

Preface

by

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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

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 Vergangenen 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.“

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 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

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:

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."

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.

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