December 2020
country report
Rule of Law Program South East Europe (Bucharest)

KONRAD ADENAUER STIFTUNG

Belated lustration in the Republic of Moldova: a pretext to strengthen the PSRM

Stanislav Splavnic, Hartmut Rank

The current draft law for a lustration in the Republic of Moldova, in its current form, will further strengthen the politicization of the civil service and take the wind out of the sails of the efforts to fight corruption.

Introduction

On the initiative of the Socialist Party of the Republic of Moldova (PSRM), currently the strongest force in parliament, to which both the parliamentary speaker and the outgoing president of the country belong, the Moldovan legislative passed a draft law on December 3, 2020, aimed at the lustration of certain state authorities, which are responsible for combating corruption and money laundering. The draft was approved in its first reading. It is not a lustration in the classic sense, but rather a selective cleansing of some state authorities from their unwanted heads appointed by political opponents. Without making an assessment of the respective appointments, this raises reasonable concerns about the impact of this lustration process on the rule of law and human rights situation in the Republic of Moldova.

On the matter of lustration: in brief

Lustration in the context of the former Eastern Bloc states means the “purging” of state authorities from civil servants who, by exercising their administrative power, have endangered or violated rule of law principles and in particular human rights. These are not classic criminal proceedings, but a temporary special procedure that should enable the state to transition to the rule of law and (the new) constitutional conformity. In this sense, a distinction is made between the classic lustration, which aims to part with former communist officials, and a lustration in the broader sense, which aims at distancing from newer anti-democratic regimes. The political and legal conditions for both categories are likely to be different. Mainly, however, the state must observe a number of standards in the case of lustration so that the lustration itself will not become an example of misconduct under the rule of law.

Background and main content of the draft

In June 2019, shortly after the formation of a government by the PSRM and the parliamentary bloc "ACUM" under the leadership of the pro-Western head of government Maia Sandu, the Moldovan parliament adopted the "Declaration of the Republic of Moldova as a captive state". This declaration was directed against the political attacks on the Moldovan constitution and rule of law launched by Vladimir Plahotniuc, the then chairman of the until recently ruling Democratic Party (PDM) and still a symbol for the rise of the

oligarchy in Moldova. According to the draft law, the parliamentary majority was also controlled by Plahotniuc. Thus, all parliamentary appointments to several state authorities are to be described as being directed against "the interests of the people". To prevent a new rise of Plahotniuc, the PSRM designed the list of central appointments between 2016 and 2019, which included the board members and chairmen of the Broadcasting Council, the Data Protection Authority, the Financial Market Commission, the National Bank, the Oil and Energy Price Supervisory Authority, the Competition Council, the Anti-Money Laundering Service and the Integrity Authority.

The dismissal of the targeted individuals in the course of the planned lustration was meant to take place by legislative proceedings. There is indeed no mention of any legal means available to those affected to challenge the lustration in court. No supervisory authority was set up or tasked to ascertain the contribution of the respective civil servant to the consolidation of the oligarchic regime.

The rather succinct legal justification contains a reference to the above-mentioned declaration, the demise of the rule of law in the Republic of Moldova due to ubiquitous corruption, illegal privatizations and money embezzlement, political control over the judiciary and attacks on human rights. However, this listing of various reasons does not contain an analysis of the causality between the actions of the respective authorities in the relevant time frame and the need for lustration.

Against this background, the international review of the Moldovan judges, which was requested by the former coalition partner (the PAS - Party for Action and Solidarity, which has an observer status in the EPP), failed and has since been forgotten. Another, better draft law for a lustration brought in by the "Platform for Dignity and Truth" party has recently been withdrawn.

International framework for a balanced lustration

The concept of lustration was implemented in various ways in several countries of the former Eastern Bloc. The main goal of the lustration is to sustain still fragile democracies. During the course of the lustration, the system is to be cleansed of those people who manifestly violated human rights and the democratic development of the respective country. However, the lustration itself must not violate rule of law standards.

Since the need to develop clear lustration standards arose relatively early after the collapse of the USSR, the Council of Europe and, in its case law, the European Court of Human Rights had issued relevant guidelines and lustration rules, which were essentially intended to prevent a state governed by the rule of law from harming itself by a badly or incorrectly performed lustration.

In accordance with these principles, a state governed by the rule of law e has sufficient resources at its disposal to avoid sinking back into totalitarianism.

The guidelines and reports of the Council of Europe and its "Venice Commission" set up a number of principles. Firstly, certain legal guarantees under criminal law apply in the case of lustration proceedings: above all the presumption of innocence, the prohibition of retroactive effect and the prohibition of double punishment for the same crime.
The lustration enacted by the legislature *must therefore not count as punishment.* The aim of the lustration may be to rebuild trust in state institutions, to fight corruption or to remove representatives of a totalitarian regime from office, but not to hold individuals accountable. Their guilt must be weighed in each individual case.

In addition, the lustration should only be applied to civil servants who pose a *serious threat* in that the democratic order will continue to be at risk and / or human rights violations will be committed. This usually affects the judiciary, law enforcement agencies and intelligence services. In itself, membership in a political party or organization should not constitute sufficient grounds for dismissal. In each case of lustration, the person concerned should be provided with a judicial means of defense.

From the outset, even after a first look, the new Moldovan draft law arouses visible concerns about the rule of law in more than one respect.

The case law of the ECtHR on the recent lustration in *Ukraine*

For a better understanding of the plans to carry out a lustration in the Republic of Moldova, it is worth looking to the neighboring Ukraine. In 2020 it is difficult to imagine carrying out a comprehensive classic lustration of the former officials from the communist era, as over time this process becomes less relevant and problems with its legality arise. The lustration aimed at after the Ukrainian revolution of 2014 was primarily directed against the oligarchy and corruption running rampant under the previously ruling President Yanukovych. The fight against corruption and oligarchy may serve as legitimate lustration purposes, but the design of lustration procedures is a core element of the rule of law. This played a decisive role in the ECtHR case of ***Polyakh and others against Ukraine***. The dismissal of five state officials was based either on their affinity to the former oligarchic regime, on suspicion of corruption, or on their past professional activity during communism. Regarding the first criterion, the European Court of Human Rights (ECtHR) found problematic the fact alone that the dismissal was rather based on the political connections to the former president, regardless of the specific functions the officials performed. The anti-democratic tendencies of the persons concerned played a secondary role, if at all. The ECtHR found this to be motivated more by "political vindictiveness" rather than an authentic pursuit of a cleansing for the sake of democracy. As an exception, the key figures are allowed to be dismissed in a legislative manner under certain conditions, while other officials are to be subjected to procedures that can be reviewed under the rule of law.

In addition, the same standards must not be applied in both the fight against corruption and lustration. Although ab initio both purposes may be described as legitimate, criminal proceedings are to be preferred if corruption is suspected. A state governed by the rule of law would have the necessary instruments to do so. Otherwise there is a risk of politicization of the civil service, which should be combated in the spirit of lustration. In the case of *Polyakh*, the ECtHR found no link between the applicants' activities and their dismissal. In view of these circumstances, the ECtHR found a violation of the right to professional development, which is covered by the right to private life, Article 8 of the European Convention on Human Rights (ECHR). Several concerns expressed by the ECtHR in the above-mentioned Ukrainian case also apply to the Moldovan Lustration Act.

A review of the Moldovan Lustration Law

The intended lustration in the Republic of Moldova is problematic from both a legal and a political standpoint in several respects.

The bone of contention is the political affinity of the officials concerned. According to the draft law, since they were appointed during the PDM-led government, they should all be dismissed. This is objectionable if only for the reason that the justifying arguments for the law mention this as being the primary grounds for dismissal. This practice bears the risk that other future governments could dismiss public officials now appointed by the PSRM in the same way. This would lead to a further politicization of the civil service, whereby the rule of law and the intended fight against corruption will play second fiddle.

The state must use resources available. This includes an extensive investigation of the role of individual officials, or the creation of a parliamentary body to this purpose. Both options would be more desirable under the rule of law than simply connecting the fight against corruption with party membership. Otherwise the impression arises that the lustration is carried out more to the purpose of political reckoning. If a state is unable to carry out the lustration under rule of law standards, this only shows that the rule of law and constitutional order have failed.

The fact that neither the Moldovan officials concerned were assessed nor investigations were opened also speaks against the suitability of the draft law. If a number of officials are classified as suspected of corruption or abuse of human rights without any assessment, then the alleged aim of this legislation becomes secondary.

Another problematic point is the lack of a supervisory authority. However, such a body is a fundamental condition under the rule of law for a fair trial against those targeted. According to the draft law, it will not be possible to challenge the

dismissal in a national court. That alone would constitute an obvious violation of the right to a fair trial (Article 6 para. 1 ECHR) or to means of defense (Article 13 ECHR).

There is also the risk of the weakening and further politicization of important state authorities, for example in the areas of fighting against corruption and money laundering, as well as in the field of financial security. At the same time, the Moldovan Parliament passed a law to lower the statute of limitations for the National Integrity Authority (ANI) and to limit its powers in criminal matters.

According to this, the statute of limitation period is to be shortened from the current three years to only one year in the future.

The ANI is tasked with examining the asset declarations of civil servants. Among other things, the new regulation authorizes the ANI to initiate an investigation only if the person concerned continues to work in the same function. If, for example, the person moved from their function or office during or before the investigation, the ANI will have to stop investigating. Coupled with the early and (so far) groundless dismissal of the ANI board, these changes will leave the ANI with less leeway and will likely weaken the fight against corruption to a significant extent.

would be to negotiate with parties that are directly or indirectly involved in money laundering and / or the "vanishing of the stolen billion" from the Moldovan banking system. This fact alone would rob the ill-considered lustration of its legitimacy. This lustration initiative is unlikely to win any vote from any other party.

This lustration draft bill has many shortcomings that should be addressed before the bill is passed. The draft raises numerous constitutional and human rights concerns. The only two means of appeal would lie with the Moldovan Constitutional Court, which currently enjoys political independence, or, ultimately, with the ECtHR. For both judicial forums there would probably be enough reasons to overturn the law in its current form: political reckoning seems to be the primary goal of this lustration, with party affiliation as the main criterion for dismissal. The draft bill does not establish any determination of actions of those targeted and no causality has been shown between their behavior and the negative consequences for the development of the country. Although the Moldovan parliament wanted to create the impression of a well fortified democracy through the justification of the law, there is a clear need to find a constitutionally acceptable balance between lustration and the protection of human rights.

Conclusions

With currently no parliamentary majority, the only option left for the PSRM to pass the law

Sources:

1. The Bill on Lustration and Cleansing State Authorities of Oligarchical Influence of December 3, 2020; http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/5340/language/ro-RO/Default.aspx
2. The draft amendment to the law for the National Integrity Authority; http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/5353/language/ro-RO/Default.aspx
3. The Polyakh case against Ukraine and others; http://hudoc.echr.coe.int/eng?i=001-196607
4. Resolution 1096 (1996) of the Council of Europe on Measures to dismantle the heritage of former communist totalitarian systems; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507
5. Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine adopted by the Venice Commission; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)044-e

Konrad-Adenauer-Stiftung e. V.
Hartmut Rank, LL.M., Head of the Rule of Law Program Southeast Europe
Stanislav Splavnic, LL.M., Research Associate

Rule of Law Program Southeast Europe
Main department Europe / North America
www.kas.de
hartmut.rank@kas.de