approached lustration very differently, agreed that the application of lustration is a highly sensitive issue, which has questionable results. See "The Strange Epoch of Post-communism: A Conversation with Václav Havel," in Michnik (1998: 228-229).

focuses on individual deeds and on a good quality of proof, similar to the German legislation, and not on the position the respective people occupied, as introduced in 1991 in the Czech and Slovak Federal Republic.

The Romanian law stipulates that political police included "all those structures of the secret police created in order to establish and maintain the communist totalitarian power, and to suppress and restrict the fundamental human rights and liberties". In short, this law has been conceived to be as consistent as possible to the rule-of-law principles. According to Article 3 of Law 187/1999, people seeking or occupying public office must fill in a special form in which they have to state if they were or not agents or collaborators of the former communist secret police. Disqualification of persons proven by CNSAS to have been agents or collaborators of the Securitate occurs only if they did not acknowledge their position within, or their collaboration with, the Securitate apparatus when completing the above mentioned form. If collaboration is proven and has not been acknowledged, the respective person is to be charged with false statements provided in a public document.

Nonetheless, up to the year 2006 the application of Law 187/1999 proved to be very difficult, and it may be argued that a major hindrance in this respect was the lack of political will by the Constantinescu (1996-2000) and the second Iliescu (2000-2004) regimes to push for the transfer of the Securitate archives to the CNSAS. Moreover, the verification of individuals based on what they did represents a difficult operation that requires the work of many people over a very long period of time. As compared to the Federal Agency for the Administration of the Stasi Files, which has some 3,000 employees, the Romanian institution has around 300. At the same time, as it was argued in the case of the Stasi files, such an operation could hardly shed definitive light on the collaboration issue. The files of the former secret police are both over-and under-inclusive. On one hand, one can find names of people that refused to collaborate, but were abusively registered; on the other hand, some informers that held prominent positions within

the party or state structures were never registered since they gave no written, but only verbal informative notes (in general, the files of the informal collaborators were destroyed once they became members of the communist party).[22]

As for the malfunctioning of lustration in Romania, this has originated in an abusive interpretation of the Law 187 by the holders of the secret police archives. The law stipulates that the access to the former secret police files is restricted by the principle of "national security". However, up to the year 2005 the number of files considered as pertaining to the "national security" category, and whose transfer to the CNSAS was denied by their holders, proved to be unusually large. As a consequence, during the period 2000-2005, CNSAS has been confronted with major problems related to the transfer of the archives of the former Securitate – hosted mainly by: the Romanian Intelligence Service (*Serviciul Român de Informații* – SRI), the Foreign Intelligence Service (*Serviciul de Informații Externe* – SIE) and the Ministry of National Defense (*Ministerul Apărării Naționale* – MapN) – to its archive. In fact, since its establishment in the year 2000, CNSAS has constantly struggled with the above mentioned institutions over the custody of the documents produced by the former Securitate. During the period 2000-2005, such documents were transferred to CNSAS very selectively, without disclosing the previous system of file classification.[23]

Nevertheless, after the general elections of 2004, things changed tremendously. In mid-December 2005, SRI donated over one million files to CNSAS, which had to inaugurate a new building for their preservation. A Government Ordinance (No. 149 of November 10,

22 With regard to the East German case, this argument is developed in Offe (1997: 97-98).

23 By 2005 it was obvious that a large part of these files were either not released by SRI, or already destroyed. A prominent former dissident who had clear proof of being under close surveillance by the *Securitate* in the 1980s – photographs with individuals watching his house – received a considerable number of files (around 50) from CNSAS, recorded under his name. Being granted access to the respective files, he discovered that the files were a total mess, mixing together very different documents, and of which only four referred to his dissident activity. By November 2005, the number of files taken over from SRI, according to the annual report of CNSAS, was 9,142. See (Colegiul dosarelor ... fără dosare" 2005: 2).

2005) extended the application of the law for another six years under a new Collegium. Also, the functioning of the CNSAS has been improved by Government's Ordinance (No. 16 of February 27, 2006) and Government's Decision (No. 731 of June 7, 2006).[24] It should be mentioned that it was primarily due to Romania's President, Traian Băsescu – elected, as already mentioned, in 2004 – that the bulk of the Securitate files have been finally transferred to the CNSAS archive. Thus, over the period April-August 2006, a number of four decisions of Romania's Supreme Council of National Defense (*Consiliul Suprem de Apărare a Țării* – CSAT) have made possible the transfer to the CNSAS archive of 1,555,905 files, comprising 1,894,076 volumes. As a result, the activity of the CNSAS has gained momentum. For instance, according to the CNSAS Annual Activity Report 2006, during the year 2006 only, CNSAS' Collegium has unmasked 270 informal collaborators of the Securitate, which represents more than the number of informers unmasked by the Collegium during the entire period 2000-2005.[25]

Nevertheless, a proper functioning of the CNSAS does cover only one dimension of the lustration issue. In communist regimes, the secret police has always been the "iron fist" of the communist party. Therefore, the principle of vetting must be extended to the former nomenclature members, of whom many gave direct orders to the secret police. In this respect, circumstantial evidence indicates that, in order to recruit party members that occupied relatively important posts, the Securitate officers were compelled to ask first for the approval of the party officials. Only after the party officials' approval, the recruitment procedures could be pursued. This is just one example regarding the need for a second dimension of lustration, which has to focus on the high ranking officials of the former Romanian Communist Party.

It should be added that, on December 18, 2006, the President of

24 Law 187/1999 underwent some modifications. In this respect, see *Monitorul Oficial al României*, No. 182, February 27, 2006, pp. 1-8. For the extension of the activity of CNSAS, see *Monitorul Oficial al României*, No. 1008, November 14, 2005, pp. 7-8.

25 For more details regarding the activity of the CNSAS – related legislation, annual activity reports, research projects, publications etc. – visit its website at www.cnsas.ro.

Romania has issued, in the front of the joint chambers of the Romanian Parliament, an official statement which characterized the defunct communist regime in Romania as "illegitimate and criminal." The statement was based on the conclusions of a special presidential commission – the Presidential Commission for the Analysis of the Communist Dictatorship in Romania (*Comisia Prezidențială pentru Analizarea Dictaturii Comuniste din România* – CPACDR) – headed by a Romanian-born American professor of Political Science, Vladimir Tismăneanu. The said commission, which functioned during the period April-December 2006, issued a 650-pages report, which is also available on the Internet.[26] The report of the presidential commission, followed by the official statement of the President of Romania, have opened the way for completing the existent lustration legislation (Law 187/1999 completed by Government's Ordinance 16/2006) with a law concerning the former nomenclature members.

Prospects for Adopting a "Lustration Law"

After the general elections of 2004, debates over lustration legislation became even more intense. As shown above, Law 187/1999 has created the legal framework for unmasking the former agents and collaborators of the communist secret police, the infamous Securitate. The joint efforts of the newly elected president, government agencies and civil society organizations have led to a massive transfer of Securitate files to the CNSAS. Simultaneously, in 2005, a group of MP's belonging to the National Liberal Party has devised a project of a law meant to limit the access to public office of persons who held positions in the power structures of the former communist regime.[27] The initiative has been based on the principles put forward by the "Proclamation

26 For the full text of the CPADCR Final Report visit the site of the Romanian Presidential Administration at www.presidency.ro.

27 Mona Muscă (Deputy), Viorel Oancea (Deputy), Eugen Nicolăescu (Deputy) and Adrian Cioroianu (Senator).

of Timişoara" (March 11, 1990) in its famous by now Article 8.

The law is entitled: "Lustration Law regarding temporary limitation of access to public office of persons who held official positions within the power structures and repressive apparatus of the communist regime". One can observe that the principle put forward by the initiators of the law is that of collective responsibility: in other words, the lustration is meant to be applied in relation with the positions the respective persons occupied within the party or state structures during the communist regime, and not in relation with their deeds under the respective regime. Basically, the law defines as members of the power structures of the former communist regime the persons who held top positions within the central and local organizations of the Romanian Communist Party and the Union of Communist Youth (including the associations of Communists Students in Romania), as well as those who held top positions in state administration (at both central and local levels), judiciary, diplomacy, internal affairs (Militia), propaganda, foreign trade (heads of commercial offices abroad) and the banking system.

In all the cases mentioned by Article 1, the law introduces an interdiction of 10 years for access to public offices such as: president of Romania, senator and deputy, mayor and deputy mayor, member of the government, presidential counselor, director or deputy director of intelligence agencies, director or member of the board of state companies, judge or attorney at law, head of state sponsored cultural institutions (at both central and local levels) or member of the diplomatic corps.

Finally, it should be mentioned that the project has been voted by the upper chamber of the Romanian Parliament (the Senate) on April 10, 2006. In spite of its adoption by the Senate, the project has not been discussed in the Chamber of Deputies for over a year by now. It remains to be seen if there is enough will from the part of the parties represented in the Parliament for adopting the law. However, considering that almost all political parties represented in the present Parliament would be affected by such legislation, it is very likely that the

adoption of such a law will be postponed until a new Parliament is elected.[28]

Concluding Remarks

This paper has addressed, in a historical perspective, the inception of the lustration process in post-1989 Romania. As shown in the case of Romania, the violent exit from communism was not followed by a rapid democratization process. Due to a complex aggregation of factors, the early post-communist period in that country was marked by the dominance of second-and third-rank nomenclature members, who joined the FSN headed by Ion Iliescu. Since Iliescu and his party derived their political legitimacy from their involvement in the 1989 events and the removal of Nicolae Ceauşescu from power, they allowed a limited application of criminal justice with regard to the bloody repression of the protesters in Timişoara and Bucharest. It should be mentioned that one of the first acts of revolutionary justice applied by the FSN was the hasten execution of the Ceauşescu couple, after a poorly staged trial, on December 25, 1989.

The power shift of 1996 and the coming to power of the democratic opposition opened the way for introducing lustration in Romania. Due to the efforts of former political prisoners, most prominently of the president of the AFDPR, Constantin Ticu Dumitrescu, the Parliament eventually adopted Law 187/1999 or the "Law regarding the access to the personal file and the disclosure of the Securitate as political police." This law has created the conditions for what has been termed by this paper as "one-dimensional lustration," i.e., has created the legal framework to deal with those persons who were either agents or informal collaborators of the communist secret police, the Securitate. Initiated in the year 2000, such a process has gained momentum beginning

28 Recently, an experienced post-communist politician, Victor Babiuc, who held several ministerial positions in different post-1989 governments (Minister of Justice, Minister of Internal Affairs, Minister of National Defense), has criticized the project of the "Lustration Law" as being unconstitutional. See Babiuc (2007: 12).

in 2005, when a major transfer of documents to the institution specially created to fulfill the scope of the law, the CNSAS, took place. In spite of many ups and downs, it may be argued that this dimension of lustration has finally started to bear fruit.

An initiative of introducing the second dimension of the lustration process, i.e., the lustration of the former nomenclature members, took place only in the year 2005. A group of MPs belonging to the National Liberal Party presented the project of a law, entitled "Lustration Law regarding temporary limitation of access to public office of persons who held official positions within the power structures and repressive apparatus of the communist regime". The project was eventually voted by the Senate, the upper chamber of the Romanian Parliament, in April 2006, but is still waiting to receive the sanction of the Chamber of Deputies. It should be mentioned nevertheless that in comparison with the Law 187/1999, which observes the principle of individual responsibility, the principle put forward by the initiators of the "Lustration Law" is that of collective responsibility.

Simply put, the lustration is meant to be applied in relation with the positions the respective persons occupied within the party or state structures during the communist regime, and not in relation with their deeds under the respective regime. Considering that the debates regarding the "Lustration Law" are still under way, it is hard to predict how the final version of the law will look like. Therefore, it is even more difficult to say if, and when, the second dimension of the lustration process will be initiated.

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Vladimíra Dvořáková

The Institute of National Memory, Historical Memory as a Political Project[29]

Introduction

History of each nation is an important part of national heritage. History gives lessons that are crucial for the formation of the political culture and to some extent can prevent the reproduction of the negative sides of the national history. The deep recognition of the history, mainly the understanding of the periods that represent the "dark" side from the perspective of liberal democratic values is extremely important.

In this paper I ask the question whether the institutionalization of the historical research of the communist past in the Institute of National Memory can enable to understand this history and can produce the lessons for the future. I argue that the scientific research can bring the results only if it is free from any political pressure and that the proposal for the formation of the Institute of National Memory has been a political project with clear political goals and with a strong political control. The politicians formulating the tasks and goals of the research are searching for the results that would be part of their political competition not for the answers that would prevent the reproduction of the past. Thus, from this point of view such Institute reproduces the

29 This paper was prepared as a part of scientific project of Faculty of International Relations, University of Economics, Prague MSM6138439909.

past and prevents from the understanding of the history. In this paper I analyse the legal proposal for the formation of such institute in the Czech Republic and I also compare this proposal with the Slovak and Polish experience where such institutes exist and where the political connections are evident.

History, legitimacy, governance

History plays an important role in the formation of national identity, legitimacy of the political regime, establishment of the basic values of the society; it has its impact on the forms of governance (in the sense of inclusion or exclusion of particular groups). We witness competing interpretation of the historical events, even the spring of violence dealing with emotional (and political) attitudes to some historical symbols[30], searching for common history is one of the tasks of European Union on which territory more conflicts than collaboration prevailed in the past. Does it mean that history as a scientific discipline is condemned to be a "political" instrument for competing streams aspiring for power? (Havelka, 2001; Kvaček, 2001; Tůma, 2001; Vaníček, 2001; Vašíček 2001).

Not necessarily, although the use and misuse of historical interpretations and symbols have been traditionally present in political competition and sure would be part of politics in the future. Nevertheless, history as a scientific discipline means both using the scientific methods and freedom of research. The historical interpretations in liberal democratic regimes differ mainly because of different questions that are asked by the scientists. This pluralism is very important because only pluralistic approach in searching for the answers on different questions can give us plastic picture of the past, can help us understand the presence and give us the lessons to prevent the reproduction of the non-democratic past.

30 Recently, the violent protests in Estonia provoked by the dislocation of the statue of a Soviet soldier.

It is clear, that any historical period opens the new questions that are important for the current state of society, searching for the answers that mostly help the basic identification of the public with the political society (and its different representation), legitimizing or delegitimizing the regime, trying to find the arguments for the paths that are offered. The difference between non-democratic and liberal democratic regime is mainly in the fact that non-democratic regimes controls first of all[31] the questions that are asked by the scientists, thus narrowing the space for scientific research and, mostly, these regimes control also the methodological approach that is "acceptable" as scientific. Liberal democratic regimes open the space for scientific research, with an approach that is based on the methodological pluralism of science and freedom to ask questions and acceptance of the answers if they are based on scientific methods. The criteria of "science" are formed by scientific community, not by political decisions.[32] This does not mean that the questions do not reflect the "needs" of the society (as it was mentioned above) as well as the results of the scientific work can be used and misused by the politicians.

The fact of the "open" scientific research is extremely important for the basic principles of liberal democratic regimes. First, liberal democracy is based on pluralism and any narrowing of the scientific research goes against its basic principles and thus undermining the bases of the regime. Second, the questions asked by social scientists form a very important feedback that can predict future development and the potential crisis. Third, it can find the roots of the problems of the society, to learn from the history, to prevent the reproduction of the history.

31 This „first of all" does not mean that they do not control the answers – censorship is a traditional tool of the non-democratic regimes to control the answers, by not publishing the texts that do not correspond to the hoped-for answers.

32 This „idealistic" approach can be criticized by the fact that the research strongly depends on financial support, but mostly in the case of governmental financing of the research (not so strong private investments in social sciences) in liberal democratic regimes there are basic procedures that gives the scientific community the chances to influence the decisions on the projects.

The post-communist regimes and the history

During the communist regime the historical research was limited both by methodological approach (Marxism and/or Marxism-Leninism or other modifications of Marxism)[33] and by official formulation of scientific questions (through five years plans of scientific research[34]) and controlling the answers (control of publishing houses, scientific journals[35]). The result was that there was no real discussion, some historical periods were totally neglected and not studied at all. The fall of communism then opened the space for the research in this field, but mostly in a much politicized atmosphere.

The basic task of the historians in post-communist countries just after the fall of communism was thus twofold. First, it was necessary to fulfil the "white spots" (*hic sunt leones*) and to start the research on the history of the communist regime. The second task is not possible to do without interdisciplinary approach, without the collaboration with political scientists, sociologists, lawyers etc.

Even the first task was not as easy as one could suppose. The interpretation of the events that "were frozen" for any research during the communist regime were often connected with the search of national identity and affected the situation mainly in multinational states. The competing interpretations were part of the political struggle that were strongly connected with the questions of basic political orientation and the character of the new regime both in the sense of internal

33 In fact, only few historians were really able to use Marxism in scientific sense, most of the historians were positivists with the obligatory quotations of Marx, Lenin (Stalin in 50's) in the introduction of their studies.

34 This principle could be partly evaded. The author of this paper has own experience with studying Revolutionary movement in Latin America as a part of five years plan of research in late 80's, that enable her to get in touch with the problems and theoretical approaches dealing with „transitology" .

35 This was difficult to evade, only through samizdats (self publishing) or studies published abroad that was used by scientific community that was "excluded" from official structures. Sometimes some open questions could be paradoxically found in very "ideological" studies – Criticism of the bourgeois theory of ... If the author was smart enough after the „hard" criticism of the bourgeois theory in the introduction (repeated in the conclusion) the rest of the text concentrated on the analysis of western theoretical discussions with a very broad quotations that enable to get some basic ideas about the problems.

politics and foreign political orientation. In Czechoslovakia/Czech Republic such questions dealt mainly with the interpretation of the period of Slovak state during the WWII[36], for Czechs the problem was mainly connected with transfer/expulsion of German minority after WWII, to some extent also the character of the Second Republic and internal sources of authoritarianism during this period.[37] The problems of these historical interpretations were not present only just after the fall of communism; recently we have witnessed the political impacts of such competing interpretation in Estonia.

The second task, as was mentioned before, is connected with the interpretation of the communist history. And again, it became strongly connected with the politics. Although, there were published a lot of scientific studies[38], there has been a strong political pressure to control both the "inputs" and "outputs" of the research, to define the tasks and to "legalize" the interpretations.[39] The understanding of the historical processes is narrowed to secret police activities and its files, and this information is often misused in political competition. The culmination of such interference into scientific research has been the attempt to form the Institute of National Memory (Institute for studies of totalitarian regimes)

36 In March 1939 Nazi regime formed the Protectorate of Bohemia and Moravia and "independent" Slovak state that closely collaborated with Hitler.

37 Second Republic (September 1938 - March 1939) represents the short period during which there was an attempt to form "authoritative" republic and in which the basic liberal democratic principles were left. See (Rataj, 1997).

38 According the Bibliography of Czechoslovak History only in the years 1999-2004 there were published circa 5,000 books, editions of the documents, papers and articles dealing with the history of the communist regime. (Bibliography 2005).

39 The Czech Parliament for instance passed the law saying that the Communist regime was a criminal one. In fact, this does not help with any decommunization of the society and it had negative impact on scientific research mainly when using the method of oral history. The respondents were afraid to answer.

Institute of National Memory – Institute for studies of totalitarian regimes

The law on the Institute was proposed by the upper chamber of the Czech Parliament - Senate and after the common legislative procedures passed by it on June 21, 2006. The position of the cabinet was formulated on September 13, 2006, and the House of Representatives passed the law on May 2, 2007[40]. Because the Senate proposal was changed by the House of Representatives it was passed again by Senate and then signed by the president in June 2007.

The passing of the law was accompanied by a very hard discussion not only in the parliamentary chambers, but also in public. The discussion took place on Internet, to some extent it was covered by public media – Radio and TV; articles were published in some cultural and political journals for broader public. Great part of the leading scientific personalities working in the field of contemporary history, archival science (and some of the other social scientists – political scientists, sociologists etc.) protested against the law, a petition against it was sent to the House. Some of the partial arguments of the experts were taken into account through the amending of the original Senate proposal, but the main logics of the Law remained the same.

The final discussion in the House before the law was passed was very symptomatic. This can really illustrate the approach of the politicians toward the free scientific research. Before the final discussion started, the representatives obtained the letter supported by several leading social scientists who argued against the formation of such institution. The representative Alena Páralová mentioned the names of some of them in a very depreciate way. In several cases she mentioned their former communist membership, she characterized field of their research interest[41] (somehow supposing that only those who are doing

40 14. schůze, 210 hlasování, 2.5.2007, 18:49, URL = http//www.psp.cz/sqw/hlasy.sqw?G=45319&o=5 (July 27, 2007)

41 The leading historian working in the field of the colonial history of the USA was declared as a specialist on American Indians. Although Ms. Páralová was sent an e-mail (she asked for) about the publications dealing with communist history, she did not use that.

research of the period of the communist regime have right to comment the proposal – and she was very exasperated by the fact that some of those who signed were even political scientists!) and did not mention their posts.[42]

Basic Features of the Law

The law[43] starts with the preamble with the words *"He who does not know his history is condemned to repeat it"* and continues with the explanation why it is important to study the past connected with the communist and Nazi ideology. It is mentioned that the education of public in this field is important to strengthen the democratic tradition and the development of civil society and to fulfil the ideas of justice.

The law establishes the Institute for the studies of totalitarian regimes (Senate proposal was for the Institute of National Memory) and the Archive of security components (§ 1). The period that is to be covered by the Institute is since September 30, 1938[44] till May 4, 1945 and February 25, 1948[45] till December 29, 1989[46]. The Institute can do research of the period 1945-1948 if it is connected with the preparation of the "*totalitarian seizure of power by Communist party of Czechoslovakia*" (§ 2).

The Institute is the organizational part of the state and any intervention in its activity can be done only by the law (§3, subparagraph 2). The financing is covered by separate chapter of the state budget

42 Among those who argued against were a former rector/president of the University of Opava, director of the Institute of Contemporary History of Academy of Sciences, director of the Institute of International Relations, co-chairman of the joint Czech-German Commission of the historians, president of the Association of historians of the Czech Republic, director of the Institute of the Contemporary History of Academy of Sciences, director of the Archive in Olomouc, director of the Archive of the Academy of Sciences, deans of several faculties chiefs of several departments of the Universities etc.

43 URL = http://www.psp.cz/sqw/hl.sqw?o=5&s=14&d=20070502, sněmovní tisk 15 (July 27, 2007)

44 The date of formation of the Second Republic after Munich agreement.

45 Communists gained the power after president Beneš accepted the resignation of non-communist members of the cabinet.

46 Václav Havel was elected president.

(§3, subparagraph 3). There are also specified tasks of the Institute that has to:

"a) *research and impartially evaluate the period of lack of freedom and the period of the communist totalitarian power, research antidemocratic and criminal activity of the authorities of the state, mainly of its security components, and the criminal activity of the Communist party of Czechoslovakia, as well as other organizations based on its ideology,*

b) analyse the causes and the methods of the liquidation of the democratic regime in the period of the communist totalitarian power, document the participation of the national and foreign personalities in the support of the communist regime and the resistance against it,

c) obtain and make accessible to public the documents testifying about the period of the lack of freedom and the period of the communist totalitarian power, mainly about the security components and the forms of persecution and the resistance,

d) transfer the kept documents into electronic form without undue delay

e) document the Nazi and communist crimes

f) provide the results of its activity to the public, mainly publish the information about the period of the lack of freedom, about the period of the communist totalitarian power, about the acts and fates of individuals, publish and disseminate publications, organize expositions, seminars, expert conferences and discussions.

g) collaborate with the scientific, cultural, educational and other institutions in order to interchange information and experiences in scholarly questions

h) collaborate with foreign institutions or individuals with analogical direction (§ 4, translation by author).

The Institute has a right to process personal data and to ask for all the documents and archive materials from all the state institutions that are connected with the tasks of the Institute (§5).

The authorities of the Institution is the Council and the director

(§6).

The Supreme authority of the Institute is Council; the members of the Council are elected and can be recalled by the Senate of the Parliament of the Czech Republic. Council has seven members. Senate elects two members from the personalities proposed by the House of Representatives, one member from those proposed by the president of the Czech Republic, and four members from those proposed by the Associations.[47] A member of the Council has a five years term and can be once re-elected. A member of the Council cannot be active in politics or have some high rank state post (party membership, member of Parliament, President of the Republics, judge, prosecutor...) and is reliable and taintless (§7). The definition of the reliable and taintless persons is defined in § 19 of the law and includes those who were not members of the Communist party of Czechoslovakia or Slovakia, did not graduate on any university of political, security and army specialization in the Warsaw Pact countries, did not work in security components of the state, or had not been collaborator of security components and member or collaborator of intelligence services of the Warsaw Pact countries. The member of the Council has to have clean criminal record.

The Council determines the methods to fulfil the tasks of the Institute, appoints and recalls the director and controls his activities, approve organizational orders, approve one year plans of activities, establishes the scientific board, appoints the members (proposed by director) of this board, approves standing orders, approves the financial proposals and closing account of the Institute, approves the annual report, etc. The members are rewarded.[48]

Director has to be a master programme graduate on the university and is to be reliable and taintless.

The second part of the law is devoted to the Archive of security

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47 Means organizations and associations that are connected with the research dealing with human rights, history, archival science, education and organizations that associate the members of resistance movement against Nazism, communism or political prisoners.

48 The salary is derived by the specific coefficient according the law 236/1995 Sb. It is approximately 1,5 of the average salary in non-business sphere.

components that is characterized as administrative body that is run by the Institute. The Archive is headed by the director of the Archive who is appointed and recalled by the director of Institute after the consultation with the Council. The director is to be a historical graduate or archival specialization.

Comparison of the Senate proposal and final statutory text of the House of Representatives

The first important difference we can find in the title of the Law. Senate proposal[49] called it the "Law on the Institute of National memory and the change of the certain laws"; the final proposal is the "Law on the Institute for studies of totalitarian regimes and on Archive of security components and on the change of the certain laws".

Change of the name also broadened the period on which the Institute is to concentrate on, that is the House included also the period since September 1938 to May 1945.

In the Senate proposal we can also find one striking paragraph in the preamble, that is connecting the communist ideology with the ideology of current terrorism and thus the Institute is supposed to be *"an important contribution for current actions against the international terrorism"*. Also another paragraph that spoke about the findings out of those who were co-responsible for the crimes and other activities was not accepted by the House. As a whole, the wording of the Senate proposal is very "hard", ideological and "radical".

From the Senate proposal the House also deleted two important tasks of the Institute – first, that the Institute documents the crimes during the communist totalitarian power for the needs of international judiciary institutions, and second, that the Institute provides the public authorities with the expert evidences, positions and recommendations.

49 URL= http://www.senat.cz/xqw/xervlet/pssenat/historie?ke_dni=19.05.2007&O=6&action=detail&value=1790 (July 27, 2007)

As far as the way how the Council is elected, the Senate proposal did not suppose that the candidates for the Council are to be proposed by someone else than Senators.

If we compare these two versions of the law, it is clear that the House soften the language, partly narrowed the political character of the Institute[50] and formally limited the powers of the Senate to appoint the Council (Senate has to choose from the proposals from outside). On the other hand, the logics of the work of the Institute remains the same and although one can suppose that some scientific results will be presented by the Institute, as the whole it is strongly non-effective project how to do research and mainly the freedom of research is at stake.

The main problems with the Institute for studies of totalitarian regimes

The change of the title of the Institute from the Institute of national memory to the Institute for studies of totalitarian regimes was a reaction on the public pressure (mainly from the liberal streams) that criticizes the idea of some Institute to institutionalize the national memory.[51] Also the extension of the period that is to be covered influenced the decision to call it as an Institute for studies of totalitarian regimes.

What does it mean for the future research? First, the legal system has codified the scientific term to define some historical period. I am afraid that most of the historians and political scientists working in the field of non-democratic regimes would never characterize the period of so called Second Republic before WWII, or the 70's and 80's in communist Czechoslovakia as totalitarian. Will it be possible for the employee of the Institute to try to form any typology of non-democratic regimes if the typology is characterized by the law as a subject of his/her study?

50 The main changes in the House were proposed by the Greens as members of governmental coalition. Opposition (social democrats and communists) were against the law as a whole.

51 The Orwell novel 1984 was very often quoted by the opponents.

Secondly, the "independence" of the research is well described in § 4, defining the task of the Institute to "*impartially evaluate ... criminal activity of the authorities of the state, mainly of its security components, and the criminal activity of the Communist party of Czechoslovakia...* Is it not the waste of time to do any evaluation if the character of evaluation is part of the law?

Third, the main problem of the law is the fact that the research will get under the political control. As it was precisely formulated by the authors of the letter to the representatives[52] *"...institution which primary goal is supposed to be the research of recent past, will change into the institution for the interpretation of such past according to the interests of the opportune senate majority or the strongest party in Senate; in worse case it will change into the agency for political square accounts by purpose-oriented use of delicate archive materials that need substantial historical critics. After 18 years the research of contemporary history is to be returned back under the curatorship of the state, thereupon the politicians"*. Although the Senate proposal dealing with appointments was changed and the House partly limited the choice (proposals are introduced by other actors), the political character of the Council is still clear because the members are appointed by the Senate. Very symptomatic is the analysis - who is excluded from the membership in the Council and what are the demands for those who are eligible. Among those who are not "reliable and taintless" are those who were members of the Communist Party during the whole communist period, that is, even those who were reform communists in 1968 and later signed Charta 77, the main document of the opposition against the communist regime, and who were strongly persecuted by the communist regime in 70's and 80's. On the other hand, the members of the Council do not need any education and a director of

52 Rizika spojená s chystaným založením Ústavu paměti národa, signed on February 26, 2007 by Martin Franc, Pavel Mücke, Vít Smetana, Miroslav Vaněk (e-mail electronic version). It is interesting that these protests were initiated by younger generations of the historians and archivists, which means by those who started their scientific careers after the fall of communism. This letter was later supported by the leading historians and social scientists as was mentioned above.

the Institute has to be university graduate only, but does not need any historical or social science training, or deeper skills, knowledge or experiences in scientific research (PhD graduate etc).

The fear that the research of the Institute will be strongly influenced by the political situation can be well documented using the examples of neighbouring countries. In Poland, Instytut Pamięci Narodowej (Institute of National Memory - IPN) became part of the political fight of the national conservative government with the opposition and recently it has been asked to control the lustrations of approximately 700,000 people (Rizika, 2007; Dvořáková, 2007). The Slovak example is even more illustrative. After the tragic death of Ján Langoš, founder of this Institute of National Memory (Ústav pamäti národa), it took half a year until a new chair was elected. The "right" to appoint a proper candidate was given to Slovak National Party (this decision was a part of coalition agreement). This party is near to radical right wing parties families (recently accepted the visit of Le Pen from France). The opposition proposing the dissident František Mikloško was not successful; on the other hand the proposal for Arpád Tarnoczy, whose statements were strongly criticized by Slovak Jewish community, was also not accepted. After all, as the new chair of the managing board was elected Ivan Petranský, 30 years old historian, whose candidacy was proposed by Matica slovenská. This historian regularly celebrates March 14, the date of formation of Slovak state (1939)[53]. This is an interesting „qualification" of the historian who is supposed to organize the research of the Institute that includes also the period since 1939. And Slovak National Party declared that the important topic on which the Institute was to concentrate is the oppression of Slovaks by Hungarians during the Horthy period in Hungary (Dvořáková, 2007).

53 In March 1939 former Czechoslovakia finished its existence. Bohemia and Moravia was occupied by Germans as a Protectorate of Bohemia and Moravia and in Slovakia an "independent" state was formed, closely collaborating with Hitler.

Conclusions

There is a very broad consensus in the society that it is important to study the communist past. The problem is whether the questions asked and the interpretations are to be under the control of politicians or done by free scientific research. The crimes that happened during the communist regime and the activities of secret police are only one part of the history, though important. Also the interpretation of history primarily through the sources of secret police narrows our understanding of what really happened, how the system really worked, etc. There are many very important topics to be studied, dealing with social, economic and cultural changes in the society, political culture, the processes of decision-making, internal conflicts, dissent, propaganda, the way of control of public, legitimization doctrines, etc. It is necessary to concentrate on oral history, to speak to observers and actors of those times. This research is to be done not only by historians and archivists, but also by sociologists, economists, political scientists…

The proposal for the Institute goes not only against the principles of liberal democratic regimes, but does not bring anything dealing with the justice. There is no need for any further institution,[54] if there is a public interest for deepening of such research the political representatives could support it by additional financing of scientific research in social sciences. The competition for the grants and projects would guarantee the scientific level of such a research; it would enable the further development of scientific institutions and could help to include students and PhD. students into the research.

This is the way how to form "national memory" that would prevent the reproduction of the non-democratic past, strengthen the democratic character of the political culture and would unite the society, not divide it.

54 In the Czech Republic exists the Institute for the documentation of the crimes of the communist regime and the research dealing with communist past is mostly done by the Institute of contemporary history of Academy of Sciences; More, there are many historical, sociological, political science departments on particular universities.

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Vesna Rakić-Vodinelić

An Unsuccessful Atempt of Lustration in Serbia

Reaction to the very idea of lustration (a short introduction)

It was only after October 5, 2000, that lustration started to be considered outside small expert circles.[1] The professional public in Serbia had divided opinions on the notion, need and reaches of lustration – from the moment the political possibility for its legislative regulation and institutionalization had occurred. Moreover, the development of this idea, informing the public about it and expert and quasi-expert adaptations placed to the public, showed that the doctrinal issues of lustrations, the ones that are serious and grave, are actually not what presents the real problem. For the Serbian political elite and its accompanying "scientific" and "expert" support, the problem was primarily of political nature, based on fear from disclosure of data on violations of human rights and in the legal and moral responsibility that may follow.[2] In addition, it may also be sustained that

1 This delay probably has the same causes as the overall retardation of Serbia in the transition process in Central and Eastern Europe. In the meantime, during the 90's of the previous century in particular, a number of legal texts on this topic were published and/or written. One of the most comprehensive and influential ones is (Kritz; 1995). Subsequently, the issues of facing the authoritarian past were analysed in particular in the following works: (Neumann, 1992; Rus, 1992; Albon, 1992a; 1992b; 1993a; 1993b; Cepl, 1992; Niño, 1991; Offe, 1993; Osiatynski, 1994; Uzelac, 1995) etc. Two books were published in Serbia: (Zidar, 2001; Vodinelić, 2002) and a number of expert and newspaper articles.

2 In that sense, a series of texts written by Ratko Marković, professor of the Belgrade Law Faculty, and published in «Danas» newspaper on February 12, February 26 and March 11,

the opinions of some members of the new Serbian political elite against lustrations were based more on prejudice and misapprehensions on the notions of this legal and moral measure, than on sound information. It is surprising that even judges (with or without just cause seeing themselves as possible "victims" of lustrating measures) do not know much about the notion and practice of lustration.

Prejudice No. 1: Lustration is retribution and is applied against political opponents.

This assertion is most often based on unprofessional and insubstantial statements given by politicians, often those highly-ranking in state administration. However, it must be conceded that comparative analysis of the results of implementing lustration laws passed in some countries (Poland, Hungary), particularly when it comes to the judiciary, to a certain extent justifies this prejudice. Namely, these laws, instead of expressly invoking mass violations of human rights as the *ratio legis* of lustrating, invoke authoritarian and ideological legal system (as more political and less legal phenomenon). The essence of legal disqualification is that a holder of public office who has committed mass violations of human rights should not be entrusted with deciding on these rights because he/she *has lost public trust and hence cannot be expected to professionally protect human rights and to exercise the public duties.* Only that much should have been done.

Prejudice No. 2: Lustration is a measure of collective, not individual responsibility.

This assessment is also most often based on the same factors as the former. However, comparative analysis indicates that it has far less grounds in legislation than the previous one. In the procedure for examining the responsibility of judge or other office holder for violation of human rights, it is individual responsibility that is examined, that is, that *must be examined,* not responsibility that would derive from membership in a political party, a group or even a profession. If responsibility was not to be examined individually, it would constitute

2004, is paradigmatic.

the same violation of human rights (right to fair trial) as was committed by those subjected to lustration.

Prejudice No. 3: Lustration procedure does not meet the conditions of fair and just decision-making by an impartial body.

This opinion also does not have sufficient grounds in the results of practical implementation of the lustration laws so far. Almost all these laws guarantee to persons whose liability is being examined the right to effective remedy, right to participate in the procedure, propose evidence and the right to defence.

The Law on Responsibility for Violation of Human Rights (Republic of Serbia "Official Herald" No. 58/2003. of June 3, 2003), despite certain shortcomings, which mainly consist of legal gaps, is based on the following sound postulates:

(1) the subject matter of the procedure is to examine responsibility for violation of human rights committed in the capacity of holder of public office;

(2) examination of responsibility solely on the grounds of membership in a political party or group, except a criminal organization, is excluded;

(3) only individual responsibility of a natural person is examined;

(4) the person whose responsibility is being examined has guaranteed right to defense, right to hearing and the right to lodge two legal remedies: objection and appeal; objection may be lodged for any reason, and appeal for all the usual reasons, but when it comes to the state of facts (in appeal) it is allowed only to present those facts and evidence that were not presented in the first degree procedure before the lustration commission or its panel.

Even though the Law exists in Serbian legal system for over half a year, *it has not been applied in a single case.* This fact calls for an explanation of the causes.

2. *Why has not the law on responsibility for violation of human rights been implemented?*

a) Lack of Social Consensus on the Necessity of Facing up the Past. Primarily, it may be sustained that there is no social consensus on the necessity of facing up the past, one segment of which would be the lustration of holders of public offices. In addition, it is apparent that there is no consensus among the political parties on the issue. Moreover, even though the republican state administration established after October 5, 2000, was often perceived as reformist, there can be no talk of its serious intention to face the past, even the recent one. Why was such consensus not established even when it became evident that the dark parts of the past will overwhelm the society, if the society fails to overcome them, and the peak of rule of the past was embodied in the assassination of prime minister Zoran Đinđić, followed by somewhat sloppy and unreliable so-called "Sable" action – is a topic for a serious debate that is yet to come.

b) Compromising the idea of lustration. »Lustration the Serbian way« started off on a wrong foot and ended up being seriously compromised in the public.

The first case of political action that was presented as lustration was the relieving of a large number of court presidents during 2001. Serbian Constitution reads that court presidents are elected directly by the Parliament. According to the years-long political experience in the Balkans (not only in Serbia!), the main lever of control over courts exerted by political executive power are the court presidents. This underlies the persisting tradition that court presidents are elected by the Parliament. Even after the passing of a new judicial law, our legislator did not dare entrust the election of the court president to fellow judges of that court. Instead of changing relevant constitutional provisions and setting up a new resolute legislative practice, the Ministry of Justice (of the both after-Milošević governments) took up as its prime task to remove court presidents, because it wanted to preserve this canal of in-

fluence of the ministerial executive power over the court power. Even if there is some understanding for such gesture (for, in all transitional states, the main bearers of judicial reform are the executive powers, namely, the ministry of justice), what has no justification is the fact that the Ministry, simultaneously with relieving former court presidents, did not require amendments to the constitution, so that court presidents would no longer be elected by the Parliament, but by the judges. Had it done so, the Ministry would have created an important new institution which would have a considerable bearing on judicial independence. As the case is now, the only new "institutions" are the new court presidents, having the same powers as the former ones, with the same mortgage of being the extended arm of the executive.

The other instance of mass relieving, presented as lustration, was the relieving of magistrates. The procedure was initiated by the Minister of Justice, who indeed has such competence; however, the initiation of the procedure was preceded by the publication of the list of magistrates whose relieving is to be demanded. This constituted a grave violation of human rights – putting people on black lists. The magistrate's defense, also published in the press, however, showed that they had no elementary legal knowledge relating to lustration. They claimed that they have only "applied the Public Information Act (of 1998)", largely well-known as illegally derogative towards the freedom of expression and information and as ultimately unconstitutional. Paradoxically, not one magistrate whose release was requested mentioned human rights, even their own. If the law orders a judge to violate human rights (in this case: right to timely, truthful and impartial information), the judge must invoke the Constitution. Even the legal system in Milošević's time enabled the judges to raise the question of constitutionality of certain legislative rules. How many magistrates have raised this question? None. The magistrates have gathered to protest against being put on the black list (and rightfully so!). But, why did not these same magistrates gather in 1998, when the Public Information Act was passed? Why didn't the magistrates protested when, at the very time of their resolution, numerous ministers in the government requested the initia-

tion of criminal proceedings against certain journalists? The following wrong step taken by the Ministry of Justice was that the magistrates were accused for applying the former Public Information Act of 1998 (even though this Act was an example of legislative violation of the Constitution), not for direct violation of human rights guaranteed by the Constitution, which, as the magistrates know, cannot be derogated from by a law.

Furthermore, the procedure against each judge whose relieving was sought should have been individual and should have established which human right was violated with what action and whether such violation may be qualified as unprofessional conduct of the magistrate, thus constituting a reason for release. According to the facts that could be gathered from the press, the procedure conducted against the magistrates relieved had no such characteristics.

c) New notion of »legalism«, as a political argument. The hypocrisy of invoking new «legalism», as a pretext for not doing anything, is well observed and explained in our country: «Legalism in post-Milošević Serbia constitutes a practical political position insisting on the necessity to observe legal norms and procedures. Legalists are those who identify themselves as defenders of law in a political context in which law is violated by practices of illicit conduct, or rather, violations of existing regulations. This is followed by an important auto-legitimizing step: the position of legalism is self-recognized in the tension towards "the other side", that is, towards those political forces that do not observe the law… Recognizing the other side is the work of legalists themselves… Legalism is not a political position without content. But, I repeat that its identity is not determined by insisting on the observation of law. This position is not identified by a positive relation towards the law in the form of legal continuity and criticism of lawlessness, but primarily by the relation towards ideology. Turned towards the past in the manner of a 19th century romantic nationalism, legalists have – probably contrary to their sincere intentions - ended up in the position of defending the institutional, legal and ideological heritage of the Milošević's nationalism» (Dimitrijević,

2003). This assessment should be accompanied by a note that the mentioned ideological and political continuity is also perceived in parts of human resource structure of the current government, which is attributed to deals directly preceding October 5, or following in times after it. On the other hand, barren invoking of "legalism" as an excuse for not doing anything when it comes to facing the past, will undermine the main principles of the rule of law, even from the "legalistic" standpoint, since the state has to provide sanctions for violations of human rights which it guarantees to its citizens. If human rights of the victims are not observed by pronouncing sanctions to those who have violated them, there can be no legality or legitimacy. There can only be peevish easiness of politically bias interpretation of the law. After the latest parliamentary elections in 2003, "new legalism" of Koštunica's government announces a resolute break – not with the past, but with lustration, as one method for overcoming authoritarian past, therefore, announcing continuity with the authoritarian government, which will no longer be covert, but open. (Judging by the press[3], as one of the first reactions to the results of election 2003, Tomislav Nikolić, deputy president of the Serbian Radical Party, which has designed, together with Milošević's socialists, the authoritarian regime before its downfall in the end of 90's, stated that he has reached an agreement with Vojislav Koštunica, president of the Democratic Party of Serbia and founder of "new legalism", that the Law on Responsibility for Violation of Human Rights will be put out of force immediately after the constitution of the new Parliament. This is, therefore, the first step in reaching the rule of law of the new "legalist" majority in Serbian Parliament. That never happened, the Law is still in force, but in the field of lustration in Serbia there is nothing else - just the written Law - in paper as well as in electronic version.)

d) Mocking with Truth and Reconciliation. The experiences of the Commission for Truth and Reconciliation in South Africa, appropriate for their political and legal state, according to undivided estimates, have given good results. Those who have confessed at violating hu-

3 »Glas javnosti« of January 10, 2004.

man rights were given amnesty: if the Commission concludes that he/she has lied, criminal proceedings would be initiated against him/her for criminal offence of violating human rights, including the gravest (homicide). The Commissions work was based on the high moral authority of its chairman and members, on the considerable influence of religion and religious feelings of those participating in the proceedings, and in the resolute support by the state. A sad and inadequate imitation of such facing with the past was attempted in our country, with the forming of the Commission for Truth and Reconciliation. Not only did the Commission fail to do anything, but, in addition to having no high moral authority, it was not supported by those who have established it, and it compromised the earnestness of the intent of this society to face its own past.[4]

e) Obstruction of the Work of the Lustration Commission. Commission for Examining Responsibility for Violation of Human Rights has not yet been fully formed (eight, instead of nine members were elected). Serbian Radical Party has initiated proceedings before the Constitutional Court of Serbia against this Law, its main argument being the retroactive effect of the law. The procedure is not yet finalized. Why was the Commission not elected in full composition? According to the Law on Responsibility for Violation of Human Rights, the Commission comprises: three justices of the Supreme Court of Serbia, three legal experts, one deputy Republican Public Prosecutor and two MPs who hold a law degree, and who were not elected on the same electoral list. One of two MPs was not elected, because no members of Parliament, except those who were elected on the former DOS list, would take up the Commission membership. Those MPs who were not elected on the DOS list in former Parliament were MPs from SRS, SPS and parties emerging after its dissolution, as well as the SSJ MPs – all who have supported the Slobodan Milošević's regime or directly participated in it.

Viewed from such political standpoint, their "reservation" towards taking up the Commission membership may be understandable. One

4 Very informative text on the Truth and Reconciliation Commission, see Ilić (2003).

may also understand why they advocated against the passing of law and voted against it. However, what cannot be understood and defended in a serious state is the position of a Member of Parliament who, after the passing of a law, refuses to implement it. Our parliamentarians have still not learned the first lesson in parliamentarism – you can do whatever the Constitution and the law allow you in order to prevent the passing of a law in Parliament, you may contest it before the Constitutional Court, but once the law enters into force, you *must* implement it because if you, as a member Parliament, do not implement it, you may not ask an ordinary citizen to do so.

In addition to this initial obstruction, the Commission did not receive resolute support of the executive organs, in terms of being provided with the basic working conditions. Among other things, it never had an address, nor does it have one now.

f) Weakness of the Commission. As a member of the Commission for Examining Responsibility for Violations of Human Rights, the author of this text has had direct insight into its work. So far, the Commission has dealt mainly with itself. After legally analysing the consequences of it incomplete composition (eight, instead of nine members), the Commission has decided to constitute itself, and it has chosen the chairman and deputy chairman, formed three panels and passed its Rules of Procedure, which were published in "Republic of Serbia Official Herald". Rules of Procedure have filled, in regard to the method of work, collecting and presenting evidence, some gaps existing in the Law. There will be no talk in this text on the content, shortcomings and advantages of the Rules of Procedure, save for the note that this act, as the Law itself, will, most likely, have only historic character. Immediately before the Parliamentary elections on December 28, 2003, the Commission has concluded that it cannot carry out the so-called interim lustration, not only due to not having necessary working conditions, but also because it could not observe the time limits determined in the Law on Examination of Responsibility for Violation of Human Rights, which would observe the rights of MP candidates to defense and legal remedies. At the same time, the Com-

mission has pointed out that subsequent lustration procedure will be carried out after the elections. The elections have passed, the Commission's chairman was no longer an MP, and hence his capacity of the Commission member was terminated *ex lege.* As a member of the Commission, I was in minority, in finding that interim lustration, despite "tight" time schedule, could (and should) have been carried out. My resignation was not individual, but a collective one, together with other Commission members, in September 2004. Even though the National Assembly is obliged to elect the new Lustration Commission, at the proposal of President of the Assembly, it has not done that, and there are no indications that it will do so in the future.

Future of Lustration in Serbia

Can we expect, in the near future, a break with political and legal mechanisms of authoritarian past in Serbia, and hence, lustration? Considering all above mentioned circumstances following the idea of lustration and attempt at its implementation in our country, the answer seams to be clearly negative. This, however, does not mean that professionals should give up on studying the methods and results of legal overcoming of the past. In addition, this does not mean that in the more distant future of Serbia, lustration and other forms of legal facing with the past are doomed to a historical failure. It is important to explain why.

a) Authoritarianism as a social evil. In most societies, authoritarian past is considered politically, legally and morally compromising, due to the evil authoritarianism procedure and particularly because of the illegality as its form. It is legitimate, from a social and legal standpoint, to opt for the policy of overcoming, but also for the policy of not overcoming the past. All the political parties, members of the former DOS, before the electoral victory on September 24, 2000, have promised their voters that they will overcome (prevail) the past of authori-

tarian Milošević's regime. Had there been serious measures for overcoming of the past, they would have been legitimate. The Commission for Truth and Reconciliation was established, but it yielded no results. Law on Responsibility for Violation of Human Rights, that is, on lustration, was passed, but with no results. The attempts at passing a serious legal act on opening of the state security files were so far without success. Political and other causes of lack of results belong in another analysis. The reason for accepting and realizing the idea of overcoming the past lies in the need for the authoritarian past not to be repeated. In Serbia, this past has not been overcome; it is being repeated in many ways. What is most stunning in this context is the ease with which the opponents of facing with past declare lustration to be a political reconstruction of the past in order to deal with political opponents, invoking the rule of law and principles of criminal law. It is as if the speak from a 19th century standpoint, when there was no international criminal liability, nothing similar to the Nuremberg trial, or International Covenant on Civic and Political Rights, or serious and comprehensive legal literature on legal overcoming of authoritarian past.

b) Comparative and historical experiences. Many states have coped with the problem of legal overcoming of authoritarian past after the break down of authoritarian regimes: after the defeat of Nazism and fascism – Germany, Italy and Japan; after the overthrow of dictatorships in seventies - Greece, Portugal and Spain; after the overthrowing of military dictatorship regimes in the eighties in South America – Chile, Argentina, Bolivia and others; after the breaking of the Berlin wall – numerous European communist states; after the abolition of apartheid - South African Republic. Even in those states that have opted for the policy of not overcoming of authoritarian past, which was preceded by a serious social consensus on forgetting, such as Spain, it was still necessary to pass a law on that. Such law was passed in Spain on October 14, 1977, and it included a general provision on amnesty of all "acts with political intent, irrespective of their result". Even though

this state opted for not facing the past, it had to pass a legal act on the issue - I underline – based on a wide social consensus.

c) Widespread of the idea. Finally, it is worth knowing that presently, in some forty states, different processes of legal overcoming of the past are underway (this includes Serbia: Commission for Truth and Reconciliation is not abolished, nor is the Law on Lustration). Given that, according to H. Rogeman's criterion, only one third out of 200 United Nations member states may be considered as the states that have the rule of law, legal overcoming of the past does have a future, despite the reversible process in Serbia. (Advocating for facing with authoritarian past and giving up on it is not specific for Serbia alone.)

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Raluca Grosescu

The Role of the Civil Society and Anticommunist Political Actors in the Romanian Transitional Justice Partial Failure

The present article analyses one of the factors that determined the partial failure of transitional justice in post-communist Romania. This factor is the role played by the political and civil actors who assumed a radical anticommunist identity in the aftermath of December 1989 and who militated from the very beginning of the transition period for a fast and deep-seated decommunization process. The main assumption of this paper is that besides the reproduction of former communist elites in public offices – phenomenon that hindered the decommunization process – the Romanian political and civil actors who claimed transitional justice were unable to built coherent methodologies and long term projects regarding this kind of policies.

The research relies on a qualitative analysis and interpretation of different types of sources: legislative documents regarding the lustration and the "screening processes" developed in Romania after 1989; documents of the penal proceedings against former communist leaders accused of crimes and abuses (Public Prosecutor's Charges, verdicts, appeals, etc). Ten semi-structured interviews with various actors involved in the transitional justice process – former communist leaders judged for crimes and abuses; prosecutors and lawyers involved in

these trials; political actors (former communist leaders who continued their activity after 1989, as well as former political prisoners who became political elites after 1989); members of the Civil Society involved in the anticommunist movement after 1990.

The article has three sections. The first one will provide a historical framework concerning the particularities of the December 1989 revolution and the emergence of the new political and civil actors. The second one will present the main policies of transitional justice in Romania. The third one will evaluate how the civil society and the self-declared anticommunist political parties activated for the implementation of these procedures.

1. Context and Character of the Romanian Revolution

Considering that transitional justice is generally influenced by the extrication-path from the dictatorial regime (Mink, Szurek, 1999: 13), we will present further certain particularities of the Romanian 1989 revolution.

First of all, it is necessary to stress that a strong opposition against Nicolae Ceausescu's dictatorial regime never took root in Romania. Conditioned by the excessive authoritarianism of the communist regime, but also by the absence of a participative political culture, the protests against the communism always maintained an individual character. Additionally, the demands of the few strikes, which took place between 1977 and 1987, had economic changes for primary objectives. The national-communist doctrine seduced most of Romanian humanist intelligentsia, which joined and supported the party's liberalization policy between 1965 and 1975. Afterwards they had difficulties in recognizing their error or in mobilizing their energies in a protesting movement. Although the notorious adversaries of the regime, Doina Cornea, Laszlo Tokes, Ana Blandiana, Mircea Dinescu, etc., enjoyed an extraordinary reputation, at least in Bucharest, they did not have the experience and the calibre of an opponent like Vaclav Havel

and they were not prepared to assume political responsibilities in case of a possible fall of the dictatorship. The Romanian revolution did not manage to impose new political personalities. Only the Democratic Forum, created in Timisoara by individuals who were not involved in the political life before 1989, would have been able to replace the Communist Party and the Nomenclature. On the other hand, this city was not the country's capital and did not have any media resources to legitimize its position at the national level. In the absence of strong anticommunist elite, the fall of the Ceausescu's regime generated a profound void of power in the first days of the popular uprising in December 1989.

Secondly, at the time of the revolution, there were two types of Nomenclature members in Romania. First of all, there was an active, in-office Nomenclature, faithful to Ceausescu's regime and a marginalized one, pushed aside from the political life, belonging mostly to the former Stalinist elite of Gheorghiu Dej, but which had opted in time for the reformist ideas promoted by Mihail Gorbatchev. The latter constituted a sort of passive dissidence to the dictatorship of Ceausescu, nevertheless without questioning the foundations of the communist system. Although it had not the scope of the reforming teams imposed to power in Poland or Hungary, it possessed the necessary prestige to take over the political power in the potential case of Ceausescu's fall (Grosescu, 2004: 105).

Thirdly, Romania is the only state within the Warsaw Pact in which the passage from the communist system to democracy was achieved through a bloody revolution. It must be added that these events unfolded unexpectedly over a severely short period of time. The Nomenclature close to Nicolae Ceausescu was not able to engage negotiations in the Polish or Hungarian manner. Using violence against the masses it signed its own sentence to political and social exclusion. Most of the members of the Executive Political Committee were called in court for committing genocide, sent to prison and as a result they lost all political rights. Although later they were amnestied by president Iliescu, they remained compromised and could not regain

an honorable place in the post-communist history. The Nomenclature close to Nicolae Ceausescu initially suffered a social displacement, leaving the political scene free to other less damaged communist actors, but whom, through their experience and contacts, would have been able to stop the violent actions of the Army and the Securitate – the former political police.

In this context, the political power was recovered in December 1989 by a group of former communist leaders - organized around Ion Iliescu[1] and Silviu Brucan[2]. Their negotiations with the Army and the Securitate pulled up the violence against the population and led to the creation of the National Salvation Front (FSN), a political organism presented as "the emblematic force" of the Romanian Revolution. This situation provoked the discontentment of a part of the Romanian population and anticommunist manifestations continued to be organized in several Romanian cities by the historical political parties, reconstituted in 1989 after 40 years of interdiction (The National Liberal Party - PNL and The National Christian-Democrat Party - PNTCD). This mass mobilization was also sustained by certain civic bodies (The Group for Social Dialogue – GDS and The Timisoara Society) that were regrouping former political dissidents and prestigious intellectuals. In the same time, the former political prisoners and the victims of the revolution organized themselves in associations and actively participated to the anti-FSN manifestations. Both the exclusion of the communist leaders from the public life and the punishment of political crimes and abuses committed during the previous regime

1 Ion Iliescu: Member and First Secretary of the Central Committee of the Working Youth's Union (1949; 1954); Minister for Youth's Problems (1967-1971); Secretary for propaganda within the Central Committee of the Romanian Communist Party (1971); Substitute Member and Member of the Central Committee of the Romanian Communist Party (1965-1984); Member of the Executive Political Committee (CPEx) (1969-1979); Deputy in the Great National Assembly (Representing the counties of Bucuresti, Ilfov, Iasi, Vrancea, Cluj) (1957-1961, 1965-1985); Vice-president of the Timis County Council (1971-1974); President of the Iasi County Council (1974-1979); President of the Waters' National Council (1979-1984); Director of the Technical Publishing House - Bucuresti (1984-1989).

2 Silviu Brucan: Deputy in the Great National Assembly (1952-1956); Assistant Chief Editor of the Party's newspaper Scinteia (1944-1956); Ambassador in the USA (1956-1959); UN Permanent Representative of Romania (1959-1961); Vice-President of the Romanian Radio and Television (1961-1966).

were claimed by the participants (Stoiciu, 2000: 58). These mass demonstrations gave legitimacy to a series of political and civic actors, who were identifying themselves as the artisans of the anticommunist revolution and opponents of the former communist elites' conversion. Among them: the historical political parties, the civic bodies formed by intellectuals who opposed the Ceausescu's regime – the GDS, the Civic Academy and the Timisoara Society – the Association of Former Political Prisoners (AFDPR) and a part of the victims of the revolution regrouped in the 21 December Association.

2. Romanian transitional justice procedures

In Romania, justice regulations regarding crimes and abuses committed during the communist regime materialized in several types of policies.

Criminal justice. Numerous communist leaders and officers who activated in the Army, in the Militia and the Securitate were sued for the repression of December 1989 manifestations. Besides Nicolae Ceausescu's execution, most of the members of the Political Executive Committee of the Communist Party were condemned for complicity to murder and more than 200 officers and non-commissioned officers were brought in Court. These trials referred to the December 1989 events, but no verdict was pronounced for the violence produced in Bucharest, the city with the highest number of victims. Only two sentences regarded crimes committed by the repressive apparatus before 1989, one case concerning the assassination of a political dissident in 1988. No condemnation was stated for the crimes committed in the early 50's, the harshest period of the communist regime in Romania.

The "anti-Securitate" Law. In 1999 - under a centre-right wing government led by the PNTCD and the PNL - a law for the disclosure of the former Securitate was adopted and a special institution was established as a consequence: the National Council for the Study of the Securitate Archives (CNSAS). Its main functions were: to verify the

collaboration with the political police of all post-communist political dignitaries, without taking any measure against them but the verdicts' publishing; to allow all Romanian citizens to consult their personal file established by the Securitate; to give access to researchers to the Securitate archives. But the accomplishment of these three functions was superficial and at least until 2006, the CNSAS functioned as "a car without fuel" (Stefan, 2007: 10), most of the Securitate files remaining in the custody of the Romanian Intelligence Services (SRI) – the direct inheritor of the Securitate. In this context, the CNSAS became the SRI's "spokesman" and "occasionally the instrument of political conflicts between the SRI and other institutions" (Ursachi, 2005: 65). At the same time, the CNSAS functioning reproduced all parliamentary alliances and divergences, as its Directory Council was formed by the Romanian political parties' representatives. In this context, many CNSAS verdicts were politically influenced and the files of the former Securitate became potentially blackmail material, revealing the power of those controlling the Securitate files over the officeholders who hid their former relationship with the political police. But the most important aspect of the enforcement of this law was the lack of the disclosure of the Securitate officers and recruiters. In fact, the CNSAS focused mostly on the disclosure of the former Securitate informers and it pronounced only very few verdicts regarding the high rank leaders of the repressive apparatus (Ursachi, 2005: 74).

The lustration laws. Since 1990, various political and civil actors have been supporting the adoption of a lustration law, but this initiative remained a project. However, a lustration project initiated by the PNL in 2005 was voted by the Senate, waiting to be debated in the Chamber of Deputies, where it is blocked since June 2006 (Burcea, Bumbes, 2006: 257).

Truth Commissions and Institutes. In 2006, an *Institute for the Investigation of Communist Crimes in Romania* was set up, under the coordination of the Prime Minister. Its main mission is to identify political crimes and abuses committed during communism and lodge penal complains against the perpetrators. So far, the Institute accused,

through penal complains, more then two hundred persons of crimes against humanity[3], but no indictment was yet set up by the prosecutors.

In 2006, a *Presidential Commission for the Analysis of the Communist Dictatorship* was created, under the coordination of the President of Romania. Following the conclusions of the Commission's Report, the President condemned the communist regime in the Romanian Parliament and declared it criminal and illegitimate. This condemnation, although having a strong symbolic meaning, had no consequences in the legislative field and no visible measures were actually taken.

For conclusion, we may stress that Romania is a country where various transitional justice measures were enforced, but their results are still strongly criticized for their partial failure or for their pure symbolic value.

3. The role of the anticommunist political and civil actors in the Romanian transitional justice process

In Romania, the main element accused as responsible for the partial failure of transitional justice policies was the political continuity of the former communist elites after the 1989 revolution. The civil bodies, who assumed a radical anticommunist identity, as well as the traditional political parties reconstituted in 1990, systematically denounced the converted nomenclature as the main factor which undermined the decommunization process. In fact, without being dominated by former high-ranking communist officials, the Romanian post-communist political institutions regrouped an important number of nomenclature's members. Between 1990 and 2000, around 15% of the Romanian post-communist parliamentarians and 30% of the ministers proceeded from the communist elites. In the same, Ion Iliescu was elected three times president of the Republic and three presidents of the Parliament chambers were members of the nomenclature (Grosescu, 2007: 224,

3 URL = http://www.iiccr.ro/ro/sesizari_penale, August, 31

249). The reticent attitude of these elites regarding the lustration or the disclosure of the former Securitate protracted the adoption of transitional justice policies and enclosed their enforcement.

However, the political activity of their opponents – historical political parties and civil bodies who assumed a radical anticommunist identity in 1990 – can also be included among the factors that generated this particular situation. In Romania, these actors may be divided in three categories: 1. the traditional political parties: The National Liberal Party (PNL) and the Christian Democratic Party (PNTCD). 2. The associations of former political prisoners and victims of the Revolution. 3. Civic bodies, such as the Group for Social Dialogue, the Timisoara Society or the Civic Academy. Since January 1990, all these groups were very active and they militated for what was generically called the "communism's trial", as well for the exclusion of communist leaders from political and administrative positions. But their activity raised several problems which have to be added on the list of the factors that led to the partial failure of the Romanian transitional justice.

First of all, the persons who militated for the condemnation of communism have been systematically trying to hide the culpabilities and the ambiguities regarding their own positions and their own adhesion to the former system. In this context, their militant actions sprang from **dishonest grounds**. The historical parties assumed a radical anticommunist political legitimacy, even if many of their founding members were collaborators of the Securitate. For example, four PNL founding members (Dan Amedeo Lazarescu, Constantin Balceanu Stolnici, Alexandru Paleologu, Mircea Ionescu Quintus), who had activated before 1945, and who had been political prisoners in the early fifties, became informers of the Securitate later on. Among them, only one confessed his collaboration right in 1990. For all the others, the collaboration was proved ten years later, the last file being published in 2007. Similar cases are known within the PNTCD, although not with regard to the founding members[4]. The presence of the former

4 For example, in 2000, the PNTCD Deputy Solomon Luminosu was exposed as a former Securitate collaborator.

Securitate collaborators within the declared anticommunist political parties had a negative effect over the adoption of the CNSAS law. The radical project initially proposed by a Christian Democratic senator was rejected by no others than his party colleagues. At the same time, the last lustration law project, debated in Parliament last year, had been promoted by the liberal deputy Mona Musca - also member of the Timisoara Society. Her file of former Securitate collaborator was made public at the end of 2006 and the CNSAS verdict pronounced in 2007 (http://www.cnsas.ro/main.htlm, August 31, 2007).

The Group for Social Dialogue, the main civic body that assumed the fight against communism in 1990, among its founders had a former member of the Central Committee (Octavian Paler) and at least one Securitate collaborator (Sorin Antohi). If the activity of the first one was well-known, the activity of the second one became public only in 2006. The same thing happened with numerous members from the leadership of the Former Political Prisoners' Association. The President of Romania, Traian Basescu, who condemned communism at the end of 2006, had been member of the former economic nomenclature and he was also publicly accused of collaboration with the former Securitate. His file, although systematically demanded by the public opinion, has not been published yet.

Thus, an important part of political and civic actors who strongly claimed the condemnation of communism, did not assume their own collaboration with the former regime. Although they asked for the "moral cleaning" of the Romanian society, they avoid to publicly confess the "guilt" they were officially reproving. Their disclosure as collaborators of the communist regime compromised to a considerable extent the idea of decommunization.

Secondly, **the conflicts of interests** within these anticommunist groups hindered the coalition of its members and the achievement of common projects. Thus, the past became a legitimating instrument for different political parties and civic organisms which were competing against each other. For example, the setting up of the *Institute for the Investigation of Communist Crimes in Romania* was a PNL project.

When political conflicts appeared between the liberal Prime-Minister (Calin Popescu Tariceanu) and the democrat President of the Republic (Traian Basescu) the IICCR project was immediately followed by the setting up of the *Presidential Commission for the Analysis of the Communist Dictatorship*. The collaboration between the two institutions was difficult at the beginning, considering the conflicts between the National Liberal Party and the Democratic Party.

In the same time, in the middle 90's, political splinters occurred inside the former political prisoners' association, leading to the constitution of two different organizations: the Association of the Former Political Prisoners and the Federation of the Associations of Former Political Prisoners and Anticommunist Fighters. The ideological conflicts between the political prisoners proceeding from the former extreme-right and those proceeding from the historical democratic parties made their collaboration became almost impossible after 1996. The same thing happened with the associations of the victims of the revolution. Starting with 1990, they divided on political grounds and started to associate with various political parties. The 21 December Association strongly supported the anticommunist movements initiated by the PNL and the PNTCD, while the 22 December Club sustained president Iliescu and his political group (Maries, 2007).

As for the lustration law, a project proposed by the National Initiative Party (PIN) was rejected in 2006 by the Parliamentarian commissions, due to the lack of political support. A very similar project - proposed by the Timisoara Society - was instead assumed in the Parliament by the National Liberal Party.

Thus, transitional justice in Romania was used for various legitimating purposes. The past became a field where various actors competed for supremacy. Personal and group interests surpassed public interests.

Another problem raised by the activity of the anticommunist groups was their level of competence in transitional justice matters. Even if they systematically militated for pursuing communist crimes and abuses, they preferred to activate in the press or in public debates,

without being involved in precise activities such as the lodging of penal complaints. At the beginning of the 1990s, the mistrust in the state institutions, but also the fear to reduce the trial of communism to several disconnected cases, generated a globalizing discourse concerning a trial of the "communist system". Victims' organizations referred, in their only four penal complains, to the "communist genocide", but this accusation wasn't accepted by the justice, as political groups are not protected by the 1950 Genocide Convention. Still, today, people involved in lodging penal complains are not familiar with the code of penal procedure and they do not work systematically with legal advisors (Siserman, 2007). Out of 10 persons interviewed, none is acquainted with the definition of genocide or the definition of the crimes against humanity, such as stipulated in the Romanian penal code or in the international treaties signed by Romania.

In the same time, no analysis of the international legislation regarding crimes against humanity was made by the prosecutors or by the researchers (Siserman, 2007). Other Central-European models are barely known in Romania, as no book concerning transitional justice has been ever written or translated in Romanian. At the same time, the two condemnations regarding political crimes committed during communism entered under the incidence of an amnesty adopted by Nicolae Ceausescu in 1988. This amnesty cancelled any condemnation for a crime punished with less than 10 years of prison and it reduced to half any sanctions surpassing 10 years. Thus, certain convicts were released and others saw their sentence reduced to half. No legislative proposal and no public debate mentioned the necessity to abrogate this amnesty. On the other hand, numerous political prisoners refuse to lodge penal complaint against their former torturers, because their favourite target is the converted communist leaders (Dan Rusieski, 2007).

Another example for the lack of experience of the anticommunists is the way in which the definition of the nomenclature was conceived in the lustration law project. As one of the initiators stated, the definition was conceived without precise documentation, without consult-

ing the organizational scheme of the communist party or the communist state (Mihalcea, 2007). For example, although they played an important role in the communist state, the members of the communist Parliament were not included in the list (Burcea & Bumbes, 2007: 258). In the same time, the politicians who supported the law in Parliament were not acquainted with the judicial problems that such a law could raise. The sanctions of the European Court of Justice against the states which adopted such a law were not known by the respondents of our enquiry.

4. Conclusions

Romania is a country in which transitional justice was achieved through various procedures: criminal justice, screening laws and an official condemnation of the former regime. Although the symbolic value of these measures is very important, the results of their enforcement are rather deficient. This partial failure of transitional justice policies is often explained in Romania as the effect of the communist elites' conversion after 1989. Besides this factor that hindered the decommunization process, as a complementary explanation we offer the lack of decisive actions of the civic and political actors who assumed an anticommunist identity after 1989. The dishonest grounds of the radical anticommunism, the use of the past for political purposes, as well as a certain incompetence of those who assumed the decommunization battle, are equally important factors for explaining the partial failure of the Romanian transitional justice policies.

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Sifting Through the Past: Lustration in Reunified Germany

A central claim of transitional justice scholarship is that successful democratic transitions hinge, in part, on confronting the abuses committed by previous regimes and depriving former leaders of immunity from prosecution (Bornemann, 1997; Cohen, 1995; Hayner, 2001; Herz, 1982; Huyse, 1995; Linz, 1978; McAdams, 1997, 2001; Nino, 1996). In the context of German unification, East Germany's transition to democracy entailed a series of determined, diligent and protracted efforts to reckon with the communist past. These included lustration, the prosecution of former East German leaders and their subordinates, and two parliamentary commissions of inquiry. A recurring narrative in all of these efforts revolved around the much reviled East German Ministry for State Security (*Ministerium für Staatssicherheit)* (MfS or "Stasi") and the thorny issue of individual collaboration. Indeed, an important component of many transitional justice efforts is to uncover and expose collaborators associated with repressive regimes. But, as McAdams notes, if one factored in the estimated 2,3 million members of the East German communist party, the SED (Socialist Unity Party), the personnel of the state bureaucracy, armed forces and police, plus so-called IMs or "unofficial collaborators" employed by the MfS, the number of conspirators could amount to one-third of the East German population (McAdams, 2001: 44). Hence, from the early days of East Germany's transition to democracy there were grave concerns about individuals who may have colluded with the Stasi and/or were

employed by the East German state. Uncertainties about their trustworthiness and whether they should be permitted to work as public servants fueled demands for lustration in the ex-communist eastern part of Germany.

This paper presents a brief overview of lustration in post-unified Germany, paying particular attention to the legal frameworks governing lustration and the critical role that the new federal states in the East played in framing lustration policies. I argue that the decisions that were made regarding lustration immediately following unification led to a highly decentralized approach that was difficult to reverse. This generated a variety of inconsistencies between the states in the East and across professions.

Legal provisions for lustration – an overview

Lustration was used for two key purposes, namely, to dismiss individuals from the civil service who collaborated with the MfS and/or were "too close" (*Staatsnah)* to the East German state, and to render new applicants with similar biographies ineligible for employment in the public sector. Several legal provisions regulated lustration procedures: the Unification Treaty, the Stasi Records Law (StUG), the civil service codes and constitutions of the new states in the East, and the Federal Civil Service Code. Here I focus on the two most important ones, namely the Unification Treaty and the StUG. On October 3, 1990, East and West Germany united. The German Democratic Republic ceased to exist and the West inherited 4,000 East German socialist structures including, but not limited to, the East German railway, schools, law enforcement units, the postal service and the military. Political elites had to quickly decide what structures were worth retaining based on need and employees' technical skills (Derlien, 1991; König, 1992). Redundant structures were slated for so-called "winding down" (*Abwicklung*), an episodic feature of unification that often incited public anger due to the considerable social and economic

dislocations it caused. But arguably the more sensitive issue confronting policy makers concerned the past activities of individuals in order to assess their future suitability for the civil service. What individual behavior from the past was "unreasonable" or "inappropriate" enough to make one ineligible for public service in the present? In order to generate trust and legitimacy in public institutions, policy makers had to devise a strategy to carefully screen individuals for past ties to the MfS, or to the East German state more generally. In the run up to unification, the West's major negotiating partner with the East, Interior Minister Wolfgang Schäuble, argued that it was neither realistic nor proper that former representatives of the East German state be automatically excluded from participating in public life, including the civil service. He emphasized that lustration should focus on the serious cases and, even then, to act in a more charitable rather than self-righteous manner (Schäuble, 1991: 268). Apart from his opinions, the effects of full-scale dismissals could not be assessed accurately. In the wake of the Treaty negotiations it was estimated that roughly 2,125,000 East Germans, or 12% of the former GDR population, would be affected (Weiss, 1991: 6). Of those, it was speculated that one million would have to find new jobs.[1]

But Schäuble's benevolent views provided little succour to former East German dissidents, many of whom suffered from the machinations of the MfS and endured unrelenting harassment because they refused to join the SED. For them, exposing former Stasi collaborators and other representatives of the regime was incontrovertible, indeed essential for the foundation of democracy and the rule of law. Individuals who conspired were judged early on therefore, at least in the court of public opinion, as unfit and untrustworthy, if not criminally liable, and thus unsuitable to work as civil servants in reunified Germany.

Despite the difference of opinion between rather cautious, yet highly influential individuals from the West, such as Schäuble, and the former dissidents who by and large insisted on a rigorous reckoning with East Germany's past, there was general agreement on both sides

1 "Nicht mehr marktgerecht," Der Spiegel, 34/1990, 21.

that lustration was necessary. Thus, the Unification Treaty had to accommodate the more reticent preferences of officials in the West, who were focused primarily on technical competence and getting things "up and running" as quickly as possible, and the demands of Easterners, particularly former dissidents, which centered more on moral and ethical qualifications. The results were special provisions in the Unification Treaty with regard to lustration. Namely, upon unification employees of the East German civil service were not automatically terminated from employment. First, their pasts would have to be examined. If problematic behavior from the past surfaced that raised questions about one's "suitability" (*persönlicher Eignung*), termination could take one of two forms: ordinary (*ordentliche*) or extraordinary (*ausserordentliche*).

What might warrant dismissal on ordinary grounds? The answer is not so simple, as this involves a much more detailed legal analysis (see: Loschelder, 1995; Stapelfeld, 1995). In general, however, ordinary dismissal applied when an individual had unsuitable or insufficient qualifications. But these criteria tended to cast a very wide net due to their lack of specificity. Ordinary dismissal *might* also be appropriate if the individual in question worked for the MfS (Catenhusen, 1999: 173). MfS activity could *prima facie* indicate a deficiency in terms of "personal suitability" thus calling into question one's loyalty to the Constitution (see: Kathke 1992). Indeed, Article 33 (2) of Germany's Basic Law demands loyalty to the Constitution as a prerequisite for all would-be civil servants. Moreover, the Federal Civil Service Code requires that individuals admitted to the civil service promise to uphold the free, democratic constitutional order. If they cannot do so, they are not suitable.

It is worth noting that Germany has a rather tortuous history when it comes to the issue of constitutional loyalty and civil servants. In the wake of left-wing political agitation in the West in the 1970s, the issue of loyalty became particularly acute when the so-called "Radicals Decree" was enacted in 1972. The decree supplemented the Federal Civil Service Code, requiring authorities at the federal and state level to

strictly enforce the loyalty requirement. It engendered a wave of vetting at the federal and local levels resulting in the dismissal of many civil servants due to membership in political parties and organizations deemed dangerous to the political order (Braunthal, 1990). Germany's Constitutional Court upheld the validity of the decree in 1975, but this did not prevent the International Labor Organization (ILO) from voicing serious concerns about this practice in the late 1980s (Human Rights Watch World Report, Germany, 1993). In subsequent years, the politically liberal, SPD (Social Democratic Party) dominant states essentially disavowed the Decree, but to this day loyalty remains a key requirement of employment in the German civil service (Kathke, 1992: 345).

Other factors for ordinary dismissal were weighed as well. As a general rule, former collaboration *suggested* that the person was unsuitable, but the extent of collaboration had to be determined (Catenhusen, 1999:174). Lying about one's past, perhaps in a lustration questionnaire or hearing, provided further grounds for ordinary dismissal, as lying could be interpreted as "willful deceit" (*arglistige Täuschung*). Such a breach of trust suggested a lack of suitability. Finally, and in fact more common than cases involving former MfS collaborators or misrepresenting one's past, ordinary dismissal was permitted if the prospective employee lacked the skills necessary for the demands of the job. Thus, dismissals resulting from redundancy and the "winding down" of structures in the East were covered under this provision as well. In practical terms, it was easier to apply for a new job with the notation of "ordinary dismissal" on one's employment record than the "extraordinary" variety. But the ordinary dismissal option was a temporary rule and expired on December 31, 1993. After this date any cases warranting employment termination, including those analogous to the "ordinary" type had to be legally justified via another route (Catenhusen, 1999: 181-188). In the majority of cases, individuals with past ties to the MfS were judged as lacking the moral and political integrity required for the civil service and faced extraordinary dismissal (Loschelder, 1995: 197).

Perhaps more important were the extraordinary dismissal provisions in the Treaty. These drew on international legal instruments, specifically the 1966 International Covenant on Civil and Political Liberties and the 1948 Universal Declaration of Human Rights. The former covers the guarantee of physical and psychological integrity of individuals, freedom to travel, right to assembly, right to association, religion and opinion. The latter articulates, *inter alia*, rights of equality based on religion, race, color, sex, opinion, treatment before the law, freedom of movement and prohibitions on arbitrary arrest. Applicants could not make the exculpatory claim to have acted on orders or rules to justify a violation of any of the aforementioned rights.

Finally, extraordinary dismissal could apply to individuals who were "active" for the MfS, either in an official capacity, as an "HM," or in an unofficial capacity, as a so-called "IM," but the Treaty makes no mention or distinction concerning length of service for the MfS, intensity of collaboration, or type of activity performed on behalf of the MfS. Consequently, vetting authorities were required by law to consider each applicant in a case-by-case basis (*Einzelfallprüfung*). As a result of numerous court cases, a jurisprudent test evolved: would the retention of an individual *appear* (*Erschein*) unreasonable? Simply put, how it would appear *to the public* if a *public authority* retained someone with a tainted past? In June 1992 the federal labor court provided a rudimentary guideline for decision making: the higher the position in the MfS or the greater the degree of entanglement (*Verstrickung*), the greater the improbability that the individual is suitable for the civil service (BAG, June 11, 1992, 8 AzR 537/91). If in the course of working for the MfS an individual violated the principles of humanity, then extraordinary dismissal was *de rigueur*.

It is important to note that over the years, particularly over a seven year period between 1990-1997, various labor and administrative courts clarified the concept of "suitability," with the effect of delimiting the grounds for termination (McAdams, 2000: 77-83; Quint, 1997: 174-175). Stasi activity had to be deliberate and significant enough to render a civil service applicant unsuitable. In sum, the evidentiary bar

was elevated; requiring would be employers to carefully weigh evidence before disqualifying individuals (BAG 23.9.1993; Lansnicker and Schwirtzek, 1993: 106). For example, in 1995 a labor court ruled that a signed declaration of willingness to work for the MfS did not provide ample ground for extraordinary termination, rather concrete evidence of activity was necessary to prove an actual connection or collaboration with the MfS (BAG 14.12.1995-8 AZR 356/94). Furthermore, the courts eventually ruled that the kind of job one was applying for mattered in the course of evaluating an applicant's past (McAdams, 2001: 81-83). Some positions required higher levels of trust than others and this had to be weighed as part of the overall evaluation of an individual's suitability.

Whereas the Treaty provided an overarching legal framework for vetting, the StUG provided a means of accessing the infamous Stasi files for lustration. The stipulations in the StUG's §20, coupled with the aforementioned provisions in the Unification Treaty sanctioned use of the information contained in the Stasi files to establish collaboration with the MfS. Individuals subject to its provisions included, among others, persons in the federal or state government, public law officials, representatives and members of municipal representative bodies, persons seeking employment in federal or state service, notaries, attorneys, managing directors and members of managing boards. An exception is allowed for persons who were under 18 at the time they began working for the MfS. Any information supplied to lustration officials could not contain information concerning subjects or third parties by public and private bodies. It is worth noting that, like the Unification Treaty, the term "collaboration" is never defined in the StUG. Various other terms are used synonymously, such as "activity" (*Tätigkeit*) or "become active" (*Tätigwerden*), making the case-by-case approach that much more critical. One of the challenges lustration officials faced, therefore, was to establish a list of criteria that would delineate behaviors constituting "activity."

In the context of post-unified Germany the use of the Stasi files for the purposes of lustration generated various degrees of criticism.

Much of it focused on the role that the federal authority overseeing the Stasi files, the BStU, played in providing interpretations of the contents of the files and determining whether or not an individual collaborated with the MfS. Appeals had to be filed in court. And while some of its evaluations were challenged in court, public officials at the local, state and federal levels generally respect the agency and heed its reports. As Quint (1997: 239) notes, "…as a practical matter, the agency has taken on the role of a final tribunal instead of a fallible government agency".

The StUG and Treaty were but two, albeit important components in an intricate, and at times, impenetrable bureaucratic labyrinth governing lustration in post-unified Germany. Above and beyond these legal guidelines, lustration *policies* and *procedures* to dismiss former Stasi collaborators from the civil service, and to a lesser extent, high ranking SED members and other state functionaries, evolved slowly over the course of 1990 and were further concretized after unification on October 3, 1990. Like many other policies and procedures that are implemented in the context of transition to deal with the abuses of the past, they did not necessarily "reflect deliberate choices among alternatives" (Elster, 2004: 116). Indeed, in the immediate months after unification decision-makers had to essentially muddle through and adjust their approaches to lustration. But by decentralizing the decision-making processes, per the requirements of Germany's federalist structure and constitution, administrative matters, such as the hiring and firing of former East German personnel, rested in the hands of the states. Thus, the particular social and political contexts of lustration policies and politics assumed great importance, leading to a host of anomalies and idiosyncrasies.

What is more, the federal government assumed a rather surprisingly low profile on the matter. Apart from several circulars in late 1990, including one issued by the Federal Ministry of the Interior on September 10, 1990, to all *federal* offices stating that there was considerable doubt about the "constitutional loyalty" of those who had worked for the MfS and/or who occupied an official position in East

Germany, the issue was effectively left to the new states to settle on their own.[2] The federal government's low profile in the early phases of reunited Germany's transitional justice efforts, and the absence of sustained, subsequent efforts to introduce greater uniformity into lustration policies across the states in the East, meant that the basic contours of lustration were set by the end of 1990. To be sure, the Treaty and the StUG provided a broad, legal framework for lustration anchored at the federal level. But apart from these provisions, the hands off approach taken by the federal government in late 1990 constituted what scholars of path dependence call a "critical juncture" and shaped the course of lustration in post-unified Germany (Collier and Collier, 1991). Decisions that were made early on in the reunification process, in this case delegating lustration matters to the states, profoundly impacted the sequence of events that followed. Thus, to better understand lustration in the context of reunified Germany, one must examine the policies articulated at the state level, in the form of intermittent instructions and guidelines, typically by mid to lower level bureaucrats buried away in a variety of ministries who rarely coordinated their efforts or consulted one another on these matters. Many of the instructions and guidelines to manage the lustration process were prepared in the immediate days after unification, during a period of acute anxiety about Stasi agents and others who represented the old regime, and then reworked over time. Actors at the state and ministry level operated within a highly fluid context of sensitive political decision-making. More important, lustration was highly decentralized with astonishingly inconsistent regulations *between* states, *within* states, and *across* professions (Maijer, 1992; Weichert, 1992; Crossley-Frolick, 2007). So what explains these sharp contrasts?

First, to assist the new states in the East as they tackled a multitude of tasks related to the establishment of new and the reform of old administrative structures, the Federal Ministry of the Interior set up a pipeline of sorts, by way of partnering arrangements, to export West German civil servants to the East (Glaeßner, 1996; König, 1992; 1993;

2 Schnellbrief, Bundesminister des Innern, September 10, 1990, D III 1-220 000/43.

Meyer-Hesemann, 1991; Scharnhoop, 1992). “Loaner” civil servants from the West, as they were called, played critical roles in assessing needs for personnel, including training and recruitment, *and* lustration.

The partnerships were arranged as follows:

Receiving State: East	**Sending State: West**
Brandenburg	North Rhine-Westphalia, Saarland
Mecklenburg-Pommerania	Schleswig-Holstein, Hamburg, Bremen
Saxony-Anhalt	Niedersachsen
Thuringia	Bavaria, Hesse, Rheinland-Pfalz
Saxony	Bavaria, Baden-Württemberg
Berlin (East)	Berlin (West)

Source: BT/Drs. 12/916, 11: July 10, 1991.

The partnerships were often distinguished by political compatibility (Crossley-Frolick, 2007: 144). In several instances there was more than one partner. Even so, at least one of the partners in “the marriage“ shared the political leanings of the host state. An exception to this pattern was the partnership between Niedersachsen and Saxony-Anhalt. From 1990-1994 Saxony-Anhalt was governed by a coalition comprised of the right-of-centre CDU and the centrist FDP. The Ministry of the Interior, a critical ministry in all lustration procedures, was headed by Western imports during this period who were all CDU members. By contrast, Niedersachen was governed by the liberal SPD. By the time the CDU-FDP coalition left power in Saxony-Anhalt, to be replaced by an SPD led government, the bulk of lustration was complete. With the change in government the so-called automatic inquiry rule was relaxed so that lustration would only cover individuals born before 1971.

The states in the West assumed the brunt of the financial burden resulting from these partnerships, ranging from rather simple assistance, such as furniture and office supplies, to more expensive items

such as expertise, salaries, travel money, relocation expenses and financial bonuses for the personnel going East. Plus, they had to recruit enough individuals who were willing to relocate or commute to the East on a regular basis. Given the difficulty in finding people willing go to the East, not to mention a shortage of well qualified personnel in the West willing to undertake the unique challenges of rebuilding in the East, the state governments in the East had to take what they could get. It is worth mentioning as well that the intense time pressures that accompanied unification effectively foreclosed the opportunity to train individuals for the delicate job of lustration, or even contemplate such an endeavor in the first place. Once they arrived in the East, loaner civil servants typically occupied key positions in state governments and often assisted in drafting lustration guidelines, often with little understanding of East Germany or the Stasi. And the more sensitive or higher the position, the more likely it was that a Westerner held the job (Derlien, 1998: 13). Indeed, the transfer of West civil servants to the East focused predominantly on the higher ranks of the civil service, with the ministries of justice, interior, finance and economic absorbing the majority of them due to the high premium on political *and* technical qualifications (König, 1993: 391).

Second, as noted above, political kinship in the partnerships between East and West appear to have influenced lustration policies. A general pattern emerged, with some states acting in a more thorough manner to implement lustration as a means to cleanse the civil service than others. Based on queries to the BStU through the first quarter of 1997, the new states in the East can be placed on a spectrum. Thuringia and Saxony were the most rigorous. Brandenburg lagged far behind them, but Mecklenburg-Pommerania was the least scrupulous, trailing all of the new states in the East (BStU Tätigkeitsbericht, 1997: 11). The city of Berlin and Saxony-Anhalt fell between these two extremes. In Berlin lustration depended heavily on the dynamic of decision-making at the district level. In general, PDS leaning districts, such as Marzahn, acted far more leniently. Analysed further by professional groups one finds more discrepancies. Teachers in the former

eastern part of Berlin, the epicenter of SED rule, generally faced *lesser* scrutiny than teachers in Saxony or Brandenburg. But when it came to police, individuals in Saxony and Brandenburg had a better chance of keeping their jobs than their compatriots in Berlin. Saxony-Anhalt was more rigorous during the period of CDU/FDP rule, but as noted above, relaxed its rules after elections in 1994 led to an SPD victory, bringing its practices more in line with the other SPD governed states in the East. Indeed, by early 1995, following a lead set by the SPD-led government in Brandenburg, all of the SPD governed states in the East began reexamining their lustration policies with a new emphasis on leniency (Fehrle, 1995: 5).

The states that were more rigorous in implementing lustration policies, such as Thuringia and Saxony, have been governed by the CDU since unification. They were, not surprisingly, paired with CDU leaning or dominated states in the West, such as Bavaria and Baden-Württemberg. By contrast, the more liberal, SPD leaning states in the East, most notably Brandenburg and Mecklenburg-Pommerania, were paired with SPD leaning or SPD governed states in the West, e.g. Hamburg, Saarland, Northrhine-Westphalia, and they tended to be less preoccupied when it came to lustration. This broad pattern coincided with the most intense years of lustration, as measured by queries to the BStU and numbers of individuals dismissed from 1990-1997. During that period there were 1,505,583 queries to the BStU, accounting for 86 percent of the 1,75 million queries registered as of April 2007. In terms of dismissals, an analysis by McAdams rejects an earlier estimate of more than 500,000 individuals dismissed for prior Stasi collaboration (Rosenberg, 1995: 326). He contends that by February 1997, 42,046 were dismissed out of a total of 1,420,000 persons vetted (McAdams, 2001: 73). That is, of the 6.3 percent revealed to have Stasi ties, it is estimated that a mere 3 percent were removed from their jobs[3]. If one includes investigations outside the civil service (e.g.

3 In March 1991, the Government reported that 1883 individuals had been dismissed from their jobs according to the special dismissal rules provided by the Unification Treaty. Of those, 65 were removed from their posts for violations of the principles of humanity, 1818 due to cooperation with the MfS. 233 had filed court cases contesting the dismissals. BT-Drs. 12/304.

private sector) the total number dismissed was no more than 54,926 (McAdams, 2001: 73). Taken as a whole, therefore, a "positive" report from the BStU revealing past cooperation with the Stasi did *not,* by and large, translate into automatic termination. But the picture is incomplete, because the BStU does not collect any data on dismissals related to "political" factors, such as close ties to the SED.

While there were distinct and difficult to ignore differences *across* professional groups *within* states, indicating slight deviations from the overall pattern (e.g. former East German teachers with ties to the MfS were more likely to face termination in Saxony and Brandenburg than in Berlin), the general trend held. To reiterate an aforementioned point, the federal government was passive and made no significant effort to regulate or introduce uniform criteria for lustration. Once reunited Germany embarked down the path that it did vis-à-vis lustration, it was very difficult to change course without incurring serious costs, particularly in a legal sense. The Constitution is clear in that states have the responsibility for administrative matters. Challenging that principle would have meant running in to considerable legal barriers. Thus, as Pierson notes, from a path dependence perspective, once initial steps are taken in a particular direction "the costs of exit—of switching to some previously plausible alternative—rise" (Pierson, 2000: 232). However, it is very important to emphasize that there were also no concerted efforts, by any federal authority, including the BStU, to encourage the states *on their own* to harmonize their lustration policies which might have ameliorated some of these rather large and perhaps troubling discrepancies. There were attempts by the *state* commissioners for the Stasi files to synchronize lustration criteria, but they were largely unsuccessful, in part because not all of the states elected to have a state commissioner. Brandenburg stands out in this regard. It has never had a state commissioner, making it difficult for intra-state coordination. Saxony-Anhalt's state commissioner for the Stasi files managed to devise a set of guidelines for lustration officials, but these were published in 1995[4] after the bulk of lustration

4 Handreichung für die personalführende Stellen des Öffentlichen Dienstes in Sachsen-Anhalt

cases were completed. There is no evidence that the guidelines were followed elsewhere. If geography typically trumped all other factors, then what does this say about the lustration efforts overall?

First, despite the enormous advantages Germany had to implement lustration (e.g. funding, qualified personnel to replace disqualified candidates, historical experience from the post-Nazi period), the policies, particularly early on, were muddled, uncoordinated and inconsistent. Lustration officials at the state and ministry level operated within a highly fluid context of sensitive political decision-making on an issue with profound moral, ethical and legal dimensions. Second, lustration officials had little guidance or support from the federal government. Rather, they had to take advantage of East-West partnerships concluded between states, often with strong political overtones, to reform the civil service. To be sure, this was a benefit that many other states in Central and Eastern Europe did not enjoy as they underwent the transition to democracy. But it was no guarantee that lustration would be conducted without mistakes and maladroit procedures. Third, the varied approaches to lustration in the East did not lead to an all out "witch hunt" as critics have claimed. The statistics simply tell a different story. The number of disqualified individuals has been far less than what "worst case" scenarios predicted. At the same time, a less rigorous approach, as evidenced by the case of Brandenburg, does not suggest that it is less democratic than the other states in the East or that the Stasi-network has reconstituted itself. Therefore, when examining the choices that successor elites make in terms of transitional justice, it is important to direct our attention to micro-level actors and the subtle nuances in policies and decision-making.

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zur Überprüfung von Beschäftigen und Bewerben auf eine Tätigkeit für das MfS. See Sachsen-Anhalt, LT-Drs. 2/858, 25. April 1995. 1. Tätigkeitsbericht des Landesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR.

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II.

Case Studies

Jakob Finci

Lustration and Vetting Process in Bosnia and Herzegovina

In recent years, BiH has been the site of some of the most comprehensive vetting efforts in recent decades. Two experiences stand out: the removal of abusive police officers, and the hiring or re-appointment of judges and prosecutors. In the former case, the UNMIBH vetted approximately 24,000 police officers between 1999 and 2002. In the latter case, three High Judicial and Prosecutorial Councils screened the appointments of approximately 1,000 judges and prosecutors between 2002 and 2004.

Of the two vetting experiences, the vetting of police proved to be the most challenging. Police officers were deployed as soldiers during the 1990s wars, often serving at the front lines of ethnic cleansing alongside military and paramilitary battalions. A thorough purging of the country's police forces was, therefore, necessary in the post-Dayton era. Helpfully, the Dayton Accords provided that civilian law enforcement agencies would have to operate "in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms."[1] It also required the parties to the Agreement to ensure the "prosecution, dismissal or transfer" of police officers and other civil servants responsible for serious violations of minority rights.[2]

By the end of the war, there were tens of thousands of police offic-

1 Annex 4, Constitution of Bosnia and Herzegovina (Art. III Para. 2(c)) and Annex 11, Agreement on the International Police Task Force (Art. I Para. 1).

2 Annex 7 Art. I Para. 3(e).

ers in the Federation and the RS – far more than at the beginning of the wars and far more than are needed in a democratic state the size of BiH. In the early post-Dayton years, police officers continued to operate with relative impunity in ethnically homogeneous forces that served nationalist agendas. Although there were some early efforts by the UNMIBH to vet police in the Federation, the results were disappointing and were ended by 1998. In the RS during the same period (i.e., 1995-1998) there was essentially no vetting at all due to resistance by RS authorities.

Subsequent vetting efforts were far more successful. The UNMIBH Human Rights Office established a fifty-person Local Police Registry Section, made up of international police officers, local lawyers and administrators, and two UN professional staff, all of whom were supported by the Human Rights Office and by two ICTY liaison officers. The vetting process itself consisted of three steps: mandatory registration (which involved completion of a detailed registration form), prescreening (which, in most cases, resulted in provisional authorization to continue law enforcement work) and certification (which involved more extensive background checks, performance monitoring and a final determination on whether there were "grounds for suspicion" of wartime violations). Anyone decertified was barred from serving in law enforcement anywhere in BiH. Decertification decisions were subject to an internal appeal only and no oral hearing was provided. In the end, approximately two thirds of those vetted were granted provisional authorization to exercise police powers. Of those provisionally authorized, over 90% were granted full certification.[3]

Though generally regarded as successful – the police forces are now smaller and more diverse, and attacks on minority returnees are less common – public perceptions of the process appear to be mixed. The process has been criticized as too slow and too closed. Within the police service itself, opinion is less charitable. Many, but particularly those decertified, question the fairness of the procedures, and as

3 *Report of the Secretary-General*, U.N.S.C., U.N. Doc. S/2002/1314, Para. 11 (December 2, 2002).

many as 150 former police officers challenged their decertification in domestic courts after the departure of the UNMIBH.[4] Regrettably, the vague and non-legislated criteria employed by the UNMIBH, and the fact the vetting files were sent away for storage at UN headquarters in New York City, have complicated the resolution of these cases. In his March 2004 briefing to the Security Council, High Representative Lord Paddy Ashdown, discussing the legal challenges to certification, stressed that there was a danger that the UNMIBH's vetting efforts could unravel and endanger the rule of law. It is, however, rather late to sound such an alarm. The vetting procedure needed greater scrutiny during its operation.

The other major vetting process in BiH concerned the appointment of judges and prosecutors. In the early post-Dayton years, the state of the judiciary was especially weak, given the absence of an independent judiciary during the prior communist era, the ensuing years of war, and the continuous influence of organized crime and nationalist leaders. In May 2000, the High Representative promulgated laws on judicial and prosecutorial services to improve the independence of both.[5] These laws established commissions comprising Bosnian judges and prosecutors who assessed the performance of their peers over a period of eighteen months. But the process was never adequately resourced and ended in failure. The vast majority of complaints were dismissed as unsubstantiated.

In late 2001, the Independent Judicial Commission, the lead agency on judicial reform, developed a new strategy for reform. It aimed to reduce the number of judges and make the judicial and prosecutorial services more ethnically diverse through a formal re-application and appointment process. Three High Judicial and Prosecutorial Councils – one for each of the BiH, the Federation and the RS – were created by the High Representative in 2002. The Councils are permanent bodies

4 OHR, Speech by the High Representative for BiH Paddy Ashdown at the United Nations Security Council (March 3, 2004), available online at http://www.ohr.int. The European Union Police Mission replaced the UNMIBH in 2003.

5 The laws are available online at http://www.ohr.int.

comprising, for the most part, elected and appointed members from the legal and judicial professions. The High Representative also appointed international members to serve during a transitional period. The Councils have jurisdiction to appoint, transfer, train, remove and discipline judges and prosecutors.

Under the re-application and appointment process, judges and prosecutors were required to submit detailed application and disclosure forms which, among other things, included questions about wartime activities. A considerable amount of complaints was also received from the public. Once a file was considered complete, a Council nomination panel would review the application, interview the applicant and make a recommendation. Unsuccessful applicants could file requests for reconsideration.

Because the re-appointment process concluded only a few months ago, it is too early to assess its overall impact. Some initial concerns may, however, be noted. The most significant concern is that the goal of restoring the multi-ethnic character of the judicial and prosecutorial services appears not to have been fully achieved, particularly in the RS where there was an insufficient pool of minority candidates. Another concern has to do with the limited nature of the investigations conducted into applicant's alleged or suspected wartime activities. This leaves some doubt about the sufficiency of the purge. Lastly, the exceptionally high cost and staff size demanded by the procedure encouraged public criticism.

On the positive side, however, the procedure has the virtue of permanence. With the completion of the re-appointment process, the Councils will continue to operate as the standing appointment and discipline bodies for judges and prosecutors, and will be run entirely by nationals of BiH.

Law on Civil Service in the Institutions of Bosnia and Herzegovina, imposed by High Representative in May 2002, and after that adopted by the Bosnian Parliament, article 64 provise that all existing civil servants are subject of review process by the Civil Service Agency. The review is basically control to find out were they appointed in ac-

cordance with Law on Public Administration, and do they fulfil requirements from this law.

Process of verification of existing civil servants on the state level was completed by September 2004.

With all this activities it's clear that Bosnia and Herzegovina finished the most important part of lustration, and is ready for a next steps toward European integrations.

Neviana Dosti

The Limited Opening of the Files in Albania

Albania has experienced one of the most repressive communist regimes of the former socialist Eastern countries. The healing of the consequences of that period is one of the major tasks to be handled by all major actors of the public life in the country. It requires a country with a consolidated and healthy democracy and a strong social awareness that solving of this problem should take into account not only the past, but most importantly, also the future of the country.

Since 1995 the state institutions in Albania tried to do justice with the victims of the communist regime in issuing a number of laws. Nevertheless, this problem is far from being solved and here follow some considerations with regard to that topic.

In my opinion, the opening of all files of the communist past in Albania would be a dangerous act with heavy social implications. The reason for such an arguing will be backed by the following considerations:

1) One of the most important reasons is that the undiscriminated opening of the files cannot be done unless there is no political consensus among major political parties in the country. Building up a collective memory of a specific historical period, in our case the period of the totalitarian regime, has a strong need for a political consensus.

2) The important process of dealing with the files of the communist regime cannot be carried out in the conditions where there is no trust in the state institutions. In the conditions of the actual post-communist Albania, it seems that there are no institutions invested with the required moral authority to run the process of the files.

3) The existence of independent state institutions is a first hand condition for a fair implementation of such a delicate process. Unfortunately, in the post-communist Albania there is a consolidated tradition that almost whole state apparatus changes along with the change of the parties in power.

4) There have been no appropriate compensations for the ex politically persecuted persons in Albania. This social stratum still remains among the most marginalized ones. A fair and just compensation would be a mean of creating a favorable atmosphere of social peace, which is badly needed for carrying out a process with wide social implications, such as dealing with the files of the old regime.

5) Such conditions as in the post-communist Albania speak for great risks the whole process could degenerate and turn into a political tools of the parties to manipulate the past, to fight the rivals and managing to hold the power in a firm grip. Therefore the opening of the files could be restricted, as a first step, to the politicians, or all persons that run for high ranking posts in the state administration. The main reason is that a person with a not very "clear" past cannot be a legitimate representative of a community. This would lead to another moral crisis.

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Summary

Papers collected in this book are presented in the international scientific conference „Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe" that was held on May 24th 2007 in Zagreb, Croatia. The Conference was organized by the Political Science Research Centre Forum in cooperation with the Konrad-Adenauer-Stiftung and its regional Rule of Law Program South East Europe. It gathered eminent scientists and experts in the field from Croatia, Central and Eastern Europe, Western Europe and USA.

Papers in the book discuss a broad spectrum of questions: from theoretical issues of lustration, consolidation of democracy and the rule of law to very specific processes and country's experiences of coping with the totalitarian or authoritarian past. In this volume one can find a lot of examples how lustrations, transitional justice and coping with the past has been solved in particular post-communist countries. The papers in the book reflect both the search for justice, and the misuse of lustrations for political competition. In this way book has managed to offer wide reflections of issues important for the understanding general and specific features of a rule of law in strengthening of the new democracies.

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The Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung is designed as a program to promote dialogue on rule of law issues within and among the countries in South East Europe. It aims to support, in a sustainable manner, the establishment and consolidation of a democratic state of the rule of the law. Program participant countries are Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania and Serbia. In these countries, the Rule of Law Program wishes to contribute to the development and solidification of an efficient legal order and a justice system that is in accordance with the fundamental principles of the rule of law. As such, both are core elements of a democratic system, and a prerequisite for membership in the European Union.

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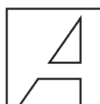

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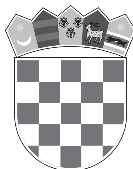

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