MEMORY OF NATIONS

Democratic Transition Guide

[The Argentine Experience]

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CEVRO

PURGING

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INTRODUCTION

In the Argentine Republic, no administrative or legal purging mechanism was implemented. This was mainly due to the fact that, although the transition was brought about by collapse, it did not imply a total defeat of the military and the civilians who led the March 24, 1976 coup d'état. Likewise, and due to the characteristics of the transition, the trial of those responsible for crimes against humanity was limited by the "categorical imperative" defined by President Raúl Alfonsín (1983–1989): to hand over command to another democratically elected president. All the linked actions were subordinated to this great objective.

The first section analyses the situation during the fall of the authoritarian regime. Secondly, it describes the context in which the transition took place in order to understand why laws were not implemented to purge the state of the officials who had held positions during the dictatorship. Thirdly, the crimes of the Dictatorship were tried after a long process with advances and setbacks that continues to this day. Finally, the final reflections are presented.

TRANSITION FROM COLLAPSE?

Raúl Alfonsín (1983–1989) and his collaborators considered that the main objective of their government was to hand over the "presidential baton" to another civilian president, an unprecedented event that had not occurred since 1928, and that the Armed Forces were the greatest threat to the democratic transition.[1] In fact, the radical president considered before winning the elections that "the regime has not abandoned power, has abandoned the land and is entrenched in its last line of defense, where it is preparing to fight back".[2] In his opinion, the Armed Forces had made a "strategic withdrawal" leaving the country in a deep economic crisis, in an international scenario where the Cold War (1947–1991) had warmed up with the arrival of Ronald Reagan (1981–1989) to the presidency of the United States and where, in addition, the involvement of its Armed Forces in the so-called War on Drugs in Latin America had begun. Alfonsín therefore considered that it was impossible not only to judge all the military, but also his civilian accomplices. This context, plus the pardons granted by Carlos Menem (1989–1999), explains the absence of policies aimed at purging civilian and/or military officials who had been part of the state during the last dictatorship (1976–1983).

In fact, both Ernesto López[3] and Patrice McSherry[4] argue that the *Armed Forces, paramilitary groups, economic groups and the intelligence services retained an important veto power that made it impossible to fully prosecute those responsible for state terrorism and to implement policies aimed at modifying the functioning of military organizations.* Moreover, during the 18 months that the transition lasted until the assumption of the new civilian authorities on December 10, 1983, the Armed Forces controlled the process and acted ("veto power") to preserve certain prerogatives in the future constitutional and democratic government.

This was due to the fact that, among other factors, the political actors presented inconsistencies and hesitations to take advantage of the favourable moment that the defeat in the Malvinas/Falkland war (1982) meant. On the one hand, in the Justicialist Party (PJ) the position of accepting that the transition be commanded by the military prevailed. On the other hand, the Multiparty – formed by the main political parties in 1981 – agreed that the military government should establish "the bases and lead the process that would lead to the announcement of elections and the return to democracy."[5] The Dictatorship presented a proposal for agreement on the basis of fifteen points – covering both economic and foreign policy issues – which was rejected by the Multiparty. In addition, the military wanted to close the issue of human rights violations through a final report and a self-amnesty law No. 22.924. Despite the pressure of public opinion, expressed in the march of December 16, 1982, asking for trial and punishment, the Multiparty remained in the position of only asking for the release of the political and union prisoners. The exceptions were Raúl Alfonsín in the Radical Civic Union (UCR) and the internal line of Intransigence and Mobilization in the PJ, which insisted on the need to repeal the self-amnesty and to judge the repressors.[6]

The only priority the military had after the radical Raúl Alfonsín won the elections, unexpectedly for some domestic and external actors,[7] was to avoid judicial review of what had been done regarding human rights violations. Issues such as the application of lessons learned in the Malvinas/Falkland war[8] to reform the Armed Forces were set aside by the inability to reach consensus among the forces. In other words,

> "there was no agreement between civilians and the military, which means that there was no agreed transition (…), but neither was there a complete political defeat of the military and a complete occupation of the spaces and resources of power by

1 Sergio Eissa, *¿La irrelevancia de los Estados Unidos? La política de defensa argentina (1983–2010)*, Buenos Aires: Arte y Parte, 2015. For example, the then head of the Navy maintains in his memoirs that he perceived that the radical government "did not view the military with friendly or at least neutral eyes…". They wanted to make the military appear to be the only ones responsible or guilty of all the evils that have occurred in the country. See Ramón Arosa, *De Constitución a Retiro. Reseña y reflexiones del Jefe de la Armada 1984–1989*, Buenos Aires: Instituto de Publicaciones Navales, 2008, 31.

2 Patrice McSherry, *Incomplete transition. Military power and democracy in Argentina*, Lexington: Authors Guild Backprint.Com Edition, 2008, 108.

3 Ernesto López, *Ni la ceniza ni la gloria. Actores, sistema político y cuestión militar en los años de Alfonsín*, Quilmes: Universidad Nacional de Quilmes, 1994.

4 Patrice McSherry, *op. cit.*, 2008, 86.

5 Ernesto López, *op. cit.*, 1994, 43.

6 Ibid., 45.

7 Just as an example, both the United States and the military preferred the victory of the Peronist candidate, Italo Luder. See also Patrice McSherry, *op. cit.*, 2008, 112.

8 Ministerio de Defensa, *Informe Rattenbach*, Buenos Aires: Ministerio de Defensa, 2012 [1982].

civilians that placed them in a solid position of domination and control over the military (…) the military led – even in the midst of growing political weakness – the process of democratic re-institutionalization to the end, which allowed them to withdraw in a more orderly and less costly manner (…) this gave a very special peculiarity to consolidation (…): a) a residual capacity for pressure in the Armed Forces and b) the persistence of the limitations of the conception and behavior of the civilian actors – which obviously did not magically evaporate with the arrival of consolidation–, conditions were created so that it had strong features of instability and unpredictability with regard to the evolution of civil-military relations".[9]

In conclusion, this transition, despite being characterized as a "collapse",[10] allowed the military and its civilian allies to retain significant shares of real power with which they were able to effectively condition the new democratic government.

SOCIOPOLITICAL CONTEXT OF THE TRANSITION TO DEMOCRACY

The democratic transition took place during the overheating of the Cold War and, in this context, the United States, with Ronald Reagan in the presidency, put aside the human rights policy of President James Carter and focused once again on the fight against communism in Latin America. Based on the discrepancies raised by Alfonsín regarding U.S. policies in Central America in March 1985, that country once again strengthened its *bridges with the Argentine military*. Since then, various U.S. government officials have warned of the danger of the resurgence of the montonero guerrilla and that in Latin America there was an enemy that was fighting governments from the inside "employing communist subversion, terrorism or the production and trafficking of narcotics."[11] They also insisted again on the Soviet threat in the region,[12] due to the signing of fisheries agreements by Argentina with the countries within the Soviet-dominated sphere. This heightened U.S. fears about possible control by the South Atlantic Soviet Union that would allow a network of drug traffickers and subversives to carry arms on fishing boats to the Chilean opposition to the dictator Augusto Pinochet. Argentine Foreign Minister Dante Caputo assessed that this set of statements meant that, while the U.S. had unplugged the military plug in Argentina, it could be plugged back in at any time.[13] According to Verbitsky[14] this meant that for the superpower democracy it was good, but it was better if it was controlled by the military.

Secondly, the economic policy implemented by the dictatorship had transformed the socio-economic structure of the country: it had put an end to the model of import substitution industrialization (ISI) (provoking the financialization, deindustrialization and reprimarization of the economy) and had left an external debt of US$ 45,000 million dollars compared to US$ 5,000million in 1975.

In order to face this economic crisis, Alfonsín tried to apply a Keynesian policy during the first two (2) years.[15] In other words, they sought to design a gradual economic policy to reduce social costs, since the president believed that the application of recessive and *shock* recipes would affect the foundations of the nascent democracy.

Due to the failure of the approach outlined above, the "Austral Plan" was launched on May 14, 1985 with the aim of lowering inflation and creating favorable conditions for deeper transformations. However, the success achieved in the short term hid the lack of structural measures to encourage recovery or growth.[16] Thus, given the ongoing deterioration of the political situation, the military resistance to the transformations and the electoral defeat of the governing party in the 1987 parliamentary elections, the new economic plan, known as "Primavera", was born without the necessary strength to control the ever-increasing inflation. In early 1989 – at the behest of Argentine economist and former dictator Domingo Cavallo – the World Bank and the International Monetary Fund announced that they were limiting their loans to the Argentine government. The run against the dollar ("from which some financial groups were no strangers")[17] and the lack of reserves in the Central Bank to intervene adequately in the exchange market, led the country from a situation of high inflation to a hyperinflation that precipitated the government's early delivery to the Justicialist candidate triumphant in the presidential elections, Carlos Saul Menem.

THE UPS AND DOWNS IN THE TRIAL OF THOSE RESPONSIBLE FOR STATE TERRORISM AND ITS IMPACT ON PURGING

While the Justicialist Party (PJ) was in favour of self-amnesty, Raúl Alfonsín considered the trial of those responsible for state terrorism important for the construction of a democratic society. However, he was convinced that it was impossible to judge all military personnel in a transitional context and that they should be differentiated by levels of responsibility: 1) the head who gave the orders; 2) those who exceeded their orders; and 3) those who had merely carried out the orders. In addition, he believed that the unrestricted persecution of the military was unjust because various sectors of the Catholic Church, political parties, trade unions, businessmen, the media, among others, had been complicit in state terrorism. Nor did Alfonsín order the trial of the illegal state action of the Armed Forces, Security Forces and police, and the paramilitary organization, Argentinian Anticommunist Alliance (Triple A) during the Justicialist government of María

9 Ernesto López, *op. cit.*, 1994, 47–50. See also Patrice McSherry *op. cit.*, 2008, 86 and 118.

10 In the collapsing transition, "authoritarian rulers fail to control the agenda of the negotiation issues and the outcome of the negotiation". In the agreed transitions, "the rulers of authoritarian regimes […] tend to have a strong dominance (although declining over time) over the rhythms and agendas of the transition". Huntington establishes a third category: transfer. In the latter, "democratization is brought about by the combined action of government and opposition". See respectively Guillermo O'Donnell, "Transiciones, continuidades y algunas paradojas", in *Cuadernos Políticos*, 1989, (56), 25, 26; and Samuel Huntington, *La tercera ola. La democratización a finales del siglo XX*, Buenos Aires: Paidós, 1995, 143.

11 Horacio Verbitsky, *Civiles y militares: memoria secreta de la transición*, Buenos Aires: Contrapunto 1987, 132, 229, 234.

12 Patrice McSherry, *op. cit.*, 2008, 213-2014, 360.

13 Sergio Eissa, *op. cit.*, 2015.

14 Horacio Verbitsky, *op. cit.*, 1987, 264–267.

15 Mario Rapoport, *Historia económica, política y social de la Argentina (1880–2000)*, Buenos Aires: Ediciones Macchi, 2000, 924 and Andrew McAdam, Viktor Sukup, Claudio Katiz, *Raúl Alfonsín. La democracia a pesar de todo*, Buenos Aires: Corregidor, 1999.

16 Mario Rapoport, *op. cit.*, 2000, 913–914.

17 Ibid., 924.

Estela Martínez de Perón (1974–1976), because this could generate a "confrontation" with the PJ and he had no political margin to do so.

Based on this conceptualization, the main difficulties arose in its implementation.[18]

It is clear that Raúl Alfonsín never intended to try all the military and civilian accomplices, even if civil society and the military perceived exactly the opposite.[19] This led to an increase in civil-military tensions, which resulted in four (4) military uprisings between 1987 and 1990.

President Carlos Menem opted for another approach that was in line with the Justicialist Party's position in 1983. Although he was not interested in military issues, he knew that he could not ignore the military situation if he wanted to focus mainly on the economic front, which had got out of hand due to hyperinflation in February 1989. To this end, on 7 October 1989, President Menem issued the first pardon, comprising four decrees: 1002/89, 1003/89, 1004/89 and 1005/89. They reached military personnel involved in acts of state terrorism and the Malvinas/Falkland war, persons belonging to armed organizations, and officers, non-commissioned officers and civilians who participated in the military uprisings of 1987 and 1988. The last carapintada (painted face) uprising occurred on 3 December 1990. After the repression, President Carlos Menem granted a second pardon on December 29, 1990, through decrees 2741/90, 2742/90, 2743/90, 2744/90 and 2745/90. They reached the military juntas of the last dictatorship, former guerrillas and former Economy Minister José Martínez de Hoz.[20]

After the repression of the last military uprising, it can be argued that full civilian control of the Armed Forces was established in the country. Throughout this process, which lasted throughout the 1980s, the Armed Forces ceased to be a relevant actor in the Argentine political system.[21]

Thus, in the context in which Alfonsín conceived and implemented his policy and the pardons decided by Carlos Menem, he made unthinkable any type of action to purge the state of the officials of the dictatorship. On the contrary, many soldiers – both those responsible for state terrorism and those who rebelled against the governments of Alfonsín and Menem between 1987 and 1990 – were able to stand as legislators, intendants and occupy positions in government. Moreover, the same happened with civil servants who were never subjected to any legal process until 2003, except for a few exceptions such as the former Minister of the Economy José Alfredo Martínez de Hoz.

The enactment of these laws and decrees of impunity prevented the prosecution of those responsible for state terrorism from 1989 onwards, with the exception of cases involving the abduction of newborns between 1976 and 1983.

In 1998, at the proposal of the daughter of Argentine writer Rodolfo Walsh, the National Congress repealed the "Full Stop" and "Due Obedience" laws. In this context, the Center for Legal and Social Studies (CELS) asked the courts to annul these rules. It was only in March 2001 that a first instance ruling declared these laws null and void and unconstitutional, and so the legal processes that had been closed in the 1980s began to be reopened in a completely different political context, in which the Armed Forces no longer constituted a factor of power in Argentine society. In 2003, when Néstor Kirchner (2003–2007) took over the presidency, there were already about "a hundred or so heads of the armed and security forces under arrest for the theft of babies, the looting of property and the reopening of cases."[22] It was only in 2003 that these laws were declared insanely null and void and the Supreme Court of Justice ratified the first instance rulings in 2005.

Until 2003, relatives of the disappeared, human rights bodies and social scientists demanded that the Armed Forces, the Security Forces and the police grant access to their archives on the disappeared. However, since the last months of the dictatorship, they have claimed that they had been eliminated.[23] However, the Directives, Orders, Regulations and Plans were provided by the military themselves during the trials, as part of their defense, to justify that they had acted legally. On the other hand, the policy of impunity implemented by the Argentine government between 1989 and 2003 meant that the search for documentary material on state terrorism was completely neglected.

Néstor Kirchner's assumption of the presidency (2003–2007) made it possible, in the context of the declaration of the nullity of the so-called Forgiveness Laws and the promotion of the trials of those responsible for state terrorism, to take initiatives to preserve private documents, which had been kept by individuals and NGOs, and to search for documents in state offices. Thus, the National Memory Archive (2003), the Provincial Commission for Memory in the Buenos Aires Province (2000) and the Instituto Espacio por la Memoria (Space for Memory Institute) in the Autonomous City of Buenos Aires (2002) were created.[24]

In December 2003,[25] it was reported that in mid-1978 the 601 Intelligence Battalion counted a total of 22,000 people dead and missing from 1975 to that date. This document was part of "a dossier of 1,500 original pages obtained by the Argentine Justice System in the office and home of Arancibia in Buenos Aires, in November 1978. After years of retention in the court archives, the American journalist John Dinges obtained a copy of the invaluable five-volume compilation in January 2002 and sent it to the George Washington University National Security Archive."[26]

18 Jaunarena doubted that the Council would take up the task and argued that the entire trial would be unduly prolonged, which was detrimental to the democratic transition. He then proposed to apply the presumption that "under certain hierarchies, military personnel would be considered to have acted on orders". Horacio Jaunarena, *La casa está en orden. Memoria de la transición*, Buenos Aires: TAEDA, 2011, 33, 35. See the chapter by Gabriela Ippolito O'Donnell and María Cecilia Alegre for more details.

19 Argentines thought the transition had ended with the presidential oath, while politicians aware of the military problem differed on that point. See Carina Perelli, Legacy of transition to democracy in Argentina and Uruguay, in Louis W. Goodman, Joanna S. R. Mendelson, Juan Rial, eds., *The military and democracy. The future of civil-military relations in Latin America*, Lexington: Lexington Books, 1990.

20 See the chapter by Gabriela Ippolito O'Donnell and María Cecilia Alegre for more details.

21 Eduardo Estévez, *Relaciones civiles – militares y política en la Argentina: de Alfonsín a Menem*, paper presented at the Seminar "Armed Forces and Democracy", Academia Libertad y Desenvolvimiento, Friedrich Naumann Foundation – Stiftung, Sintra, 1991.

22 See Horacio Verbitsky, "Cuentas Pendientes", in *page 12*, April 13, 2014, https://www.pagina12.com.ar/diario/elpais/1-244021-2014-04-13.html

23 Mariana Nazar, "Debate I. Dictadura, archivos y accesibilidad documental. A modo de agenda", at the Centre for Legal and Social Studies (CELS) (Ed.), *Human Rights in Argentina. 2007 Report*, Buenos Aires: CELS.

24 Ibid.

25 "Según EE.UU., son 22.000 los muertos o desaparecidos víctimas de la represión entre el 75 y el 78 en Argentina", in *DERF*, December 5, 2003, http://www.derf.com.ar/despachos.asp?cod_des=1770

26 Sebastián Penelli, "Documento con información oficial militar computa al menos 22.000 víctimas del Terrorismo de Estado", in *Ámbito Financiero*, March 27, 2017, http://www.ambito.com/877233-documento-con-informacion-oficial-militar-computa-al-menos-22000-victimas-del-terrorismo-de-estado

On 5 January 2010, President Cristina Fernández de Kirchner (2007–2015) ordered (Decree No. 4/2010) the declassification of "all information and documentation relating to the actions of the Armed Forces during the period 1976–1983, as well as any other information or documentation produced during another period relating to those actions."

In this new political context, the Argentine Foreign Ministry created the Association for the Recovery of Historical Memory and, in order to have technical assistance, signed an agreement with the Center for Legal and Social Studies (CELS) in June 2011.

On March 13, 2014, the Argentine Army handed over to the Ministry of Defense 7,000 folders (350 of civilians) of files from the Magdalena prison, where Jacobo Timerman and Mario Galli, among others, had disappeared.[27] In November of the same year, the Argentine Navy handed over to the Minister of Defense the Isaac Rojas documentary collection, mainly related to the dictatorship that ruled Argentina between 1955 and 1958. In addition, on October 31, 2016, the Head of the Argentine Air Force reported the discovery of documentation related to the operation of the Military Junta and the Legislative Advisory Commission between 1976 and 1983.[28]

To this end, an area was created within the National Directorate of Human Rights and International Law of the Ministry of Defense for the digitization and preservation of such documents and the digitization and preservation of such documents.[29] In January 2018, workers and 500 civil and trade union organizations denounced the dismantling of the area.[30]

Finally, on 24 March 2016, United States President Barack Obama announced during his visit to Argentina that a project would be launched to "review and declassify intelligence [and military] records on the coup d'état in Argentina and the subsequent repression". The first round was delivered between August and December of that year, and the second, during Donald Trump's administration in April 2017.[31] In addition, the Vatican State announced in 2016 that it is arranging its own archives for the purpose of declassification.[32]

In summary,

> Beginning in 2006, courts across the country began issuing sentences for the crimes of the dictatorship. From then until December 2013, 494 convictions and 47 acquittals were handed down, that is, almost 10 per cent (…) The 541 trials concluded with a sentence accounting for only 26 per cent of the total number of cases that are ready for trial. All this shows that these are trials in which due process and the right of defense of the accused are respected and that no one is convicted without solid evidence against them.[33]

LESSONS LEARNT AND RECOMMENDATIONS

As a result of these ups and downs in the trial of those responsible for state terrorism and the absence of purging laws, the denial of state terrorism persisted; the attempt to involve the Armed Forces in the internal order (for example, in the fight against drug trafficking); economic policies that follow the neoliberal matrix of the dictatorship; and judicial decisions that favored impunity for civilians and the military.

The main thing that stands out is the persistence of "entrenched authoritarian clauses"[34] in the intelligence and security agencies, where – it could be argued – there has been no transition to democracy.

Regarding the national intelligence system, Decree No. 1311/2015 was adopted, which sought to modify Argentina's intelligence doctrine, professionalize the Federal Intelligence Agency as the governing body of the National Intelligence System and make it an institution capable of meeting the challenges of the twenty-first century in the collection and analysis of strategic information for security and defense. The reform project begun in 2014 was interrupted and the government of President Mauricio Macri (2015 to present) restored the old operating model and reinstated the spies who had been thrown out of the organization.

Regarding the Federal Police (PFA), for example, Marcelo Saín[35] states "that this police institution, created in December 1943 and set up in January 1945, lays its institutional foundations on Law Decree 333/58 and its complementary norms". This rule of the dictatorship of Eugenio Aramburu (1955–1958). As for the professional regime of the PFA, "it was established by Law Decree No. 21.965, promulgated in March 1979 by Lieutenant General Jorge Rafael Videla, and was regulated in 1983 by a decree signed by General Reynaldo Bignone (…) These rules and their amendments are in force, as are Law Decree No. 9,021/63 establishing the 'Organic Law of the Argentine Federal Police Information' and its regulations approved by Decree No. 2.322/67. By means of these norms, a true state-owned information and intelligence service was created and put into operation, not subject to any type of administrative, judicial or parliamentary comptroller."

On the other hand, many former officials of the Dictatorship and former soldiers who rebelled during the government of

27 Victoria Ginzberg, "Papeles de la prisión", in *page 12*, March 14, 2014, https://www.pagina12.com.ar/diario/elpais/1-241786-2014-03-14.html

28 At the same time, the Ministry of Defence declassified the Rattenbach Report on responsibilities in the conduct and operations of the Malvinas/Falkland war (1982) through Decree No. 200/2012, a task that was completed with the declassification of all documentation relating to the conflict (Decree No. 503/2015).

29 Argentine Republic – Ministry of Defence (2015), *Libro Blanco de la Defensa 2015*, Buenos Aires: Ministry of Defence, 278–281.

30 "Denuncian un 'vaciamiento' en la investigación de archivos de la dictadura", in *Perfil*, January 18, 2018, http://www.perfil.com/noticias/politica/denuncian-un-vaciamiento-en-la-investigacion-de-archivos-de-la-dictadura.phtml

31 Fernando Barrio, "Trump entregó a Macri los nuevos archivos desclasificados de la Dictadura", in *Perfil*, April 27, 2017, http://www.perfil.com/noticias/perfil-usa/trump-entrego-a-macri-los-nuevos-archivos-desclasificados-de-la-dictadura.phtml. By 2002, the United States had already declassified 4,700 secret State Department files. This was the result of a request made by the CELS, the Mothers and Grandmothers of Plaza de Mayo to the United States government in 1999. See Werner Pertot, "Nuevos secretos pueden salir a luz", in *page 12*, March 18, 2016, https://www.pagina12.com.ar/diario/elpais/1-294874-2016-03-18.html

32 "El Vaticano también desclasificará sus archivos secretos sobre la dictadura argentina", in *Infobae*, March 19, 2016, https://www.infobae.com/2016/03/19/1798315-el-vaticano-tambien-desclasificara-sus-archivos-secretos-la-dictadura-argentina/

33 See Horacio Verbitsky, "Cuentas Pendientes", in *page 12*, April 13, 2014, https://www.pagina12.com.ar/diario/elpais/1-244021-2014-04-13.html

34 The concept is used by Manuel Garretón to refer to the transition to democracy in Chile. See Manuel Garretón, *Incomplete Democracy*, Chapel Hill: University of North Carolina Press, 2003.

35 Marcelo Saín, "Los intocables", in *page 12*, January 26, 2010, https://www.pagina12.com.ar/diario/elpais/1-139049-2010-01-26.html

TABLE NO. 1	
Memory, Truth and Justice	**Impunity**
Decrees 157/1983 and 158/1983 order the trial of the guerrilla leaders and the dictatorship.	Full Stop Law No. 23.492: establishes the statute of limitations for criminal prosecution of those responsible for crimes committed during the last dictatorship.
Decree No. 187/83: creation of the National Commission on the Disappearance of Persons (CONADEP),	Due Obedience Law No. 23.521: establishes the criminal responsibilities of those involved in the genocidal plan between 1976 and 1983 according to the three-tier criterion.
Law No. 23.040: repeals Law No. 22.924 on self-amnesty.	Decrees No. 1002, 1003, 1004 and 1005 of 1989, and 2741, 2742, 2743, 2744, 2745 and 2746 of 1990: pardons to the former military leaders of the last dictatorship, former ERP guerrillas and Montoneros, to the commanders who led the Malvinas/Falkland war (1982), to the former Minister of the Economy, Alfredo Martínez de Hoz and to the military rebels who rose up against democracy between 1987 and 1988.
Law No. 23.049: modifies the Code of Military Justice, which allowed, inter alia, for appeals to the civil courts.	Decrees Nos. 1228, 1229 and 1230 of 2003: pardons for the former military officer who had risen up against democracy in 1989 and 1990, Mohamed Ali Seineldin, and for former guerrillas, including one of the leaders of the MTP and ERP, Enrique Gorriarán Merlo.
Defense of Democracy Law No. 23.077: increases the penalties for those who depose the public authorities and for those who participate in an armed organization that endangers the validity of the National Constitution.	
Law No. 23.952: repeals Laws No. 23.492 and 23.521.	
Law No. 25.779: declares Laws No. 23.492 and 23.521 insanely null and void.	
Law No. 26.475: declares extinguished the benefits obtained by officials of the last dictatorship and granted under special regimes or laws.	

Source: own creation.

Raúl Alfonsín and returned to office during the democracy can be highlighted: a) José María Lladós was an official of the General Secretariat of the Presidency during the dictatorship and again assumed the positions in the Ministry of Defense during the radical governments (1983–1989 and 1999–2001);[36] b) Domingo Cavallo was Director of the Central Bank (1982) and later Minister of the Economy (1991–1996 and 2001), Foreign Minister (1989–1991) and National Deputy (1987–1989 and 1997–1999); c) Oscar Camilión was Foreign Minister in 1981 and Minister of Defense during the democracy between 1993 and 1996; d) Antonio Horacio Stiusso was a spy for the Secretary of State for State Intelligence during the dictatorship (1972–1976), he became Director of Counterintelligence at the beginning of the 21st century and was only displaced in 2014; e) Francisco Miret was one of the investigating judges who rejected the *habeas corpus* of the relatives, he became a member of a chamber during the democracy until he was suspended by the Judicial Council in 2010; f) Aldo Rico was leader of the "carapintadas" uprisings in 1987 and 1988 and was Minister of Security of the Buenos Aires Province (1999–2000), National Deputy (1991–1995) and Intendant of the Municipality of San Miguel (1997–2003); g) Juan José Gómez Centurión was a military rebel "carapintada" in 1987 and 1988 and was appointed head of Customs (2015–2017), vice-president of the Banco de la Nación Argentina (2017–2018) and president of the same body since May 2018;[37] and f) Christian Von Wernich was police chaplain of the Buenos Aires Province and convicted of crimes against humanity. He was expelled from the police force in 1985 but continued serving in Bragado (Buenos Aires Province) and in Chile until he was arrested.

The possibility of implementing norms to purge the state of authoritarian government officials will depend on the type of transition and its socio-political context and requires political agreement among the main political parties, which did not occur in Argentina in 1983. Firstly, because the parties perceived the transition differently and, secondly, because many of the members of those parties – mainly radical and other smaller parties – held positions during the dictatorship.

36 See Paula Canelo, *La política secreta de la última dictadura argentina (1976–1983)*, Buenos Aires: Edhasa, 2016, 153.

37 Radicalism has appointed "ex-carapintadas" and military officials who were objected to by human rights bodies in the Ministry of Defence between 1999 and 2001 and from 2015. See Alejandra Dandan, "Militares retirados que se reciclan en cargos de defensa", in *page 12*, February 1st, 2017, https://www.pagina12.com.ar/diario/elpais/1-291548-2016-02-01.html and Horacio Verbitsky, "Nuevas/Viejas Amenazas", in *page 12*, undated, https://www.pagina12.com.ar/2001/01-02/01-02-25/pag11.htm

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CEVRO

LUSTRATION

Kosal Path

INTRODUCTION

Lustration as a mechanism of transitional justice in post-conflict society refers to official state policies enacted to purge individuals from their current positions or ban them from holding specific positions in the future because of their political acts or identity. These policies are often referred to in terms of the banned group: de-Nazification, de-Sovietization, de-Communization, de-Baathification, and so on. Since Cambodia gained independence from France in 1953, the supposedly neutral state security apparatus has often been used, to a varying degree, by the country's political leaders (Sihanouk, Lon Nol, Pol Pot and now Hun Sen) to suppress political dissent and maintain power. During Cambodia's tumultuous democratic transition from 1993 to 2017, no policy close to any of these post-communist lustration policies ever took place. The security forces of the People's Republic of Kampuchea (PRK) from 1979 to 1989, and its successor the State of Cambodia (SOC) from 1989 to 1993 were transferred, together with the FUNCINPEC's security forces, into the new state apparatus of the CPP-FUNCINPEC coalition government after the United Nations-sponsored general election in 1993. Since 1993, the state security apparatus has been dominated by the Cambodian People's Party (CPP) and commanded by Prime Minister Hun Sen's most loyal generals. The results of the July 29, 2018 election with the main opposition the Cambodian National Rescue Party (CNRP) banned a year before, which were widely condemned by the West but strongly recognized by the People's Republic of China, delivered all 125 National Assembly seats to the CPP. This victory gave Prime Minister Hun Sen's absolute control, with his family members and loyalists in the high command of Cambodia's security forces and state security apparatus. Cambodia is on a fast lane to joining the global one-party authoritarian state.

ABSENCE OF LUSTRATION AFTER THE UN-SPONSORED ELECTIONS IN 1993

In the ensuing years, after the Democratic Kampuchea (DK), widely known as the Khmer Rouge regime, came to power in April 1975, members of the defeated US-backed Lon Nol regime were either murdered or later purged by the Khmer Rouge security apparatus when their identity was revealed. After driving the Khmer Rouge forces to seek refuge in the jungle along the Thai-Cambodian border, the PRK, installed by the Socialist Republic of Vietnam, set up a revolutionary tribunal in 1979 to try Pol Pot and Ieng Sary in absentia for the atrocities they committed during the KR regime from 1975 to 1979. Throughout the 1980s, the PRK security forces hunted down the fifth-column elements burrowing within the ranks and files of the new socialist government. In 1983 when the military intelligence unit of Front 479 – a division of the Vietnamese occupying force in charge of combat in the northeastern part of Cambodia – launched a swift campaign to purge the "two-faced enemy" – referring to Cambodian officials and citizens who worked for the PRK government, but secretly supported the Cambodian resistance forces against the Vietnamese and the PRK. Many PRK officials in Siem Reap were arrested, interrogated, and even tortured in this brief but brutal purging campaign called the "Siem Reap Affairs." Until the Paris Peace Accords (PPA) in 1991, which offered a political solution to the Cambodian conflict, the PRK and Vietnamese police jailed at least 5,000 political prisoners in the mid 1980s.

After the 1991 PPA, the PRK security apparatus did not go away, but rather morphed into the new state security apparatus of a democratically elected government after 1993. The difference is that the state security forces changed from a communist state security under the control of the politburo of the PRK into "mixed forces" under Prime Minister Hun Sen's control in 1998, after successfully defeating the security forces of his political rival Prince Norodom Ranariddh in the July 1997 coup. The locus of power of the PRK and SOC was the military and police, and thus the Cambodian People's Party (CPP) sought to maintain these security apparatus as important institutions in the new democratic regime – a coalition government – that emerged after the UN-sponsored election in 1993. The CPP continued to dominate the security forces of the new government. According to Article 51 of the constitution of the Kingdom of Cambodia, the government adopts a policy of "liberal democracy and pluralism." Cambodia, as Article 56 stipulates, also adopts a market economic system. In 1991, the Hun Sen's government officially abandoned its commitment to Marxism-Leninism in favor of a free market economy under authoritarian government. During the transition from SOC to the Royal Government of Cambodia, formed after the 1993 elections, the CPP retained numerous posts at the local level, including those of powerful district chiefs and police. The CPP has secured a majority of ministries in the power-sharing arrangement; it controlled the bureaucracy, most of the military, and the state security apparatus; the CPP also retained entrenched power in the provinces. Law enforcement and punishment remain a state responsibility, i.e. the enforcement authorities of SOC, and other Cambodian factions in their respective territories. UNTAC's responsibility was to "promote or facilitate, but cannot replace" the state's enforcement responsibilities. UNTAC's weak and vague mandate resulted in the CPP-dominated state security forces, with most of their PRK/SOC security officers holding key positions in the new government.

The royalist party FUNCINPEC, which won the first democratic elections in 1993, became fractured from within and weak by 1995, and failed in its attempt to build up its own security forces to counter the CPP domination. Cambodia's first prime minister Prince Norodom Ranariddh was outmaneuvered by second prime minister Hun Sen, who then dismantled security forces under FUNCINPEC after the July 1997 coup. The FUNCINPEC, as biographer of King Sihanouk Julio Jeldres put it, "operated since its inception more as a royal court than a political party [...]. The courtier's style, however, is not likely to be of much help in a power struggle against the hard-bitten cadres of the CPP." In protest against the results of the 1993 elections, Hun Sen accused the UN and foreign countries of engineering a conspiracy of

massive electoral fraud, which had deprived his party of victory. This was followed by the CPP hard-liners' attempt in July 1994 to stage a secessionist coup, led by Prince Norodom Chakrapong and Sin Song, a former SOC Minister of Interior. This forced Prince Norodom Ranariddh, head of the FUNCINPEC, to make compromises with the CPP in the form of a CPP-FUNCINPEC coalition government, which set the conditions for a power struggle and eventually a violent coup in July 1997 by the Hun Sen faction within the CPP. In retrospect, the failure to dismantle the security forces of former PRK/SOC was partly due to UNTAC's lack of political will and clear and enforceable mandate.

UNTAC's mission was not aimed at lustration of the former PRK/SOC security apparatus, and rather relied on their cooperation to maintain social order. In fact, the UNTAC Civilian Police Component was ineffective, under-staffed, and widely perceived as incapable of disciplining SOC generals for their violation of human rights. Under the 1991 PPA, UNTAC had the responsibility for "the investigation of human rights complaints, and, where appropriate, corrective action." The head of UNTAC Yasushi Akashi interpreted "corrective action" to be largely limited to actions specified in the PPA, such as the dismissal or transfer of government officials. In reality, UNTAC's enforcement of human rights was limited to the use of threats to remove some of the government leaders from their authority. In 1994, senior CPP military intelligence officers were reportedly continuing to conduct a reign of terror in western Cambodia a year after UNTAC's departure. On the military side, the PPA had assumed cooperation on the part of the SOC. However, in 1992, when the Khmer Rouge began violating the PPA, the SOC also became un-cooperative. As a result, the UNTAC was unable to supervise and control the SOC's military and police. The PPA failed to bring peace to Cambodia, and the Royal Government of Cambodia plunged into a civil war with the Khmer Rouge rebels until 1998 when Prime Minister Hun Sen put an end to that civil war with his "Win-Win" policy.

In 1996–98, Hun Sen initiated his own style of conflict resolution and war termination strategies, known as the "Win-Win" Policy, which offered former Khmer Rouge soldiers and their commanders three guarantees, namely personal security from prosecution, positions within the government, and individual ownership (home and farm land). Notably, a number of Hun Sen's most trusted generals today, including General Sao Sokha, who is commander of the national military police, were his ardent supporters in the July 1997 coup against Prince Ranariddh and secret negotiations with Khmer Rouge commanders to end the civil war in 1996–98. Hun Sen's "Win-Win" Policy successfully brought about mass defection and integration of former Khmer Rouge soldiers and commanders into the Cambodian society. His policy terminated the Khmer Rouge political and military organization and put an end to the bloody civil war in Cambodia, which UNTAC failed to deliver.

Hun Sen's "Win-Win" Policy not only put an end to the civil war in 1998, but has also fostered national reconciliation and economic development in the former battleground regions. Former Khmer Rouge officers were given military posts within the RCAF, and administrative positions at the commune, district and provincial levels in regions they previously controlled such as Pailin, Malai, Samlot, and Anlong Veng. Combined with the UN-backed trials of the top surviving Khmer Rouge leaders for the eleven years from 2006 to 2017, Hun Sen's amnesty-for-peace model certainly defines Cambodia's unique transitional justice experience after the 1991 PPA.

THE IMPACT OF NON-LUSTRATION ON STATE AND SOCIETY

The state security apparatus from 1994 to 2013 was dominated by a small, cohesive and privileged organization made up of former PRK/SOC military and police officers loyal to strongman Hun Sen. This elite security organization is nearly defection-proof; the social status within this organization and members' close ties to the leader (Prime Minister Hun Sen) makes it very difficult for any members to defect. Prime Minister Hun Sen has used material rewards or sanctions to get every member to toe the organization's line. Hun Sen ostracized his recalcitrant generals and invited the cooperative ones into the inner circle. Prime Minister Hun Sen is first and foremost a military commander. As sociologist Daniel Bultmann, who specializes in Cambodian military culture, succinctly observes: "The strongman's subordinates were organized in concentric circles according to their degree of loyalty and trustworthiness, with intimates held close and always in sight. A strong man promoted and rewarded only those who were trusted and close, those who proved their loyalty by bravery in many battles for him – be it at combat operations or the 'home front'". For instance, in 2009, Hun Sen removed General Ke Kim Yan, who was long-time loyalist of Cambodian People's Party President Chea Sim and Interior Minister Sar Kheng, from the post of Commander-in-Chief of the RCAF. Hun Sen then promoted his loyalists General Pol Saroeun, General Kun Kim and General Meas Sophea to the posts of Commander-in-Chief and Deputy Commander-in-Chief. Hun Sen had his loyalist General Sao Sokha as the commander of the military police, General Hok Lungdy, and now, General Neth Savoeun as Chiefs of the national police, and Hing Bun Heang as commander of his bodyguard unit. With the widely condemned July 2018 elections in which the only political opposition was banned from participating, Hun Sen installed his two sons and son-in-law in charge of all the top spy agencies within the state security forces.

From 1998 to 2018, the control over the state security apparatus shifted from Prime Minister Hun Sen's trusted generals to his family in his quest of absolute power in Cambodia. Over the past decade, *Oknha*, a business elite class (at least 700 members) with close tie with the Prime Minister's family, has engaged in sponsoring units of security forces, adding another layer of patronage between corporate interests and the state security forces. In February 2010, the government passed a sub-decree enshrining the *Oknha*-RCAF relationship in which wealthy business elites can donate to security force units in what Defense Minister Tea Banh once called "a culture of sharing and distributing" to the nation between private institutions and RCAF. For instance, a number of *Oknha* including Ly Yong Phat and Kith Meng reportedly contributed significant funding to the Prime Minister's Bodyguard Unit.

As he prepared to eliminate the main opposition party, the Cambodian National Rescue Party (CNRP) in the run-up to the July 2018 elections, Hun Sen elevated his sons, son-in-law, and nephew-in-law to top positions in the security forces. The results of the 2013 elections and the 2017 commune elections showed that the CNRP was getting close to defeating the ruling CPP in a free and fair election. By promoting his own family members to the top positions of the state security apparatus and the army before the one-sided elections of July 2018, Hun Sen has established firm control over the state security apparatus. From 2014 to 2018, as Hun Sen's fear of losing the election and contemplated a bold move to dissolve the opposition, he made a final move to ensure

that this important organization is controlled by his family. Before the 2018 elections which the CPP won all national assembly seats, his two sons, Hun Manet and Hun Manith became the heads of counter-terrorism and military intelligence at the Ministry of Defense and son-in-law Dy Vichea serve as director of the central intelligence of the national police at the Ministry of Interior. His third son, Hun Many, is a colonel in the prime minister's bodyguard unit. In 2017–18, Hun Sen's sons and son-in-law are groomed to take over the top positions of the armed forces and the state security apparatus as a number of his top generals stepped down to assume their new roles as National Assembly representatives. The kinship tie becomes of prime importance in Hun Sen's security apparatus he continues to primarily depend on, as he would expect to face a legitimacy crisis and possible sanctions by the Western democracies after the flawed July 2018 elections.

LESSONS LEARNT

One important lesson from Cambodia's democratic transition is that the security apparatus from the communist regime morphed into the newly democratic regime, setting the stage for these spoilers to undermine the democratic process itself. The absence of lustration policies allowed former security officers from the communist regimes (PRK/SOC), who are familiar with popular repression, to continue to dominate the state security apparatus of the new coalition government after the first free and fair elections in 1993. UNTAC's reluctance to ban former communist security officers from assuming offices in the new democratic government is a missed opportunity, and has stifled Cambodia's democratic process over the next two and a half decades. Some of the PRK/SOC security officers have been promoted to top positions within the state security apparatus after 1993, members of the ruling party CPP's Central Committee, and privileged status within Prime Minister Hun Sen's inner circle. They have helped Hun Sen avert danger and crush his political rivals during the most perilous and chaotic period from 1994 to 1998. In the run-up towards the July 2018 elections, they backed Hun Sen's plot to get rid of the only viable political opposition, the CNRP, in an attempt to put an end to Cambodia's experiment with liberal democracy. In Cambodia today, a non-partisan state security apparatus does not exist, and in its place is a concentric structure of symbiotic relationship between security forces, business and political elites, with Prime Minister Hun Sen as its sole arbitrator. And Prime Minister Hun Sen has China as a reliable great power friend to back his regime.

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CEVRO

LUSTRATION

Pavel Žáček

INTRODUCTION

Lustration, originally an internal technical term of the Czechoslovak secret police, has gradually became a socio-political umbrella term including legislation and power procedures of the new democratic power, with the aim of breaking down the system of the totalitarian nomenclature. It was not a revolutionary revenge of political prisoners, but a legal instrument protecting the high representatives of the state and its institutions against the representatives and officers of ideological and repressive organisations of the communist regime.

HISTORICAL BACKGROUND

The leaders of the Communist Party of Czechoslovakia ensured keeping the totalitarian power and control over the individual state bodies and political and social institutions during their rule mainly via the system of cadre nomenclature used by the relevant party body to approve staffing of the key functions at all levels (federal, national, regional, district, sub-district).[1] From the beginning of the Velvet Revolution in Czechoslovakia, i.e. from 17 November 1989, the key problem of the opposition was how to achieve the departure of representatives of the communist regime – or persons approved by the communist regime – from important political, state and later even economic positions. It was only later that preventing persons oriented on the support of the totalitarian regime from returning to high state and social functions became the main requirement – directly related with the question of national security.

At first, the student movement required only "*an immediate punishment (…) of all persons responsible (…) for initiating the Prague massacre…*"[2] After its creation, the Civic Forum declared a request demanding the resignation of all members of the Central Committee of the Communist Party directly linked with the preparation of the occupation by the Warsaw Pact armies in August 1968, furthermore responsible for "*devastating all parts of the social life for many years.*" Besides the members of the highest political leadership, the Federal Minister of the Interior, Lieutenant General František Kincl, was also required to step down from his function, as he was responsible *for all the interventions* of the communist police in the last months of the regime.[3] The democratic initiative extended the requirements of the opposition to "*a quick resignation of the Czechoslovak government…*"[4] Ten days after the beginning of the revolution, the Civic Forum formulated a requirement to dissolve the People's Militias, the armed unit of the Communist Party.[5]

In the first eight days of December 1989 and on the order of the Federal Ministry of the Interior, the State Security (StB, the communist secret police) destroyed tens of thousands of operative files on the surveillance of both Czechoslovak citizens and foreigners.[6] Meanwhile, the Civic Forum together with the Public Against Violence movement declared that "*the nomenclature has to be abolished at all levels and in all departments.*"[7] At the same time, both opposition movements published a request that the two highest heads of the General Prosecutor's Office must be removed from their office.[8] In mid-December, the opposition leader Václav Havel declared: "*However, it is true that the totalitarian system was shielding itself by the Communist Party, and therefore, all the Communists bear a higher responsibility for the decadent situation our country is now in.*"[9]

On 22 December 1989, the Coordination Centre of the Civic Forum suggested to the government to immediately stop the activities of the secret police and dissolve the units of the State Security oriented "*on the surveillance of activities of citizens and civic activities.*" Furthermore, it demanded the dissolution of the "special departments or units" creating networks of "*informers for citizens' surveillance and reporting on their activities.*" Besides the staff changes in these units, the "*existing activities of each individual officer of the State security*" were to be examined. The communist secret police was designated as a harmful gangrene. "*Purification of our country from this gangrene is an extremely complex, but necessary step which must be carried out immediately.*"[10]

A few days later, the Coordination Centre of the Civic Forum changed its mind and decided not to carry out the immediate dissolution of the State Security under the existing circumstances. *All* its *dangerous sectors* were to stop their activities; the analysis was to be carried out in order to evaluate the state of the security apparatus on the basis of which a "*new state security and defence system*" would be created.[11]

After staff changes in the Federal Ministry of the Interior, the reorganisation and abolishment of the State Security, the new counter-intelligence service – Office for the Protection of the Constitution and Democracy – started the reconstruction of agency networks, and, on the basis of requests made by individual constitutional officials, investigated the Register of the former State Security to find out who was a collaborator of the communist secret police (vetting). Consequently, on 22 March 1990, the Minister of the Interior Richard Sacher ordered the vetting of all deputies of the Federal Parliament, both Parliaments of the two republics and members of all the three governments.

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1 Comparison Vladimíra Hradecká, František Koudelka, *Kádrová politika a nomenklatura 1969–1974*. Praha: ÚSD AV ČR, 1998; *Rudá nomenklatura*, Praha: Vydavatelství GMA 91, 1992.

2 Meaning the student demonstration on 17 November 1979, brutally suppressed by the communist security service. *Deset pražských dnů. 17.–27. listopad 1989. Dokumentace*. Praha: Academia, 1990, 31–32.

3 Ibid., 47–48, 248, 326.

4 Ibid., 90.

5 Jiří Suk, *Občanské fórum. Listopad–prosinec 1989*, Volume II – documents, Brno : Doplněk, 1998, 34.

6 Pavel Žáček, "'Můžou přijít, jsme hotovi…' Tzv. Lorencova 'skartace' z prosince 1989 v dokumentech", in *Paměť národa*, 2007, (0), 28–41.

7 Suk, *Občanské fórum*, 48

8 Ibid., 103.

9 Ibid., 245.

10 Ibid., 274–275.

11 Ibid., 291.

FORMS OF PROTECTION OF THE NEWLY ESTABLISHED CONSTITUTIONAL, POLITICAL AND ECONOMIC STRUCTURES

After an agreement with President Václav Havel, the Minister of the Interior issued an instruction by which he allegedly wanted to prevent the vetting of the President of the Republic, members of the federal and national governments, deputies of the federal and nations' Parliaments and leaders of the political parties, in order to "*immediately ensure the stability of the political development.*" Consequently, he even stopped *all the lustration processes* and provision of archive documents.[12] However, such provisions of the Minister – particularly the lustration of Members of Parliament – provoked an extensive political crisis. The fight for the State Security archives and their content touched the highest political functions, including the President of the Republic.

On 8 May 1990, the president of the Security and Safety Committee of the Federal Parliament Ladislav Lis who criticised the insufficient changes in the Federal Ministry of the Interior, declared: "*If we wish to remove the influence of the Communist Party on the activities of the Ministry of the Interior, we have to remove the apparatus that ensured its unlimited power.* (…) *The aim is to destroy the system of the State Security which proved to be the support of the totalitarianism of the Communist Party and to have fascist tendencies.*"[13]

Under the pressure of the situation, on 21 May 1990 the Czechoslovak government authorised the lustrations of candidates of individual political entities into Legislative Assemblies, provided, however, that they agreed with it and that the result would be handed over to the management of the party that asked for the vetting. Inconsistency and extra-judicial handling of the lustration data and sometimes of archive files of the State Security culminated shortly before the first free elections when the former cooperation of political parties or leaders of movements with the communist secret police was made public (Bartončík and Budaj affairs).[14]

LEGAL REGULATION OF LUSTRATIONS

In fact, from November 1989 to September 1991, the post-communist political elite was addressing the issue of whether and how the new democratic constitutional establishment should protect itself from the residues of the communist totalitarian regime. Since the Communist Party of Czechoslovakia was not abolished at the turn of 1989/1990, all the attention focused on the Federal Ministry of the Interior and structures managed by it. At the same time, the form of the possible legislation and what it should stipulate was being discussed.

Due to many political affairs of the post-communist power linked with the purification of the central state bodies, political life and public administration, revealing the specific activities of the highest communist nomenclature, publicizing crimes and violations of human rights by its power pillars (particularly by the State Security), using mass agency and an intelligence network of the soviet type to control the state and society, in the period of 10 to 16 months after the Velvet Revolution to the conclusion that it was necessary to adopt the legal regulation to protect what was a very fragile democratic constitutional arrangement regime at that time.

After a huge public discussion and on the basis of the findings of the parliamentary investigation commission of the Federal Assembly of the Czech and Slovak Federative Republic (ČSFR) to clarify the events of 17 November 1989, the federal and national parliaments adopted what we called "lustration acts" in order to legally change the existing high representatives of the state apparatus who were persons compromised by their service and cooperation with the communist totalitarian power between 1948–1989 and to settle the conditions of staffing certain functions.[15]

On 4 October 1991, the Federal Parliament finally adopted the Act No. 451/1991 Sb., *on determining some further prerequisites for certain positions in state bodies and organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic*, relating to certain positions staffed by election, designation or appointment in the bodies of the state administration, in the army,[16] in the information services, the police force, the Office of the President, Office of the Parliament, Government Office, Office of the Constitutional and Supreme Court, in the Presidium of the Academy of Sciences, in national radio and television, press agencies, and heads of organisations and chief executives in state enterprises and state organisations, joint stock companies where the state is the majority shareholder, foreign trade corporations, state railways, state funds, state monetary institutions and in the state bank. In universities, the act applied to positions of elected academic officials.

Similarly, the act also determined some further prerequisites for the positions of a judge, lay judge, prosecutor, prosecution investigator, notary public, state arbiter and for persons serving as trainee judges, trainee prosecutors, trainee notaries public and arbitration trainees. It also determined the conditions of reliability to allow the operation of some licensed businesses (sec. 1).

A prerequisite for the positions mentioned above was that during the period from 25/2/1948 to 17/11/1989, the citizen was not a member or an officer of the Communist Party or government nomenclature, in the hierarchical order specifically of:

a/ the Central Committee of the Communist Party of Czechoslovakia or the Central Committee of the Communist Party of Slovakia, the Bureau for the Management of Party Work in the Czech Lands (Committee for the Management of Party Work in the Czech Lands), a Secretary of a body of the Communist Party of Czechoslovakia or the Communist Party of Slovakia from the level of a District Committee or an equivalent committee upwards, a member of the presidium of these committees, except for those holding these posts only in the period from 1/ 1/ 1968 to1/ 5/ 1969 (i.e. during the Prague Spring and after),

b/ the National Front Action Committee after 25/ 2/ 1948, vetting commissions after 25/2/1948 or vetting and normalization commissions after 21/ 8/ 1968,

c/ the People's Militias,

12 Pavel Žáček, "'Sachergate': první lustrační aféra. Nesnáze postkomunistické elity (nejen) se svazky Státní bezpečnosti", in *Paměť a dějiny*, 2007, (1), 63–64.

13 Ibid., 76–77.

14 Lubomír Kopeček, *Éra nevinnosti. Česká politika 1989–1997*, Brno: Barrister & Principal, 2011, 55–57.

15 Comparison Ibid., p. 114–121.

16 In the Czechoslovak Army and in the department of the Federal Ministry of Defence, the act applied to positions with the highest achievable ranks of Colonel and General and the positions of military attachés (sec. 1 (2)).

d/ the system of structures from the level of a District Committee to the Central Committee of the Communist Party of Czechoslovakia (or Communist Party of Slovakia) in a department in charge of the political running of the National Security Corps,

e/ a student at Felix Edmundovic Dzerzinsky University of the Council of Ministers of the USSR for officers of the State Security Service, the University of the Ministry of the Interior of the USSR for officers of the Public Security Service, the Political College of the Ministry of the Interior of the USSR, or a postgraduate or a participant in courses lasting longer than 3 months at these schools.

f/ an officer of the State Security Service,

g/ registered in the State Security Service's files as a resident, agent, lent apartment holder, conspiracy apartment holder, informer or ideological collaborator of the State Security Service.[17]

At first, the Minister of Defence could have pardoned the membership of the State Security, if an application of the prerequisite "*disrupted an important security interest of the state"* and at the same time, "*objective of this Act was not endangered"* (sec. 2). The facts referred to in relevant sections of the act were proved by a certificate issued by the Ministry of the Interior or by an affidavit. (sec. 4)

In justified cases, the Minister of the Interior and the directors of the intelligence service and the chief of the police force could have pardoned the prerequisite to function, "*if its application disrupted an important security interest of the state"* and at the same time "*the objective of this Act was not endangered"* (sec. 3).

Before their election, designation or appointment to positions the prerequisites of which are determined in this act, the citizens submitted the certificate issued by the Ministry of the Interior and an affidavit (sec. 5).

If the citizen failed to satisfy the prerequisites for the position, his or her employment was to be terminated by a notice of dismissal served by the organization concerned within 15 days of the date when the organization learnt this fact, unless the citizen had been assigned to another position. The same procedure applied, "*if the citizen has refused to make an affidavit [...] or if the affidavit is not truthful"* (sec. 14). If a prosecutor or prosecution investigator fails to satisfy the prerequisites for his or her position, this fact was a reason for terminating the employment of the citizen (sec. 15). The competent body could even file a motion to remove the judge or lay judge from his or her position (sec. 16). Within two months of the delivery of the finding, the citizen could ask the competent regional court to review its content, as well as the invalidity of the termination of the employment (sec. 18)

The act stipulated that the publishers of press periodicals and licensed operators of radio and television broadcasting, news agencies and audio-visual programmes "*may for themselves or for their employee who is involved in forming the content production of the above media, upon his or her previous written consent,"* apply to the Federal Ministry of the Interior for issuing a certificate. Similarly, the presidents or equivalent representatives of political parties, political movements and associations "*may for themselves or for a member of the management of their political party, political movement or association, upon his or her previous written consent,"* apply for issuing a certificate or for issuing a finding (sec. 21). One of the last sections of the act forbid publishing any facts contained in the certificate or finding, or publishing the certificate or finding itself, as well as publishing any of the documents supporting the issuance "*without previous consent from the citizen"* (sec. 19).

The time factor is a logical limitation of the effect of the act: the provisions shall not apply to citizens of the Czech Republic born after 1 December 1971, i.e. they apply only to citizens who are over 18 years of age on 1 December 1989 (sec. 20).

The Act No. 451/1991 Sb. became effective on the date of promulgation and it should become ineffective in 5 years, i.e. on 31 December 1996. In 1992, both parliamentary chambers of the republics adopted "small lustration laws" (No. 279/1992 Sb.) relating to officers of the Police of the republic and officers of the Penitentiary Service of the republic, that determine very similar prerequisites for officers of both security services on the same principle.[18]

To implement the lustration laws, the Ministry of the Interior carried out investigations in its archive (former Central Operative Register of the State Security, today's Security Service Archive), to confirm or exclude that the vetted person was a member or officer of the State Security or a secret associate of the State Security between 1948–1989. Data proved by the affidavit may be verified partly in the Security Service Archive (political bodies of the security service, students of security training in the Soviet Union), or in the National Archive (officers of the communist nomenclature in the former cadre registers of the Communist Party of Czechoslovakia) or in state regional archives (action committees, screening commissions).

CONSTITUTIONAL REVIEW

On 26 November 1992, the Federal Constitutional Court issued its decision in which it concluded its finding that "*it is not only a right, but an obligation of a democratic state to promote and protect the principles"* which it was based on, and therefore, it cannot remain inactive "*in a situation when leading positions at all levels of the state administration, economic management, etc., are staffed according to totalitarian system criteria that are nowadays unacceptable"* (nomenclature system). At the same time, the Court was supposed to seek to abolish the former unjustified preference of one group of privileged citizens based exclusively on the principle of a membership of the totalitarian political party over the rest of the other citizens for which the obviously unlawful preference undoubtedly represented oppression and discrimination.

The Constitutional Court ruled that in state and public bodies as well as in places of work linked with the security of the state democratic societies, it requires complying with certain state-citizen prerequisites characterised as "*loyalty with democratic principles which the state is based on."* In comparison with the situation under the totalitarian regime when all leadership positions were staffed at all levels not only in contradiction with democratic principles and international standards but also in contradiction with the national law itself, the large lustration law covered only a very limited circle of workers, exclusively in power, administrative and economic apparatus, or in licensed

17 Pavel Žáček, "Lustrační zákon po dvaceti letech", in *Paměť a dějiny*, 2011, (4), 127.

18 Pavel Žáček: *Lustrační zákony v České republice. Aplikace zákonů č. 451/1991 Sb. a č. 279/1992 Sb.* See http://www.ustrcr.cz/data/pdf/konference/20let-pote/twenty-years-after-zacek.pdf

businesses, which could be a source of certain risks as far as the protection of a democratic system and its principles, state security or protection of state secrets are concerned, or it covered positions enabling their holders to openly or secretly influence the development of society and the desirable execution of functions of individual bodies or organisations.

In contrast with the totalitarian system which was based on an immediate objective and had never been bound by legal principles, let alone by constitutional ones, the democratic state is built on completely different values and criteria. Therefore, we cannot understand the large lustration law as "*a revenge on individual persons or groups of persons or as discrimination against persons who, contrary to generally recognized principles, violated the fundamental human rights and freedoms, either on their own or in cooperation with the repressive bodies or through them.*"

The Constitutional Court emphasised that "*each state, the more so a state that was forced to put up with fundamental rights and freedoms violations by the totalitarian power for more than forty years, has a right to establish a democratic system and to apply such legal provisions to avert the risk of subversion or a possible relapse of the totalitarian system, or at least to reduce them.*"

The Constitutional Court was persuaded that because of these reasons, among others, it was not possible to deny the state stipulating in its national law the conditions or prerequisites for the execution of management or other positions with decisive power, taking into account the criteria of its own security and citizens' security and ensuring its future democratic development.

After the fall of the communist regime, the state which was being built upon the rule of law based on the value discontinuity with the totalitarian regime naturally could not be rooted in a different system of values, not even in a situation where the formal normative continuity of the legal order allowed for it. "*In fact, respecting the continuity with the old-value system would not be a guarantee of legal certainty, but on the contrary, it would question the new values, endanger the legal certainty in society and shatter the citizens' trust in the credibility of the democratic system.*"

The Constitutional Court ruled that the determination of some further prerequisites for certain positions in state bodies stipulated in the large lustration law is essentially an admissible act, both on the basis of the constitutional standards and in compliance with international legal obligations. As a justification, the court referred to similar provisions adopted by other post-totalitarian European states that understood these "*as a legitimate tool, the purpose of which is not to endanger the democratic character of the constitutional establishment and the system of values of the constitutional state built upon the rule of law, or the fundamental rights and freedoms of the citizens, but their protection and reinforcement.*"

The Constitutional Court also looked at the argument of the possible retroactivity of the lustration law, and concluded that retroactivity had not been applied at all. The law did not declare the occupation of certain positions in the past as illegal or legally punishable facts or even points of facts of criminal offences and it did not link any legal consequence to it.

Similarly, it rejected the objection that it was a general punishment according to formal affiliation to certain categories, especially in cases that, in compliance with the politics of the totalitarian regime, it acted in line with the power apparatus and its repressive forces.

However, the Constitutional Court based its decision on the time limitation of the law "*to quite a short period in which it envisages the completion of the democratic process*" (by 31/ 12/ 1996).[19] Yet, Czech legislators concluded that this period of "completion of the democratic process" is too short and they extended the effect and force of the law indefinitely. With regard to the active role of the anti-system Communist Party of Bohemia and Moravia in the Czech political system, its stuffing policy and relativisation of totalitarian mechanisms and crimes of the Communist regime before November 1989, the lustration law continues to fulfil its important role.

LESSONS LEARNT

Lustration laws in the Czech (Slovak) conditions became a constitutionally compliant solution for the system to overcome the consequences of the nomenclature apparatus, an essential solution to the discontinuity of staffing in the state governance positions, to the protection of high representatives in public administration and partly also in the economic or financial sphere, to the prevention of many affairs that occurred in other post-communist countries (Poland, Hungary, Slovakia), the determination of conditions to occupy certain positions and an important support for the continuous creation of the rule of law.[20]

The preventive nature of the law consists in the fact that an essential part of the categories (nomenclature of the Communist Party of Czechoslovakia, membership in People's Militias, etc.) is verified exclusively by an affidavit. This is proved by the number of applications handled since 1991: out of the total number of applications 473,284 applications, pursuant to Act No. 451/1991 Sb., only 10,255 were positive ones, and pursuant to Act No. 279/1992 Sb., only 476 out of 24,619 applications were positive ones.[21]

One of the imperfections of this legislation is the fact that it does not apply to all of the power supports of the communist totalitarian regime, for example it leaves out the Military Counter-Intelligence members of the Czechoslovak People's Army, officers of the Border Guard or Intelligence Administration of the General Staff of the Czechoslovak People's Army. Similarly, it does not differentiate between the officers of the Public Security, ideologically transformed police departments some of which exceeded the acceptable level of collaboration while serving the totalitarian regime.[22]

A fundamental change was brought about by the adoption of the Act No. 250/2014 Sb., on Amending Acts related to the adoption of the Act on State service on 1 January 2015: the act stipulated that the "large lustration law" does not apply to government Ministers and Minister Deputies. This political decision, enforced in addition because of one specific politician – the leader of

19 Comparison with the decision of the Constitutional Court of the Czechoslovak Federal Republic (full court) from 26/ 11/ 1992, file No. Pl. ÚS 1/92 in: http://www.abscr.cz/data/pdf/normy/nalez-us-pl-1-1992.pdf

20 Pavel Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*, Praha: CEVRO–LKA, 2015, 25.

21 Comparison http://www.mvcr.cz/clanek/lustrace-29644.aspx?q=Y2hudW09MTM%3d; Roman David, *Lustration and Transitional Justice. Personnel Systems in the Czech Republic, Hungary, and Poland*, Philadelphia: University of Pennsylvania Press, 2011, 76.

22 Compare Pavel Žáček, *Boje o minulost. Deset let vyrovnávání se s komunistickou minulostí – pokus o předběžnou bilanci*, Brno: Barrister & Principal, 2000, 53–54.

a political movement – totally disrupted the existing requirements for the highest civil servants to have a clean record.

RECOMMENDATIONS

The Czechoslovak (Czech) experience confirms that the most convenient procedure of protecting a society (state) in transformation is to remove the information systems – as well as the file agenda linked to them – of the former secret police out of the competences of the power apparatus.

On the basis of a political consensus, expressed by the adoption of the law, it is necessary to create an independent institution managing the original data of the secret police. Then, on the basis of their analysis, it is possible to assess the way of using them for vetting, or rather for the purification of the public administration. The status of classification of operational documents that are not absolutely necessary for the further activities of the new security apparatus and intelligence services will be gradually removed.

With regard to the legitimate interests of the public, very eager to uncover the classified practices of the totalitarian regime, it is appropriate to combine the non-public system of lustrations with opening the archives and making them accessible.

Moreover, the Czech and Slovak experience confirms that the 5-year period of validity of lustration laws is too short to ensure that people compromised by their participation in the totalitarian regime do not return back to their offices.

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MEMORY OF NATIONS

Democratic Transition Guide

[The Estonian Experience]

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CEVRO

LUSTRATION

Toomas Hiio

INTRODUCTION

Estonia's independence was restored on 20 August 1991. In September, Estonia became a member of the United Nations together with the other Baltic States. Most of the world's countries recognise Estonia as a state that was created in February of 1918 and the independence of which was restored in 1991 (legal continuity). Russia and a number of other countries consider Estonia to be a state that was born in 1991 due to the collapse of the Soviet Union.

In August of 1991, the Constitutional Assembly, formed on the basis of parity by members of two political forces (30 + 30), the Supreme Council of the Republic of Estonia elected by residents of Estonia in 1990, and the Estonian Congress representing only Estonian citizens by legal succession, drew up a new constitution that was approved in a referendum held in June of 1992 and went into effect on 3 July 1992. Monetary reform was also implemented in June of 1992, in which Estonia abandoned the Soviet rouble, which was rapidly decreasing in value, and adopted the Estonian kroon with its exchange rate fixed at 8:1 Deutschmarks.

On 20 September 1992, the country's parliament, the 7th Riigikogu with 101 members, was elected in accordance with the new constitution. Political parties that set rapid integration with the West (returning to Europe, as it was referred to back then) as their objective won the election. Mart Laar, the young leader of the patriotic Pro Patria (Fatherland) Party oriented towards the West, formed the government. In October of that same year, Lennart Meri was elected president. As a film director and writer during the Soviet era, and as Minister of Foreign Affairs in the transitional government (1990–1991), Meri had already worked in the name of upholding the idea of Estonia belonging to the West and Estonia's return to Europe. Estonia is a parliamentary republic, but until 2011, the President was the supreme commander of national defence of Estonia, from which derived his right to appoint the Commander of the Defence Forces to his post.[1]

A course of radical reform began with the aim of quickly joining the European Union and NATO. One of the election slogans of Mart Laar's party was "Let's make a clean sweep!" Its poster depicted a University of Tartu Professor of Estonian History sweeping a yard with a broom, which was supposed to symbolise the aim of quickly doing away with the Soviet legacy. Yet Pro Patria's political opponents interpreted this primarily as the aim to purge the public sector of Soviet era officials and former members of the Communist Party. Many young people were hired in the public sector once Pro Patria was in power. This was particularly conspicuous in the Ministry of Foreign Affairs and the Ministry of Defence, which were built up from scratch. There was no Ministry of Defence in the Estonian SSR, and the small staff of its Ministry of Foreign Affairs primarily fulfilled tasks related to protocol when one or another foreign delegation visited the Estonian SSR.

In 1996, the 8th Riigikogu, which was elected in 1995, adopted the main orientations of Estonia's national defence policy, in which the objective was set for Estonia to become a full member of NATO and an associated member of the Western European Union (WEU).[2]

The last Russian troops, the successors of the former Soviet Army, withdrew from Estonia on 31 August 1994.

ESTONIAN SYSTEM OF VETTING

Only a few post-communist countries succeeded in implementing lustration in relation to the party that was formerly in power and its officials. In Estonia as well, lustration was limited only to purging cadre employees and secret collaborators of the former intelligence and state security service of the Soviet Union – the USSR Committee for State Security (KGB) – from official positions of greater responsibility in the Republic of Estonia, and not allowing them to work in such positions.

Almost no files of the KGB's network of agents ended up at the disposal of the Republic of Estonia. Thus for the most part, it is not possible to rely on the former state security archives for background checks in Estonia.

In July of 1992, immediately after the new constitution went into effect and before the parliamentary election, legislation was passed concerning the requirements and procedure for taking an oath of conscience. The legislation enumerates the posts for which candidates are required to take the oath of conscience:

"[…] a candidate standing in an election of the President, of the Riigikogu or of the council of a local authority, or a person who seeks the position of Prime Minister, minister, Chief Justice of the Supreme Court, justice of the Supreme Court, judge, Chancellor of Justice, Auditor General, President of the Bank of Estonia, Commander or Commander-in-Chief of the Defence Forces, or any other elected or appointed position in an agency of the national government or a local authority […]".[3]

A person taking the oath of conscience affirms that he "has not been in the service or worked as an agent of the state security organs or armed forces intelligence or counterintelligence of states that have occupied Estonia, and has not participated in prosecuting and repressing citizens for their political convictions, disloyalty, class affiliation or for having been in the civil service or served in the defence forces of the Republic of Estonia".[4]

In February of 1995, the Riigikogu passed the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act.[5] This act obligated individuals who had

1 From 2011 onwards, the Government of the Republic of Estonia appoints the Commander of the Defence Forces to office.

2 Approval of the main orientations of Estonia's national defence policy, 7 May 1996, https://www.riigiteataja.ee/akt/13009161 (only in Estonian).

3 Act on Procedure for Taking Oath, § 1, https://www.riigiteataja.ee/en/eli/520052014002/consolide (last accessed on 24 July 2017).

4 Ibid.

5 Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or ►

collaborated with the state security services of states that have occupied Estonia to register themselves at the Estonian Internal Security Service within one year and to submit a written confession concerning their service or collaboration with the state security service of a state that has occupied Estonia. The names of those individuals who had not confessed their service or collaboration within one year, concerning whose collaboration or service the Estonian Internal Security Service had sufficient information, were publicly disclosed in the *Riigi Teataja* (State Gazette, official journal). At the present time, the names of more than a hundred individuals have been disclosed.

Service in the state security organ of a state that has occupied Estonia, or collaboration with it, does not allow a person to apply for positions enumerated in the oath of conscience. The task of the Estonian Internal Security Service is to monitor that such persons will not apply for such positions: "The Internal Security Service is required to forward the information which contests the oath taken by the person if the person has not contested the notice of the Internal Security Service specified in subsection 8 (2) of this act during the period of time provided for in subsection 8 (4) or after it has been established by a court decision which has entered into force that the person has served in or co-operated with security or intelligence organisations to the Office of the Prosecutor General who has the obligation to contest the oath in court pursuant to the Prosecutor's Office Act and the Republic of Estonia Act on Procedure for Taking Oath."[6]

In addition to the oath of conscience, other measures were also employed, for instance as a rule, former KGB personnel living in Estonia who were not citizens were not issued permanent residence permits, to say nothing of citizenship, so that if a security risk came to light, it would be possible to revoke the right of the persons involved to remain in Estonia.

INTERNAL SECURITY AGENCIES

In the Soviet Union, the Ministry of Internal Affairs was a USSR-wide ministry to which the ministries of internal affairs of the union republics were subordinated. The Ministry of Internal Affairs was an agency with broad jurisdiction. In addition to law enforcement organs (the militia) and fire fighting, prisons and a number of other agencies were subordinated to the Ministry of Internal Affairs. The Ministry of Internal Affairs had its own armed forces – the so-called interior troops. A battalion of interior troops was also stationed in Tallinn. It was manned by conscripts who were mostly from outside of Estonia. In the Soviet Union, the KGB, the Committee for State Security which had the rights of a state committee since 1978, was an independent organ of the central government, fulfilled the tasks of domestic intelligence and counterintelligence. The KGB was also a USSR-wide agency and the Estonian SSR Committee for State Security (the ESSR KGB) was its territorial subordinate division. In the Soviet Union, the Committee for State Security was also the security service of the Communist Party. As a rule, the chairman of the KGB was also a member of the Politburo of the Central Committee of the Communist Party of the Soviet Union.

TERMINATION OF THE KGB IN ESTONIA

Needless to say, the Republic of Estonia could not take over the KGB's Estonian subordinate division as its own domestic security service (a few states that were born when the Soviet Union collapsed took the former KGB as their security service). A large proportion of the Estonian SSR KGB personnel were not citizens of Estonia, and people who had served in the KGB could not be counted on to be loyal to the Republic of Estonia. There was reason to assume that they were more likely to be loyal to the Soviet Union's legal successor, the Russian Federation.

On 9 September 1991, three weeks after the declaration of independence, the transitional government formed a governmental committee, chaired by Hardo Aasmäe, for terminating the KGB in Estonia. Aasmäe was educated as a geographer. He had been a member of the USSR Congress of People's Deputies in 1989–1991 and was the mayor of Tallinn in 1990–1992. As one of the leaders of the Estonian Popular Front, he was part of the immediate circle of Edgar Savisaar, the Prime Minister of the transitional government. Work began even earlier on terminating the KGB. On 29 August 1991, the Prime Minister of the transitional government, Savisaar, and the last chairman of the Estonian SSR KGB, Rein Sillar, wrote jointly to the last chairman of the USSR KGB, Vadim Bakatin, to begin the termination of the KGB in Estonia. On 5 September, a protocol of mutual obligations was signed between the government of Estonia, the ESSR KGB, and the USSR KGB. On 9 October, a protocol of the practical measures connected to the termination of the ESSR KGB was signed. The KGB's activity in Estonia was halted at more or less the same time as the dissolution of the Soviet Union took place, on 18 December 1991. The final act was signed by the last Chairman of the ESSR KGB, Rein Sillar, Minister of State of the Republic of Estonia, Raivo Vare, and on behalf of the USSR KGB, Vyacheslav Shironin. The final act stated among other things that "measures connected to terminating the activity of the ESSR KGB have been implemented and the personnel of the ESSR KGB has been dismissed from service or transferred to continue service outside of the Republic of Estonia with the exception of 25 people, whose dismissal or transfer will be completed by 31 December 1991."

The results of the termination of the KGB caused dissatisfaction in Estonia. On 16 January 2001 in connection with the question of the right of a former KGB employee to live in Estonia, the Riigikogu formed an eight-member committee of inquiry to ascertain the facts and circumstances connected to the termination of the activity of the Estonian SSR Committee for State Security, which was meant to objectively and impartially determine the factual and legal circumstances connected to the termination of the KGB's activity.[7] The committee's report was completed in March of 2002.[8]

► Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act, 6 February 1995, https://www.riigiteataja.ee/en/eli/524042014001/consolide (last accessed on 24 July 2017).

6 Ibid, § 5 (5).

7 Formation of a committee of inquiry to ascertain the facts and circumstances connected to the termination of the activity of the former Estonian SSR Committee for State Security, 16 January 2001, https://www.riigiteataja.ee/akt/72639 (only in Estonian).

8 Available on the internet: three parts, only in Estonian: http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-i-osa?id=50920257, http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-ii-osa?id=50920258, and http://epl.delfi.ee/news/eesti/endise-ensv-riikliku-julgeoleku-komitee-tegevuse-lopetamise-lopparuanne-iii-osa?id=50920259 (last accessed 24 July 2017).

The committee identified the following problems connected with the termination of the KGB, which could still have been topical in 2002:

1/ The Estonian side did not obtain lists of KGB personnel in the course of terminating the KGB;
2/ Materials on the networks of agents and operational materials, and thousands of other KGB archival files concerning Estonian citizens were taken to Russia;
3/ Some foreign travel files (these are files that were drawn up concerning every person applying to travel abroad) went missing at the time of the termination of the KGB;
4/ The copy of the agreement signed by Raivo Vare and Vyacheslav Shironin concerning social guarantees for former KGB personnel in the Republic of Estonia was missing altogether.

The committee admittedly commended the government's work in terminating the KGB but stated that "it is nevertheless surprising that during the period of establishing the country's independence, matters connected to terminating the state security and intelligence organ of the occupying regime were not considered a top priority."[9]

THE USE OF KGB ARCHIVAL MATERIALS

Most of the KGB's paperwork was classified and was subject to the classification procedure in effect in the Soviet Union. It is known that starting in 1989, a large portion of the documents that were in the ESSR KGB's departmental archive was removed from Estonia. The authorities of the Republic of Estonia did not consider it possible to take over the ESSR KGB's central agency by force in August and September of 1991 after the restoration of the independence of the Republic of Estonia. Admittedly, however, a few local KGB departments, for instance in Tartu, were taken over. In the course of these takeovers, some KGB files that were held in local departments allegedly went missing. On 24 October 1991, in the course of organising the takeover of the ESSR KGB, an agreement was concluded concerning the procedure for handing over the Estonian KGB archival collections and other materials to the Police Bureau of the Republic of Estonia.

The KGB archival files that were in Estonia or arrived in Estonia were initially handed over to the Police Bureau of the Republic of Estonia. On 19 April 1993, the Government of the Republic of Estonia issued an order according to which the Ministry of Internal Affairs was to transfer some of the Estonian SSR KGB and Estonian SSR Ministry of Internal Affairs archival documents held in the Police Bureau's Information and Analysis Bureau Archive to the national archive system.[10]

A separate state security services archive was not established in Estonia. The files of the former KGB archive were gradually transferred to the present-day National Archives, where they are accessible for public use if restrictions arising from the protection of sensitive personal data do not prevent this.[11] Thus for instance, the use of most foreign travel files and other personal files is restricted if the persons concerning whom these files were kept are alive or if less than 30 years have passed since their death. The files affected are principally the so-called foreign travel files, or files that were drawn up concerning persons who applied for a permit to travel abroad. The use of these files is permitted for the subjects themselves of the files or with their permission, or in the event that the subject of the file is deceased, with the permission of a close relatives.

It is known that not all documents that by agreement were to be returned were actually brought back from Russia in 1991. It is also known that some documents have ended up in the hands of private individuals, including documents that have been designated for destruction. The fate of a number of foreign travel files is not known. Not many cases are known where these documents have been used to blackmail one or another individual with the threat of exposing his previous collaboration with the KGB, but such cases have occurred.

In the lustration process, KGB files were used primarily in researching crimes against humanity and war crimes. Since this material mostly covers the 1940s and 1950s, this made it possible to identify the crimes committed, the perpetrators of these crimes, the persons who gave the orders for these criminal actions, and the secret agents involved, etc. The Estonian Internal Security Service has sifted through KGB material within the framework of criminal investigation (see the chapter *Investigation and Prosecution of the Crimes of the Regime*).

The so-called foreign travel files, which could contain direct or indirect information on the collaborative ties between the individual being checked and the KGB, also developed into a separate opportunity for carrying out the lustration process. Thus for instance, information was disclosed in the media in 1997 concerning Toomas Savi, who at that time was the speaker of the Riigikogu, that in 1964 he had been referred to, in his foreign travel file, as a KGB "trustee".[12] At that time, Savi's oath of conscience was not questioned because the Estonian Internal Security Service acknowledged that there was no information at its disposal that would prove that Savi was in the service of the state security organs or intelligence or counterintelligence organs of the armed forces of states that have occupied Estonia as a staff employee or agent.[13]

Professional historians have also used foreign travel files to ascertain the KGB connections of one or another individual.

THE FORMATION OF THE ESTONIAN INTERNAL SECURITY SERVICE – THE SECURITY AGENCY OF THE REPUBLIC OF ESTONIA

The security service of the Republic of Estonia – the "Security Police" – was initially established as a department of the Police

9 Ibid.

10 Order no. 172-k issued on 19 April 1993 by the Government of the Republic of Estonia, 19 April 1993, https://www.riigiteataja.ee/akt/13091784 (only in Estonian, last accessed 24 July 2017).

11 See for example Archival Information System (http://ais.ra.ee/static/misonais_en.html), ERAF.129SM, ENSV Riikliku Julgeoleku Komitee lõpetamata uurimistoimikute kollektsioon (Collection of files of unfinished investigations of the State Security Committee of the ESSR), Ajalugu (History) (only in Estonian, last accessed on 24 July 2017), and others like ERAF.130SM, ERAF.131SM etc.

12 The "trustee" was a separate form of covert collaboration with the KGB where cooperation took place with "Soviet patriots" on a strictly voluntary basis. The nature of his connections with the KGB and the tasks he was assigned were secret.

13 "Toomas Savi seostamine KGB-ga on alusetu", in *Õhtuleht*, 21 May 1997; http://www.ohtuleht.ee/3582/toomas-savi-seostamine-kgb-ga-on-alusetu (last accessed on 24th July 2017).

Bureau on 12 February 1991, even before the formal restoration of independence on 20 August 1991. The Estonian Security Police was established as a new agency, and the vast majority of its employees had never worked in security agencies before, rather they transferred from the police, or were young people with postsecondary education hired from other areas of specialisation. A small portion of technical staff from the former Estonian SSR KGB was nevertheless taken over, which when viewed in retrospect was not justified in the case of every individual concerned.

On 21 April 1993, the Riigikogu adopted a decision concerning the formation of the independent Security Police in the administrative field of the Ministry of Internal Affairs. The Government of the Republic of Estonia appointed the commissioner of the Security Police to his post on 16 June 1993. The first commissioner was Jüri Pihl, whose background was in law enforcement and who had headed the Security Police since its inception. The Security Authorities Act went into effect on 1 March 2001, converting the Security Police Bureau from a police agency into a security agency. The Security Police retained police powers in criminal investigations.[14] A team for investigating crimes against humanity was formed in 1995 as part of the staff of the Security Police. It investigates crimes against humanity, war crimes and genocide committed during the Soviet and German occupations (1940–1991).

The Estonian Internal Security Service is the security agency of the Republic of Estonia responsible for the following functions:

- collection and processing of information for the prevention and combating of activities aimed at changing by force the constitutional order and territorial integrity of Estonia;
- collection and processing of information for the prevention and combating of intelligence activities directed against the state;
- collection and processing of information for the prevention and combating of terrorism (including financing and supporting thereof);
- protection of state secrets and classified information of foreign states, performance of security vetting;
- non-proliferation of weapons of mass destruction, conduct of proceedings of offences related to explosive substances;
- anti-corruption combat;
- conduct of proceedings of other offences within the investigative jurisdiction of the Board.[15]

CONCLUSIONS AND LESSONS LEARNT

Unlike the countries of the Eastern Bloc in Eastern Europe, Lithuania, Latvia and Estonia were occupied, therefore these countries did not have their "own" domestic security agencies during communist rule. The Republic of Estonia was restored on the basis of legal continuity as a country occupied by the Soviet Union in 1940, which in and of itself already ruled out the "growing up" of the local department of the Soviet Union's KGB to become the domestic security agency of the Republic of Estonia.

The Estonian division of the Soviet Union's KGB was terminated within a few months after the restoration of Estonia's independence. Certain social guarantees for individuals who had previously served in the KGB and remained living in Estonia were guaranteed by agreement between the USSR KGB and the transitional government of the Republic of Estonia. In return, the USSR KGB agreed to transfer to Estonia some of the KGB's archival documents concerning Estonia.

The termination of the KGB in Estonia did not take place as properly as it should have. Of course, the era in which it took place must also be kept in mind – Estonia's economic situation was catastrophic, the future perspectives of the Estonian state were unclear, and at the same time, the entire Soviet Union collapsed. Regardless of this, several tons of KGB documents concerning Estonia were successfully brought to Estonia. For the most part, these documents did not have anything to do with the KGB's activity and network of agents in Estonia from the 1960s to the 1990s but were instead of historical value. A large portion of the files brought to Estonia were the investigation files of victims of mass repressions, political imprisonments and deportation committed in the 1940s and 1950s.

The KGB's archival materials were not materials of an agency of the Republic of Estonia and they had no connection to Estonia's domestic security agencies that were built back up again starting in 1991. This is one reason why a separate state security archive was not formed in Estonia. Instead, the documents were soon transferred to the Estonian National Archives. This, but especially the unrestricted access to those documents for researchers, has fostered the research of primarily the political mass repressions of the era of Soviet occupation, and of the communist period as a whole.

Background checks, the investigation of international crimes committed in the past, and the identification of former collaborators with the state security agencies of states that have occupied Estonia are within the jurisdiction of the Estonian Internal Security Service. For the above mentioned reason – newer materials concerning the KGB's network of agents are not in Estonia – two laws have been passed for resolving these questions. Persons applying for more important official positions have to take an oath of conscience by which they swear that they have not cooperated with the state security organs of states that have occupied Estonia or participated in political repressions. Persons who have collaborated with state security organs of states that have occupied Estonia were registered on the basis of voluntary confessions. The names of whoever did not appear for registration within a year were disclosed in the *Riigi Teataja*, if their names and the fact of their collaboration had been ascertained.

The distinctive feature of Estonia's experience is that state security documents concerning persons who were in active service at the time that the independence of the Republic of Estonia was restored were for the most part not at the disposal of Estonian agencies. For this reason, the method of the oath of conscience and voluntary confession was chosen. This is not a one-hundred percent success story, but for the most part, the effect of the KGB's legacy in Estonia's domestic policy has been successfully avoided. Some individuals have nevertheless been caught and convicted for collaboration with Russia's intelligence services, whereas their collaboration had begun before 1991. The best known case is that of Hermann Simm, who was the former chief

14 See Re-establishment of the Security Police, https://www.kapo.ee/en/content/re-establishment-security-police.html (last accessed on 24 July 2017); Security Authorities Act, 20 December 2000, https://www.riigiteataja.ee/en/eli/521062017015/consolide (last accessed on 24 July 2017).

15 See Areas of activity, https://www.kapo.ee/en/content/areas-activity.html (last accessed on 24 July 2017).

of the Estonian Defence Ministry's security department and was sentenced to 12.5 years in prison in 2009. His collaboration with the KGB had begun before 1991.[16]

The key to Estonia's success was how quickly it built up its new domestic security service, which helped to prevent the legacy of a totalitarian state security service, the KGB, from leaking into the security agencies of the Republic of Estonia.

16 See "How many more?", in *The Economist*, 26 February 2009; http://www.economist.com/node/13184989 (last accessed 24 July 2017).

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LUSTRATION

Giorgi Kldiashvili

INTRODUCTION

In the 20th century, the administration of lustration started from the denazification of Germany after World War II by the decision of the Potsdam Conference. Lustration was carried out in the 90s in the states belonging to Central and Eastern Europe after the fall of the Soviet regime. In other words, lustration is carried out in order to make a switch from an antidemocratic regime to a political system with democratic political order and principles of rule-of-law.

Many of the post-communist states of Eastern Europe have chosen to enact a vetting procedure known as lustration to ban former secret police agents and their informants from holding public office. This practice is part of a global trend toward increasing accountability for human rights violations.[1]

In some countries different laws on Lustration were adopted immediately or soon after the fall of the Eastern Block (Czech Republic – 1991, Baltic States – 1990–1995, Hungary – 1992); in some of them, this was done only after years of transformational change (Poland – 1997, Georgia – 2010, Ukraine – 2014). And in some countries, lustration was not adopted at all, like in the Russian Federation, Central Asian countries, etc. Lustration, the vetting of public officials in Central Europe for links to the communist-era security services, has been pursued most systematically in the Czech Republic, Hungary and Poland. Prior attempts to explain the pursuit or avoidance of lustration focused on the differing experiences of communist rule or transition to democracy. A closer examination finds that although the three countries in question had very different histories, there were identical demands for lustration in the early 1990s. These demands were translated into legislation at different times and varied considerably in the range of offices affected and the sanctions imposed.[2]

This article will try to review the lustration policy that was implemented in Georgia and analyze the implications of lustration for democratization and transitional justice.

First of all, the main reasons for lustration according to general principles and practical decisions in various countries similar to Georgia are:

- To disclose information with regard to secret officers, ones who assisted in the communist regime;
- Possibility to establish the principle of individual responsibility (mainly political);
- Removal from holding public posts of employees pertaining to former criminal regime;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity;
- To reveal and eliminate fascist/totalitarian symbols;
- Social and information functions.

Secondly, it has to be emphasized that the Parliamentary Assembly of Council of Europe, in its Resolution N1096 (1996) "On Measures to dismantle the heritage of former communist totalitarian systems" dated June, 27, 1996, grants the following:

- Firstly, 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;
- Secondly, the right of defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed;
- Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed;
- 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]

Georgia is obligated to fulfill the requirements and resolutions of the above resolution within the scope of the Association Agreement between EU and Georgia.

There are two major challenges in terms of lustration in Georgia. First, the lustration process in Georgia started too late, more than 20 years after the fall of the Soviet Union. Second, relevant documents about the staff, officers and former KGB related persons in Georgia are only partially available, making it difficult to find materials needed to ensure that the lustration process is carried out adequately. Unfortunately, the partial destruction of the former state security archive during the Tbilisi War of 1991–1992, as well as the reasonable suspicion that Moscow has taken the appropriate archival materials from Georgia, makes the full-scale lustration difficult. However, the Law of Georgia on Lustration (Law of Georgia Freedom Charter)[4] is primarily aimed at dismantling of the totalitarian ideology and the recognition of the Soviet Union as a criminal regime, which is a necessary step towards reevaluating the past and recent history of Georgia.

DESCRIPTION OF THE TRANSITION AND CURRENT STATUS

The transition process varied in different states. The Latvian electoral law from 1992 required from all Parliamentary candidates to issue a written statement on the existence of, or lack of, their ties with the Soviet or other secret services. Since 1995, the law on elections of the Latvian Seym prohibits the election of persons who were active in the Communist Party as well as a range of its partner organizations. Lithuanians created a special

1 Ryan Moltz, "Dealing with communist legacies: the politics of lustration in Eastern Europe", University of Minnesota Ph.D. dissertation, 2014, https://conservancy.umn.edu/handle/11299/162684

2 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, "Explaining Lustration in Central Europe: a 'post-communist politics' approach", in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

3 Paragraphs 12, 13 of the mentioned resolution.

4 Law of Georgia No. 1867, 25. 12. 2013, https://matsne.gov.ge/ru/document/download/1381526/8/en/pdf

parliamentary commission. Finally, in both abovementioned states former employees of foreign (Soviet or other) intelligence services may not stand for parliamentary elections.

In Hungary, according to the 1992 so-called "Zétényi–Takács law", after fairly lengthy proceedings the Constitutional Court of Hungary arrived at a decision, the essence of which was as follows: the list of agents can be opened to society, if there is public interest in disclosing the past of the agents.

In Poland, when power changed from the communists to the opposition – "Solidarity" – the government guaranteed inviolability to former communists. The newly elected government announced that a "Thick Line" would be drawn between the past and present.[5] But in 1997 the first Law "On Lustration" was adopted in order to check the connection of top executives with the security agencies from the communist period, and a fairly rigid model of lustration procedure has started. Since then, Poland checks all persons entering the civil service in terms of their involvement in the former communist regime in the country. The functions pertaining to such examination are entrusted to the Lustration Office of the Institute of National Memory. The corresponding procedure is applied to everyone starting from the President to the vice-principal of a higher educational establishment.[6]

Georgia was not able to adopt a law on lustration immediately after regaining independence. Although, in late 1980's, and especially in early 1990's, being a member of the KGB was a stigma in the society; and being accused of being an "agent of KGB" was the worst kind of insult. Open questions about the KGB and the persecution of its crimes have always stayed only on the level of rhetoric.

On April 9, 1991, after the re-establishment of independence by Georgia, during the short time of peaceful development and failed transition, which was due to the radicalization of political life and open confrontation between the radical opposition and the government of the elected president Zviad Gamsakhurdia, the reform of the state security system was forgotten. Moreover, during the escalation of the conflict, the new Georgian Ministry of State Security (based on the Georgian KGB) became a self-isolated and out of control body, refusing to comply with the President's requests to provide information about secret informers of the KGB and blocking Lustration attempts, which later former high-ranking officials proudly remembered as a sign of professional ethic.[7]

Furthermore, members of the USSR intelligence service took a considerable part of the Archive of the Former Intelligence Committee to Moscow, and most of the remaining Archive was destroyed by a fire during the Tbilisi War. The former KGB's central building caught fire during the Tbilisi Civil War of 1991–1992. According to the official version from the MIA, as a result of the fire, 210,000 archival files were destroyed – about 80% of the entire collection. The documents that survived were soggy, most of them suffered water damage from the efforts to put out the fire. War and fire affected MIA archives and a large portion of the collection was destroyed as well.[8]

Naturally, one can suppose that the complete content and capacity of these archives will remain unclear and may exceed official approximate numbers. In general, these archives give many reasons for speculation. According to alleged witnesses and participants of the process, some of the important documents from the archive were transferred to the special KGB depository in Smolensk, Russia. A group of Georgian KGB employees escorted the documents, probably in order to sort and then destroy them. Witnesses claim that those were the documents on the line of intelligence developments, accounts and reports.[9]

After all of the failed attempts to initiate a law on lustration since Georgia regained independence in the 90s, public discourse about lustration law was relaunched in early 2000,[10] after the country's westernization process started following the "Rose Revolution" of 2003. Although officially the ruling political party the United National Movement supported the process, the draft law on lustration was presented to the Georgian Parliament on November 30, 2005 by the opposition. According to the draft, those who worked in the former Soviet special services, or held high positions in the Soviet Communist Party, or were serving as KGB agents would be banned from holding key positions in the Government, the President's Administration, or the Defense and Interior Ministries. The list also included the Chair of the Soviet Georgian Television and Radio Broadcasting Committee.

Those wishing to run for elective office would have to disclose a full record of their past links with the Soviet authorities. Even if a candidate appeared to have collaborated with the ex-Soviet secret services, it would be up to the voters to decide whether to elect them.

But even the authors of the draft law admitted that it would be difficult to enforce this proposal, since documentation about those persons who were KGB agents, or collaborated with the secret services was not available in Georgia.[11]

Although the law was not enacted in the Parliament, lustration became an active topic in political and public discussions.[12] Finally, a tangible lustration started in Georgia in October 2010, when a law on lustration (Freedom Charter) was initiated by Gia Tortladze, a minority MP, and was unanimously supported by the ruling United National Movement party.[13] The Georgian Parliament adopted the law – Freedom Charter – in May 31, 2011.The Freedom Charter has three main tenets: strengthening national security, prohibiting Soviet and Fascist ideologies and removing any associated symbols, and creating a special commission to maintain a black-list for anyone suspected of collusion with foreign special forces. The law prohibits persons who were employed within the KGB of the USSR or were at the senior management level in the Communist Party of the Soviet Union from

5 Kieran Williams, Brigid Fowler, Aleks Szczerbiak, "Explaining Lustration in Central Europe: a 'post-communist politics' approach", in *Democratization*, 2005, 12 (1), 22–43, https://www.researchgate.net/publication/248950483_Explaining_lustration_in_Central_Europe_A_'post-communist_politics'_approach

6 Volodymyr Goshovskiy, "The genesis of lustration in the world and its significance for the development of law-based society", in *Legea Si Viata*, January 2017, 33.

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12 "Georgia: 'Architect Of German Lustration' Discusses Georgian Archive", in *Radio Free Europe / Radio Liberty*, 27. 3. 2007, https://www.rferl.org/a/1075535.html

13 George Topouria, "Georgia's not so Freedom Charter", Transparency International Georgia, 12. 7. 2011, http://www.transparency.ge/en/blog/georgias-not-so-freedom-charter

holding key positions in the state. The commission on lustration, established in accordance with this law, dealt with the issues of the eradication of communist symbols in Georgia, including the names of streets and squares, as well as the elimination of monuments, symbolizing the totalitarian past.

In 2011, the Parliament of Georgia unanimously adopted a law on lustration, which also forbade totalitarian socialist and Nazi symbols in public places. This law established work-related restrictions for the former employees of the intelligence agencies of the Soviet Union, as well as former public officials of the Communist Party and Komsomol (All-Union Leninist Young Communist League (AULYCL), or Komsomol). These people couldn't work in executive bodies and in judicial authorities. In addition, the above citizens were unable to hold positions as heads of higher education institutions.

According to Article 9 of the Freedom Charter, positional restrictions apply to those persons, who, from April 25, 1921 until April 9, 1991, served as:

a/ Secret officials of the former Soviet Union's special services, from the day of Georgia's declaration of independence (April 9, 1991):
  - **a/** Have refused to cooperate secretly with the special services of independent Georgia;
  - **b/** Were dismissed from the office of secret officials for state security reasons;
  - **c/** Broke off their relations with the special services of independent Georgia for unidentified reasons;

b/ Officers of the former USSR State Security Committee, who, since the day of Georgia's declaration of independence (April 9, 1991), have refused to continue working with the special services of independent Georgia or who, for state security reasons, were refused work at the special services of independent Georgia;

c/ Members of the Communist Party Central Committees of the former USSR and the Georgian SSR, as well as secretaries of district and city committees;

d/ Members of the former USSR's and the Georgian SSR's Lenin Communist Youth Union Central

e/ Committee Bureaus;

f/ Chairman of the Georgian State Committee on Television and Radio Broadcasting.

The Freedom Charter restricts persons, listed in Article 9, from being elected or appointed to the following state positions:

a/ "Members of the Georgian government, deputy ministers and ministry department heads, members of the National Security Council, members of Emergency Management Agency, members of Central Election Commission, government members of the Autonomous Republics of Abkhazia and Adjara, general auditor of the State Audit Office and his/her deputies, director of the National Archives and his/her deputies (Legal Entity of Public Law (LEPL) under the Ministry of Justice), head and deputy heads of the President's Administration, head and deputy heads of the Government Administration, head of the State Security Service, his/her deputies and department heads, extraordinary and plenipotentiary ambassadors, envoys, consuls, president and vice-president of the Georgian National Bank, representatives of executive authorities in administrative-territorial units (state trustee – governor), members of national regulatory bodies, executive director of LEPL National Statistics Office and his/her deputies.

b/ Operational unit employees of the territorial bodies of Ministries of Defense and Internal Affairs, and the State Security Service.

c/ Judges of the Constitutional and Common Courts of Georgia.

d/ Rectors of higher education institutions, vice-rectors, deans and department managers; General Director of the Georgian Public Broadcaster, his/her deputies and board members."[14]

The list is quite long. The legislator tries to cover the entire political and educational field, which could affect the safety of the state and the future generation. This list partly draws from the experience of former socialist countries; however, it can be extended further to cover more unregulated areas, such as the prosecutor's office, public schools, and so forth. For example, Poland's lustration law also applies to prosecutors.

At the same time, the Charter guarantees the privacy of those persons who admit that they have secretly cooperated or had covert ties with the former Soviet special services. A similar approach is used in Lithuania, where, according to the lustration law, special service employees, who admit their connection with secret services, will be guaranteed confidentiality, but be prohibited from holding state positions.[15]

The belated adoption of the law was criticized by some scholars: As doctor of law science, Volodimyr Goshovskiy mentions in his article, as of 2010 neither revanche of communist regime nor influence of anti-democratic ideas associated with it constituted a significant threat. Instead, Georgia encountered a problem of direct armed aggression on the part of the Russian Federation. Why there was no focus on the removal from office of individuals who were involved in the promotion of carrying out actions against the territorial integrity and independence of Georgia by intelligent services of aggressor state on the basis of individual punishment and why the interim measures with regard to the removal of persons suspected of such actions were not introduced – is a rhetorical question.[16]

The implementation of the law was criticized by a local NGO, the Institute for Development of Freedom of Information (IDFI). In its article – "Failed Lustration Process in Georgia", authors underlined why the process had stayed "on paper".[17] In order to realize the law's objectives, the Charter of Freedom entailed the creation of a special Commission. According to Article 7 of the law, a commission was to be created at the State Security Service of Georgia (which used to be under the Ministry of Internal Affairs at the time of the adoption of the law) that would collect data on people, who secretly collaborated with the special agencies of the Soviet Union, or on people who are believed to have collaborated with the Soviet agencies through information obtained by legal means. The composition of the Commission (except for members proposed by factions represented in the Parliament of Georgia) and its Code of Conduct shall be set out in regulations developed and approved by the head of the State Security Service of Georgia. The Charter promotes the participation of Members

14 Law of Georgia No. 4717, 31. 5. 2017, https://matsne.gov.ge/en/document/view/1381526

15 David Kosař, "Lustration and Lapse of Time: 'Dealing with the Past' in Czech Republic", Eric Stein Working paper No. 3/2008.

16 Volodymyr Goshovskiy, "The genesis of lustration in the world and its significance for the development of law-based society", in *Legea Si Viata*, January 2017, 34–45.

17 "Failed Lustration Process in Georgia", Institute for Development of Freedom of Information, 25. 1. 2016, https://idfi.ge/en/failed-lustration-in-georgia

of Parliament in the commission. It is not a legally binding provision for Parliament; however, it is clearly noted that MPs (one member per faction) have the opportunity.

Unfortunately, publicly available information suggests that factions in the existing Parliament (elected in 2016) have not used the opportunity to send their representatives to the Commission under the State Security Service. The composition of the Commission was most recently updated on May 25, 2018; new members included high-ranking officials from the State Security Service and the Ministry of Internal Affairs, with no mention of MPs as members.

On December 2, 2015, the IDFI contacted the Ministry of Internal Affairs and requested information about the creation of the commission and its activities prescribed by the Charter of Freedom. The IDFI wanted to collect data about the following: how many meetings the commission conducted, whether or not a register was created on secret collaborators and employees of the Soviet intelligence agencies (the ones who voluntarily revealed themselves), and how many people are registered there, etc. The Ministry of Internal Affairs forwarded the request to the State Security Service. On December 30, 2015, the IDFI received a response from the latter institution. According to the letter, the commission, based upon the demands of Charter of Freedom, has only met once on May 28, 2014, and the meeting discussed the mechanisms of creating the register required by the Charter. According to Order N167 (Adopted on February 28, 2014), Article 3, section 1, the commission was obligated to meet at least once every three months. The letter also noted that Order N167 that orders the creation of a commission and defines its provisions was annulled by Order N561 of the same Ministry on July 30, 2015. Therefore, taking into account the fact that the commission was created approximately 3 years after the Charter of Freedom entered into force, this means that the commission only existed for a year and 5 months and convened only once.

According to the Legislative Herald of Georgia, on December 21, 2015, the Head of the State Security Service adopted a new order (Order N115) on the creation of the Commission. On December 30, 2015, a new order was adopted (N122) that set May 1, 2016 as the date of the beginning of the work for the Commission. The regulation of minimal mandatory commission gatherings was also changed; this regulation no longer exists.

In January 2018, the IDFI received information[18] from the State Security Service of Georgia indicating that in 2016–2017, the Commission had considered an unspecified number of appeals to look into candidates for high-level positions regarding their connection with Soviet authorities; the Commission did not find any violations of the law. In addition, in 2016, the Commission asked two entities to stop displaying communist totalitarian symbols, and provided requested information to three entities in 2017.

In order to conduct a real lustration process in Georgia, as it was conducted in other former Socialist countries, the IDFI believes it is necessary to recruit an effective commission, which will be interested in implementing the principles of the Charter of Freedom. As of today, the commission implemented on the basis of the law is not functioning and the State Security Service as well as the Parliament of Georgia cannot ensure the Charter's translation into practice.[19]

As it was indicated above, one of the main goals of the law is "to provide preventive measures against the principles of communist totalitarian and national socialist (Nazi) ideologies; remove the symbols and names of cult buildings, memorials, monument, bas-reliefs, inscriptions, streets, squares, villages and settlements of the communist totalitarian regime, as well as prohibit the propaganda instruments and other means of communist totalitarian and national socialist (Nazi) ideologies". Starting from 2013, Stalin monuments were erected in violation of the law in several places in Georgia by local citizens and soon afterwards many of them were vandalized using red paint.[20] Because of numerous similar cases and the division of public opinion towards the personality of Stalin, MPs Levan Berdzenishvili and Tamar Kordzaia initiated amendments. According to MP Berdzenishvili, there were several instances of the restoration of Stalin monuments and the need for such a process to be under the regulation of one particular commission.[21] To make the law more practically effective, in late 2013, the Charter was amended, mainly with the following changes:

1/ Definitions of "Communist Totalitarian Ideology" and "Communist Totalitarian Symbols" were adopted.
2/ The following functions: "to ensure security and democratic development of the country, the secret employees of former USSR special services, registration of officials appointed by this Law, voluntary recognition and registry production, as well as prohibit communist totalitarian and fascist ideologies and propaganda, and other aims defined by the Law" were transferred from the State Security Agency to the Ministry of Internal Affairs.
3/ If, after a warning from the state commission, the provision banning the public display of totalitarian symbols is still violated, the action will carry a financial penalty of GEL 1,000.

In practice, there have been several cases in recent years when the State Security Service of Georgia warned both leftist (Non-commercial Legal Entity – Public Union Socialist Georgia)[22] and neo-fascist groups (Georgia's National Unity)[23] in using totalitarian symbols in public places, there is no information if these organizations were fined according to the law.[24] One thing is certain; the work of the commission is far from effective. The commission assembled only once, and to this day there are streets in Georgia named, not only after Stalin but also, after numerous communist leaders and public figures that is contrary to the law.

18 Information received by IDFI on January 17, 2018 in response to the FoI request submitted to the State Security Service of Georgia.

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CONSTITUTIONAL COMPLAINT – GEORGIAN CITIZEN NODAR MUMLAURI AGAINST THE GEORGIAN PARLIAMENT

On July 24, 2013, Georgian citizen Nodar Mumlauri filed a complaint with the Constitutional Court, stating that Article 9, Paragraph 1, Subparagraphs c) and d) of the Freedom Charter were contrary to the rights guaranteed by the Constitution. A Lawyer of the Institute for Development of Freedom of Information (IDFI), Davit Maisuradze, examined the decision and wrote an article in order to better understand the restrictions made by the Freedom Charter and the resolution part of the Constitutional Court ruling.

The Constitutional Court complaint was filed by Nodar Mumlauri against the Parliament of Georgia. In the constitutional claim, the applicant pointed out that on June 17, 2013, he participated in the competition for the vacancy of Governor of Telavi municipality, but was unjustifiably removed from the competition, and told that he would be unable to participate based on the above mentioned Article 1, Paragraph c) and d) of the Freedom Charter. The plaintiff indicated in the constitutional claim that he had been a member of the Central Committee Bureau of the Lenin Communist Youth Union of the Georgian SSR, and later worked as secretary of Telavi district committee of the Communist Party. In his constitutional claim the plaintiff pointed out that:

- The restriction on holding state positions prescribed by the disputed norms constituted an act of political retribution, which could be used repeatedly after any parliamentary elections.
- Persons who were restricted from holding state positions listed in the Freedom Charter held important state positions and made decisions prior to the adoption of the Freedom Charter (May 31, 2015).
- The disputed provisions impose the above restriction on persons based solely on the fact that they lived during the Soviet regime – a one-party state that did not leave individuals any alternatives.
- Instead of an absolute prohibition, persons applying for state positions should be examined in terms of their cooperation with Soviet secret services.
- The Freedom Charter did not specify a limitation period, and introduced a permanent ban on holding state positions.
- The Communist Party has not been banned by independent Georgia.
- The above restrictions could have been justified for a period immediately after the collapse of the Soviet Union.
- The disputed norms are contrary to Article 17, Paragraph 1 of the Constitution (the inviolability of a person's honor and dignity), since they do not differentiate between high and low level positions of Soviet Union secret services. Article 17 of the Constitution guarantees a person's right to be treated ethically and with dignity, which was being violated by the disputed norms.
- The disputed provisions contradict Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title, place of residence) by treating individuals differently based on their political views and place of work, depriving them of the opportunity to hold specific state positions based on their past political activities and the ability to contribute to the country's development. In other words, the disputed provisions were of a discriminatory nature.
- The disputed provisions created an unjustifiable barrier and violated Article 29, Paragraph 1 of the Constitution, according to which, every Georgian citizen has the right to hold any public office, if they meet the requirements set by the law.

The defendant, a representative of the Georgian Parliament, based their argumentation on Georgia's transition period after Soviet collapse, and stated that former party officials had a strong impact on domestic policy.

The respondent also pointed out that the contested provisions intended to prevent negative consequences rather than hold someone responsible, since state positions mentioned in the Freedom Charter are positions of the highest authority that are responsible for important decisions related to the country's internal and foreign policy.

The respondent argued that the plaintiff and other persons in similar circumstances held positions (described in the disputed provision) during the period of the former USSR and, therefore, were creators or supporters of the communist totalitarian regime. The actions or inactions of such persons made possible a regime that is unacceptable for everyone and deserves to be condemned.

The respondent also indicated that the archive data was artificially changed or destroyed, so there was no accurate list of persons who secretly collaborated with the special services of the Soviet totalitarian regime. Consequently, it was impossible to find out what additional work these people performed. According to the respondent, "in the fight against the Soviet totalitarian regime, it's important to take into consideration the whole system and not just individual".

The respondent noted that the disputed provisions were not contrary to Article 14 of the Constitution, since it differentiated between persons of different status. Persons mentioned by the disputed norms are subjects with a distinctive status that are connected to the communist regime and held state positions in the former Soviet Union. The defendant pointed out that the plaintiff had incorrectly understood the content of the first paragraph of Article 17 of the Constitution, since "the public opinion related to an individual is not protected by Article 17". The respondent pointed out that the disputed provisions are not contrary to Article 29 of the Constitution, since the right to hold a state position is not absolute, and must meet the requirements established by law.

The Constitutional Court ruling states that the defendant also referred to the legislation of the former Socialist Republics, which imposed restrictions on certain state positions.

The Constitutional Court ruled the following:

1/ The Constitutional Court was going to rule on whether the disputed provisions indefinitely banning certain individuals from holding state positions contradicted Article 17 of the Constitution.

2/ "The standing constitutional and legal order is established on diametrically opposed values of the communist system. The principle of the constitutional state, the rule of law, respect for human rights and equality are fundamental values of the Georgian state and its constitutional system."

3/ In view of recent history, the state may have a legitimate interest not to allow the recovery of the totalitarian regime in the country. However, this must be carried out by legal mechanisms that are based on rule of law and human rights.

If such mechanisms do not meet constitutional requirements, "the state itself will become like the regime that it is trying to suppress."

4/ Article 17, Paragraph 1 of the Constitution guarantees basic human honor and dignity as essential attributes of social identity and natural rights. "Respect for human dignity means recognizing each human person, and its deprivation or restrictions is unacceptable." However, the existence of regulations limiting rights protected by the Constitution does not lead to the violation of this right. In each individual cade, the Constitutional Court, establishes the compliance of disputed provisions with rights guaranteed by the Constitution by considering the content, goal and intensity of restriction of a right.

5/ According to the plaintiff's position, banning the ability to hold certain positions is a violation of one's honor and dignity, since this equates the plaintiff to those Soviet intelligence officials, who refused to work for the security services of independent Georgia.

6/ It is possible that not all people holding managerial positions were directly involved in the activities of the Communist Party of the Soviet regime, and could have even fought against it, as was made evident in 1991–1992, when some of these officials fought for Georgian national interests and not for narrow party ideology. However, "the disputed norms restrict such persons' right to occupy state positions."

7/ "The disputed provisions establish a blanket ban without considering the scope of activities/authority/competence of those persons who set the internal/external ideological policies of the Communist Party, as well as on those individuals, who did not have the authority to change the situation and influence the decision-making process granted to them by law or practice."

8/ The ban was also applied to persons who formally held the positions (for a short period of time) and did not have time to start performing their duties. Also, according to the disputed provisions, the decision to restrict a person from holding a state position does not have to be based on individual reviews of each person's activities and functions. The restriction to hold state positions automatically applies to all persons who had previously held a party position.

9/ As time passes, the risks and challenges that served as the basis for adopting the disputed provisions, lose relevance. The disputed provisions prevent the plaintiff to hold a number of state positions without an assessment of how realistic the above threats are today, and to what extent is the plaintiff still the same threat to state security.

10/ The Court also considered it necessary to consider the social consequences of the disputed norms. The court stated that the disputed norms may lead to social exclusion of certain individuals or groups, therefore, the implementation of these regulations holds a risk of stigmatization.

11/ The permanent restriction to hold state positions was clearly conceived as a punitive rather than a resocialization measure. In addition, these measures could not serve as an effective means of preventing threats. The Law on Public Service provides for the possibility even for persons that have committed graves crimes to hold public service positions after serving their sentence.

12/ For certain individuals who had occupied high positions in the Communist Party, there may be legitimate public interest in prohibiting them to hold high state positions. However, the risks coming from these few people cannot serve as constitutional-legislative grounds for a blanket ban.

13/ Through the disputed provisions the state has used individuals as a means of achieving its specific goal, and treated them as objects rather than subjects of law. "The state is using these people as the means for protecting national security and achieving the objective of overcoming the communist totalitarian ideology. Such treatment is not consistent with the constitutionally guaranteed right to dignity."

14/ On the basis of all of the above, the Constitutional Court ruled that the disputed norms were contrary to Article 17 of the Convention.

The Constitutional Court also examined the compliance of the disputed norms with Paragraph 1 of Article 29 ("Every citizen has the right to hold any public office, if it meets the conditions established by law") and Article 14 (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title condition, place of residence) of the Constitution.

Regarding Article 29, Paragraph 1 of the Constitution, the Constitutional Court noted that the article guarantees every Georgian citizen the right to hold an elected as well as appointed position. At the same time, the court pointed out that this right was not absolute, and that the Constitution provided for the possibility of introducing legislative restrictions on the basis of legitimate goals. The legislator may introduce special requirements for state positions. However, when restricting the right to hold state positions, the legislator is obligated to maintain the balance between the legitimate purpose and employed means.

The Constitutional Court noted in its decision that the "primary requirement of Article 29 of the Constitution is to determine reasonable, fair and non-discriminatory terms for holding any state position. At the same time, the legislation may determine different conditions for holding each specific position based on the nature of the position, its functions, and importance, since these positions are of special importance in terms of the country's independence, stability and security." Since the Freedom Charter aims to ensure national security and safety by overcoming communist totalitarian ideology, in certain cases, due to increased public interest, it is possible to limit Article 29 of the Constitution, which guarantees the right to hold state positions, and create a legal order, which will be conducive to achieving the legitimate aim by avoiding potential risks.

Due to the above-mentioned circumstances, the Constitutional Court found that the disputed provisions are not in contradiction with the requirements of Article 29 of the Constitution.

The Constitutional Court also reviewed compliance of the disputed norms with Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property, title condition and birth, place of residence).

In particular, it is noted in the decision of the Constitutional Court that the Constitutional Court considers it important to separate political views and political activity. "Individuals have private political views whether or not they hold positions in a political party and/or are members of political unions. A person may have political views without joining any political organization as well. Political activity is considered to be a person's involvement

in political unions, and/or agreeing with the ideology/worldview of a political union and being involved in trying to achieve its goals."

The Constitutional Court noted that the disputed provisions do not provide different treatment on political grounds. The restriction set by the disputed norms applied to holding political leadership positions in the Communist Party mentioned in Article 8 of the Freedom Charter. Therefore, the Constitutional Court stated that the disputed provisions do not contradict Article 29 of the Constitution.

The Constitutional Court ruled invalid Article 8, Paragraph 1, Sub-paragraph c) and d) of the Freedom Charter, which the Court considered as contrary to Article 17, Paragraph 1 of the Constitution.

Therefore, positional restrictions were removed from those persons who were members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991.

The Constitutional Court ruling discussed above can have an important impact on contemporary Georgia.[25]

LESSONS LEARNT

The Constitutional Court judges made the correct decision to impose a permanent restriction of holding state positions on certain individuals (listed in Article 9 of the Freedom Charter) without examining their functions and activities during the Soviet regime. A parallel can be drawn with Poland, where after adopting the lustration law people related to Soviet special services were prohibited from public service for a period of 10 years.

Also, it is important to differentiate working with the Communist Party, and cooperation with special services. All former Soviet Socialist Republics or socialist countries impose stricter regulations for those individuals who collaborated with security services. In several countries (e.g. Czech Republic, Poland, etc.) the list of these people is public and available to any interested person.

It is important that the Court did not consider these provisions incompatible with Article 29 and Article 14 of the Constitution. The court exhibited a positive position that restrictions made under the Charter do not lead to discrimination on political grounds, but rather is based on the activities or inactivity of certain individuals during the totalitarian regime, and that the right to hold state positions listed in the Charter cannot be more important that national security.

The Constitutional Court ruling discussed above also contains important recommendations that should be taken into account by Parliament. Specifically, changes should be made to the Freedom Charter so that persons listed in Article 9 are being examined in terms of their past work activities and functions prior to applying the prohibitions. Even though the Constitutional Court declared invalid Article 9, Sub-paragraphs c) and d) of the Freedom Charter, the basis for the decision was the blanket nature of the ban that prohibits members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991 to hold state positions listed in Article 8 without individual evaluation. Moreover, the above restriction is permanent. Therefore, if the legislator introduces individual examination of the activities of these people, and makes the restriction temporary (e.g., a 10-year term, as it is in Poland), it will be possible to modify the invalidated norms and reintroduce them in the Freedom Charter. The blanket prohibition can still apply to former employees of Soviet special services that meet the requirements of Article 9 (the plaintiff stated that his low level position was being equated to an employee of special services, which was violating his dignity, since he was trying to distance himself from them), however, other officials should be subjected to individual examinations and the limitation period.

The Freedom Charter includes many other regulations that, for example, aim to combat fascist and Soviet symbols. This issue is extremely important due to the increased frequency of recent attempts to return Soviet monuments (e.g., statues of Stalin). There are many places remaining in Georgia that have streets named after totalitarian leaders (e.g., Stalin Street).

In addition, Article 11 of the Charter provides for the openness of information of those persons, who apply to the election commission to be registered as a candidate. If the election commission determines that the candidate is a person who has collaborated with former Soviet special services, it will address the election administration. If the electoral administration registers the candidate anyway, and the person does not withdraw their candidacy, the commission will publish the secret information about this person. The lustration laws of former socialist countries (for example, Hungary) also apply to persons who wish to hold electoral positions.

The Freedom Charter provides for setting up a Commission inside the State Security Service of Georgia, which also includes members nominated by parliamentary factions. Essentially, the charter implements its regulations through this Commission.

Having a fairly rigid model of lustration procedure can harm the interests of certain citizens and it will overshadow the full process of lustration. The process should be fully harmonized with Resolution 1096 (1996) "On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems" of the Parliamentary Assembly of Council of Europe and its principles.

The biggest challenge facing Georgia is that the former KGB archives are still held by a country that is hostile towards it. It is not proven that these documents will be used as part of a political agenda and against Georgian politicians or public figures, but in the future, there is the risk that the Russian KGB, that according to recent research is a state retaliatory body, can use it for its own political reasons.

RECOMMENDATIONS

In case of Georgia, the following progress was made on the principles of lustration:

- To disclose information with regard to secret officers, ones who assisted in the communist regime – isn't/can't be fulfilled;

25 Davit Maisuradze, "The Effects of the Constitutional Court Ruling of October 28, 2015 on the Freedom Charter of Georgia", Institute for Development of Freedom of Information, December 2015, https://idfi.ge/public/upload/Davit/court-ruling%20ENG.pdf

- Possibility to establish the principle of individual responsibility (mainly political) – isn't/ can't be fulfilled;
- Removal from holding public posts of employees pertaining to former criminal regime – isn't/ can't be fulfilled;
- Initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity – isn't/ can't be fulfilled;
- To reveal and eliminate fascist/totalitarian symbols – is fulfilled;
- Social and information functions – is fulfilled partially.

The "Thick Line" policy that failed during the early 90's in Poland will fail in other countries as well because there will always be people who will consider it as a lenient approach towards communist regime and an excuse for state criminals. Despite attempts to "forgive and forget" by the first two Polish governments, the issue of dealing with the communist past did not go away. Even though it was not officially declared, Eduard Shevardnadze's government (1995–2003) in Georgia was following the same principle and the subsequent government delayed the process for 7 years.

Time is crucial in the process of restoring transitional justice. Delays only show the unwillingness of political actors and strengthen rumors that the process is being deliberately postposed.

The best way is to adopt best practices and success stories. Practical guidelines for the implementation of lustration should be implemented and strict principles should be approved.

In our point of view, the establishment of a proper institute for studying this issue is also very important. Examples include the Institute for the Study of Totalitarian Regimes and the Security Service Archives in the Czech Republic and Lustration Office of the Institute of National Memory in Poland.

Widespread access to previously secret documents about secret service agents is the most important point of the lustration process. Even though there was no possibility to adopt a law on lustration and fully examine crimes against citizens in Georgia immediately after regaining independence due to war and the burning of archives, the willingness to declare the Soviet State as a criminal regime is nonetheless crucial for Georgia's road towards westernization democratic values.

The lustration process in Georgia generally failed and there are objective and subjective reasons: the lack of relevant documents, the delay in time, and the lack of a strong political will. Despite this, the law on lustration is still a very important step forward and a statement the country made in favor of eradicating totalitarian values and the recognition of the Soviet Union as a criminal regime. All of this is clearly necessary to re-evaluate modern history and the recent past.

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CEVRO

LUSTRATION AND THE PROCESS OF VETTING

Joachim Förster

INTRODUCTION

A decisive factor in establishing a constitutional democracy following the collapse of a dictatorship is that not merely the leading representatives and functionaries of a country but rather the whole public service shall provide a guarantee for the new constitutional order to become reality in daily life and be reliably promoted. It was necessary for the GDR citizens who hadn't been in touch with democratically legitimized state power to be able to trust the future state institutions. Preventing the hitherto existing political insider relationships also played a vital role. The vetting as to whether the people had collaborated with the Ministry of State Security played a significant role in this respect.

STARTING POSITION

Following the rules stipulated in the Unification Treaty of 27. 8. 1990, the employment relations within the public services in the former GDR generally existed further (Art. 10 as amended by Appendix 1 of the Unification Treaty (in German "Einigungsvertrag"). Yet a termination of employment without prior notice was possible in cases where the principles of humanity of the constitutional state had been breached, or where a collaboration with the Ministry of State Security had been detected which made it unacceptable to further continue the employment. Furthermore, as far as the period of the following two years is concerned (i.e. until 3. 10. 1992), an ordinary right to terminate was provided for in cases of a lack of expertise or of the lack of personal suitability of an employee.

From October 1990 on, many ideologically and politically influenced GDR institutions were shut down and thus, there was a significant reduction in personnel. Also the fact that highly ideology-driven school subjects such as civics or "Wehrkunde" (*Military training*) were abolished led to several dismissals. The same applies to the diplomatic service and the National People's Army. As far as the judiciary is concerned, judges and prosecutors had to pass a special aptitude test. Only about ⅓ of them remained within the federal German judiciary system.

The checks as to whether a person had collaborated with the former Ministry for State Security which had already started in the GDR with regard to the Volkskammer representatives freely elected in 1990, became the key issue from 1992 onwards, following the reunification and the Stasi Records Act (*Stasi-Unterlagen-Gesetz*, hence the abbreviation *StUG*) and led to the vetting of many functionaries and especially public sector employees within the new federal states, that means the territory of the former GDR.

TRANSITION

The Stasi Records Act (StUG) laid down a binding and detailed explanation of the categories of persons that could be checked, as to whether they had collaborated with the Ministry for State Security. It defines regarding which persons a request to the Federal Commissioner for records of the State Security Service of the former GDR (BStU) (§ 20 Subs. 1 No. 6 and 7 StUG) is admissible. This included all public administration members, members of the federal parliament and of the federal state parliaments (regional parliaments, municipal councils), government members and other holders of official functions, party and association functionaries, judges and lawyers, church functionaries, workers' councils, people in managing posts within the business sphere as well as people in security-relevant areas. Also the applicants for jobs in these offices could be checked. Checking members of parliament was generally possible only on a voluntary basis. The responsibility and right to submit such a vetting application was based on the legal provisions applicable for the office or organization handing in such an application. After checking whether the prerequisites were fulfilled, the BStU archives were searched for clues pointing to a full-time or unofficial collaboration with the Ministry of State Security. If such clues were substantiated and if documentary evidence was found, a report was issued to the applying authority describing and summarizing the file content relevant for evaluating the extent of the activity in question. Copies of the respective documents were attached. As far as the Unofficial Collaborators were concerned, this comprised the type and duration of the collaboration, their code name, the case officers, the size of the files, the reason, aim and course of the recruitment, the date of signing the declaration for commitment, the motives, the type and the number of reports delivered, the benefits such a person received, including awards etc. In certain cases, it was difficult to state whether an Unofficial Collaborator had been cooperating willingly and wittingly with the Ministry for State Security, if neither written declaration of commitment nor clear reports filed to the Ministry for State Security were found. In case of full-time employees, it was usually relatively easy to prove the cooperation and determine their field of work, but the cadre documents usually contain little detailed information on their duties.

In certain cases – e.g. in cases of an Unofficial Collaborator under the age of 18 – no report at all should be delivered.

Evaluating the documented activities was not the BStU's task but was carried out by the applying authority responsible for the respective personnel or by a special commission, which held hearings of the respective person. The eligible authorities and committees that were entitled to hand in an application also decided on whether and which consequences should be taken on base of the report. Frequently, further explanation of the context, especially the specific, conspiratorial working methods of the Ministry for State Security and the meaning of the terminology, were required from the BStU – yet this didn't comprise an evaluation with respect to the future employment of the vetted person.

Only in exceptional cases – if an involvement of members of parliament or of certain higher ranking functionaries with the Ministry of State Security was discovered by chance – the BStU

had to issue a report even without prior application (§ 27 Subs.1 StUG).

On principle, the information given within the context of a report shall only be used for the purpose it has been applied for (§ 29 StUG).

The option of vetting people with regard to activities for the Ministry for State Security was to end on 31. 12. 2006. The legislator presumed in 1991 that after 15 years, a person should not be reproached for such a connection any more. Yet this period was prolonged twice (in 2006 and in 2011) – each time with amendments (see below).

The first years which are decisive for the renewal of the public service, witnessed the highest number of vetting. By May 1993, it had already exceeded one million. In 2006 the overall number of applications regarding members from the public service, MPs or other functionaries amounted to approximately 2 million.

Yet right from the beginning, there were differences between the different new federal states regarding their vetting practice. Frequently, the respective departments decided themselves, whether a check or consequences would be necessary. There were neither any unified federal or state rules regarding which persons in which offices or functions were to be checked nor in which cases a further employment should be regarded as unacceptable. Usually, the employees had to indicate possible activities for the Ministry for State Security in a questionnaire, which meant that it was not only necessary to evaluate the collaboration itself but also, whether a person had fraudulently lied in relation to it.

After some uncertainties at the beginning, judicial decisions on the subject of protection against unlawful dismissal led to a differentiated practice in the individual cases that had to be decided upon. Reports with hints at collaboration with the Ministry of State Security didn't automatically lead to a person being fired. Within this context, the relatively broad definition of an Unofficial Collaborator in the StUG needs to be considered, according to which a written commitment to provide was regarded as sufficient. But even a job applicant's false statement related to contacts with the Ministry for State Security didn't automatically lead to a dismissal. There is no centrally issued statistical evaluation of incriminating reports in relation to the consequences taken. Yet there are studies of individual cases from different categories. According to these there are significant deviations between different groups (police, teachers, financial sector etc.) yet one can presume an average rate of approximately 5 to 6 % of the checks where an involvement with the Ministry of State Security was discovered. In approximately half of these cases, the respective persons retained their employment after the check, but here again – there are clear differences between the individual federal states and areas. According to estimates, in approximately 42,000 cases, the persons concerned were fired. The option of vetting within the non-public sector, especially as far as management employees from the private sector are concerned, was used in only a comparably small number of cases.

The microfilm files (the so-called Rosenholz-files) from the Main Intelligence Administration (*Hauptverwaltung Aufklärung*, hence the abbreviation *HVA*) being handed over to the BStU in 2003 led to another wave of checks during subsequent years within the public service of some federal states and also for members of the parliament. Yet, due to the mostly missing files and additional documents it was often impossible to prove a wittingly and willingly committed collaboration with the Ministry for State Security. Thus, the frequently expected revelations remained far below expectations. Still, a number of activities for the Ministry for State Security were proven this way. Prior to the vetting options period running out in 2006, fierce political debates were held on the issue of whether the time for a clean break had already come. Furthermore, the fact that it could not be ruled out that further important new information would be uncovered thanks to newly accessed files, played a certain role. Finally, the StUG (7. StUGÄndG of 21. 12. 2006) was amended and determined that the option of vetting should remain only for certain functions (government members, members of parliament and municipalities, leading officers, judges etc.) until 31. 12. 2011 (§ 20 Subs.1 No.6, Subs.3 StUG). Furthermore, a separate provision was made for higher-ranking and international functionaries in the field of sports (§ 20, Subs.1 No.6 g StUG). Finally, several options of vetting now remained for an indefinite period of time (concerning persons working in the field of historical analysis and reappraisal of the GDR and State Security or rehabilitation issues, § 20 subs.1 no.7, for security checks, § 20 subs. 1 no. 11 StUG etc.).

CURRENT SITUATION

Due to the now limited circle of persons to be vetted, the number of checks significantly decreased from 2007 onwards. Within the public service, there were only several hundred applications per year, for members of parliament and other important functionaries – especially within the municipal sector – there were less than 2,000 applications per year on average. Still, the approaching end of the vetting option period again became the subject of political discussions. This was caused by media reports about the past of some public servants being linked with the Ministry for State Security, especially referring to the police force of the federal State of Brandenburg. The checks of the 90s became a publicly discussed topic and within the federal state of Brandenburg, they were also examined by an "enquete", i.e. an inquiry commission within the federal state parliament.

On 22. 11. 2011, the German parliament (Bundestag) prolonged the vetting option period of the StUG yet another time – until 31. 12. 2019, with the circle of leading officials being widened and now including lower level officials (§ 20 subs.1 no.6 d StUG). An additional vetting option for members of the public service was newly introduced in cases of substantiated suspicion. Yet both new regulations do not play a significant role today. Nevertheless, what is of practical importance, are the checks of representatives, even at the municipality level, as these elected people may be of older age and involvements with the Ministry of State Security are still an issue that people are focusing on in the respective regions.

LESSONS LEARNT

- The checks as to whether individuals holding an office or performing a function within the parliament, administration or the judiciary had formerly collaborated with the Stasi contributed to establishing a functioning constitutional democracy within the new federal states and strengthened the trust in the administration and justice system as well as freed the educational sector from insider connections coming from the old

system, particularly in the state sector. This has been facilitated by the special conditions of German reunification.
- Due to the early beginning of the checks, speculation and rumors could be counterbalanced in good time. Basically, thanks to a differentiated vetting practice with decisions taken individually, the proportionality principle has been preserved.
- Dismissals of former employees of the Ministry for State Security from public service in Germany were carried out on basis of a wide societal consensus.
- The confidentiality of the vetting procedure and the reports being linked to a particular purpose prevented persons being stigmatized.
- Time limitation of vetting corresponds to the principle of a state under the rule of law not to reproach a person for his past for their whole life.
- Yet even after 25 years, the public is still very sensitive when it comes to the credibility and trustworthiness especially of elected and high-ranking representatives within state and municipal institutions. Thus, even today, there are heated debates regarding the Stasi's past of people within public life.
- The vetting rules should not be upheld if there is the threat that they would serve a sheer formalism and no new information would be expected.
- It is important that the institutions, which decide upon the consequences resulting from discovered involvements with the Ministry for State Security, receive proper expert advice.

- It has proven to be a disadvantage within a federalized Germany that there were no unified directives as to how to make use of the vetting options. Thus, significant differences appeared between individual Federal States and areas both with respect to carrying out the vetting and to the consequences arising from them.
- It is understandable yet not unproblematic that people significantly focused on the Ministry for State Security. Thus, frequently a prior collaboration with the Ministry for State Security became the one and only criterion for further employment, whereas jobs within the governing Socialist Unity Party of Germany (German abbreviation "SED") were neglected. Unequal treatment, which arose from this situation could only be partially balanced and even this only later on.
- In contrast to the public sector, the private sector used the vetting only to a limited extent. Thus, for example, the publicly owned media and the privately owned media differed significantly as the latter showed little or late interest in coming to terms with the past regarding the State Security.
- Unfortunately prior to 3. 10. 1990 former full-time employees of the Ministry for State Security were not prevented from becoming attorneys.
- In spite of comprehensive vetting and large-scale research it wasn't possible in all cases to answer the question of collaboration with the Ministry for State Security beyond reasonable doubt – including cases of prominent politicians. This was, of course, partly due to incomplete records.
- There's always the danger that contacts to the Ministry for State Security could be politically exploited. This can only be counterbalanced through the greatest possible transparency also by the respective persons themselves.

RECOMMENDATIONS

- The vetting should be started as soon as possible in order to prevent speculation and exploitation regarding secret police contacts.
- The checks should be carried out according to joint directives and criteria in order to prevent unequal treatment. Yet, it is absolutely necessary to decide each individual case while taking the whole context into consideration. The concrete activity performed by individuals for the secret police should be the focus. Furthermore, attention should be paid to how openly, and how honestly, the respective person has dealt with his/her past.
- Setting a time limit for the vetting option is essential when seen from constitutional law and from the societal-political principles point of view. Still, sensitiveness of the public and the victims as well as their claim for coming to terms with the past should not be underestimated. Mistakes committed at an early stage and untimely leniency can hardly be remedied later without new findings.
- Checking whether a person has previously worked for the secret police is correct and important, yet it shouldn't become the one and only criterion per se or the decisive criterion as to whether to employ the respective person further on. Other functions within a dictatorship's repressive system shouldn't be neglected.
- Trust in the judiciary and thus also checking the judiciary is very important. Furthermore, apart from leading functionaries, the police, teachers and other persons of trust should be checked with priority for contacts with the secret police.
- The private economy should not be exempt from checking whether people in its leading positions had connections to the secret police. Also the private media should not refrain from coming to terms with the past.

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LUSTRATION

Radosław Peterman

Reckoning with the totalitarian past is one of the fundamental elements of the political transformation of every country going out of a totalitarian dictatorship. This issue was also faced by Poland, once the communist era ended. Janusz Kochanowski, Polish Ombudsman [*Rzecznik Praw Obywatelskich*] (2006–2010), noted that since the beginning of the Third Republic of Poland, i.e. from the early 1990s, in the public debate, what was weak "*... were voices calling for decommunization, delegalization of the communist party, and the punishment of those guilty of communist crimes was an issue that was rarely raised. What was much louder was the slogan of the 'thick line'*[1] *or the idea that 'one should support the logic of reconciliation rather that the logic of justice'*" (J. Kochanowski, *Rzeczpospolita samorządna*, published by LexisNexis, p.128). This type of attitude was represented not only by the political commentators but also by the so-called "Solidarity" decision-makers, especially within the Ministry of Internal Affairs. It was often said that an attempt to clarify the past could start a new wave of mutual accusations and allegations. For those people, trust and forgiveness was more important than seeking the truth. It is significant that such views as to the logic of reconciliation rather than the logic of justice refer only to communist crimes.

Reconciliation with the past in Poland has encountered various obstacles and resistance from some backgrounds. Lustration arouses particularly resistance. Lustration, which can be understood both as:

Firstly – a procedure intended to disclose the fact of working or cooperating with the security authorities of the communist state;

or, secondly, a system of legal remedies used by state authorities to prevent persons related to the communist regime from occupying important public posts.

In Poland, what was advocated was lustration as a procedure of disclosing the service, work or cooperation in the security authorities of the communist state of the People's Republic of Poland.

In the summer of 1991, during the preparation for the first free elections to the Sejm, the Parliament began a discussion on lustration. Asa result thereof, on 19 July 1991, the Senate of the Republic of Poland adopted a resolution calling on the Government of the Republic of Poland to "*make the Minister of Justice (the Attorney General) verify whether candidates running for the Sejm or the Senate are included on the lists of employees or associates of former public security authorities or special military services, and to make this fact public in relation to those candidates where this was the case.*"

The first legal act introducing the lustration was a resolution of the Sejm put forward by MP Janusz Korwin-Mikke on 28 May 1992, which instructed the Minister of the Internal Affairs to disclose the names of MPs, senators, ministers, regional governors, judges and prosecutors who used to be secret agents of the Security Bureau [*Urząd Bezpieczeństwa (UB)*] or the Security Service [*Służba Bezpieczeństwa (SB)*] between 1945–1990 (MP 1992.16.116). The resolution did not apply to military collaborators of the special services.[2] On the very same day, a group of deputies filed a complaint with the Constitutional Tribunal [*Trybunał Konstytucyjny*] for the resolution. On 4 June 1992, Antoni Macierewicz, the existing Minister of the Internal Affairs, presented a list[3] of persons registered in the archives of security intelligence as secret agents of UB and SB in the Sejm. Contrary to the Sejm resolution, the list did not include the names of regional governors, judges and prosecutors.[4] The list included the names of the then President of the Republic of Poland, Lech Wałęsa and the then Speaker of the Sejm, Władyslaw Chrzanowski and about 60 Members of Parliament from almost all parliamentary groups. On the very same day, on the initiative of the President of Poland Lech Wałęsa, the Sejm adopted a resolution to dismiss the government of Jan Olszewski.

The Constitutional Tribunal ruled that the activities of Minister Macierewicz, in connection with the resolution adopted by the Sejm, were not in compliance with the Polish legal system, i.e. the Constitution of the Polish People's Republic, which had been in force since 1952. The Constitutional Tribunal had no doubts that the obligation to disclose persons who were secret agents concerned those who wanted to perform or perform public functions, however, it was not specified what is and what is not a public function. Nor was the term of "cooperation", essential for the whole process of lustration, defined. The adoption of the resolution was suspended pursuant to the *Announcement of the President of the Constitutional Tribunal of 19 June 1992 on the suspension of the resolution of the Sejm of the Republic of Poland of 28 May 1992* (M.P. 1992.20.157) with effect from 19 June 1992, while it was repealed on 20 October 1992 by virtue of *Announcement of the President of the Constitutional Tribunal of 20 October 1992 on the effectiveness of resolution of the Sejm of the Republic of Poland of 28 May 1992* (M.P.1992.34.245).

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1 The expression "thick line" – a political slogan derived from the Prime Minister Tadeusz Mazowiecki's speech delivered at the Contract Sejm on 24 August 1989. He said: "The government I will create shall not be liable for the mortgage it inherits. It does, however, affect the circumstances in which it shall act. We shall draw a thick line between the past and the present. We will only be liable for what we have done to bring Poland out of the present state of collapse." At present, the term "thick line" is associated in the social consciousness with tolerance for former political leaders of the People's Republic of Poland and the security services reporting to them.

2 At the time of the drafting of the resolution, the military special services were omitted as a result of the rapid work concerning the parliamentary resolution on lustration

3 The prepared list was not the first one. Already in July 1989, just after the June parliamentary elections, under the command of Undersecretary of State of the Ministry of Internal Affairs, General Henryk Dankowski a list of agents elected to the Parliament was created at the Ministry of Internal Affairs. This archive (numbered 560) was soon lost. One of the inspectors thereof was the head of the Ministry of Internal Affairs Andrzej Milczanowski, the other one was the subsequent Minister of the Internal Affairs Henryk Majewski. Both had publicly questioned the credibility of the documents of the former SB

4 The short time of the drafting of the Sejm resolution made the team responsible for preparing the information about regional governors, judges and prosecutors have no time to prepare it.

On 17 June 1992, the Senate began work on a new bill on the conditions of occupation of certain positions in the Republic of Poland, which was adopted by the Senate on 28 July 1992. The Senate's bill contained a catalogue of positions which required the lustration procedure to be conducted (Article 1)[5] and defined obstacles preventing some positions from being occupied (Article 3).[6] The procedure essentially relied on the appointment of a para-court body, a Board of Appeal by the President of the Supreme Court, who would review appeals to certificates issued by the Ministry of Internal Affairs in the manner regulated by the Polish Code of Administrative Procedure. In September 1992, five other lustration bills were sent to the Sejm, which were delegated to the Sejm committees, where they quietly waited until the end of the term, i.e. 31 May 1993, and ended their life. The issue of lustration case was abandoned for several years because the post-communist party – SLD – won the parliamentary election and was not interested in lustration and decommunization.

Between 1994–1996 five bills concerning lustration were submitted to the Sejm. These bills were considered in 1996 by the Extraordinary Committee to consider lustration bills. It was only on 11 April 1997 that the first Polish lustration law was passed. This Act was entitled "The Act on Disclosure of Work or Service in State Security Authorities or Cooperation with State Security Authorities between 1944–1990" (Journal of Laws 1997.70.443). This happened one year after Resolution 1096 of the Plenary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems. The Polish lustration law of 1997 was based on the following assumptions:

- lustration was limited to persons performing public functions; the persons performing public functions within the meaning of the Act included, among others, the President of the Republic of Poland, MPs, Senators, Members of the European Parliament, persons appointed to the leading positions of the State, the Head of the Civil Service, General Directors in ministries, central offices or regional offices, judges, prosecutors and lawyers, rectors, deputy rectors in state and non-state universities, the directors of channels and directors of the regional centres and agencies of the Polish Television and the Polish Radio;
- the persons covered by the lustration were to submit so-called lustration declarations in which they were to declare possible service, work or cooperation with the security authorities of the People's Republic of Poland from 22 July 1944 to 10 May 1990;
- the lustration declaration was made at the time of granting consent to standing for election or to accepting a public function;
- the declarations were not to be made by persons born after 1 August 1972;
- the content of the declarations in which the person admits to working, cooperating or service was to be made public by being posted in the Monitor Polski [Official Gazette of the Government of the Republic of Poland];
- the declaration's disclosure of information on the service, work or cooperation with security authorities was not to result in any negative effects on the person subject to lustration;
- in order to verify the lustration declarations, the position of the Commissioner for Public Interest [Rzecznik Interesu Publicznego] was created, and Bogusław Nizieński, Supreme Court Judge Emeritus was the first person appointed to hold this position;
- the obligations of the Commissioner for Public Interest included conducting investigative proceedings and, if necessary, submitting motions to the Court for a lustration lie to be ruled;
- should a declaration be ruled to be a false one, this information was to be made public – it was to be announced in Monitor Polski. The result of such a lustration judgment was also the loss of moral qualifications relevant for public positions. The person submitting a false declaration was to be called a lustration liar.

Almost from the very beginning the judges tried to paralyze the lustration since the General Assembly of Appellate Courts in Poland did not select 21 judges who, according to the law, should hear lustration cases. As a consequence of this attitude of the judges, the Sejm had to amend the law and, as a result of this amendment, the Court of Appeal in Warsaw was established as the lustration court.

In the end, the Commissioner for Public Interest began his activities from 1 January 1999. At that time, about 26,000 lustration declarations were received at the Commissioner's Office. 200 declarations in which their signatories admitted to service, work or cooperation with security authorities were to be published as positive ones. The Commissioner for Public Interest submitted more than 150 lustration declarations to the court to initiate lustration proceedings. In the period 1999–2004 the lustration court ruled that 63 declarations included the so-called lustration lie, which resulted in the ban on holding public functions.

The passing of the 1997 Lustration Act also resulted in the creation of the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation by virtue of the Act of 18 December 1998, which, by law, had taken over archival documents produced by the communist security intelligence – both civil as well as military ones – from the Polish security intelligence. This solution enabled the documentation of communist security intelligence to be gathered in one place in an institution not dependent on the government and subject exclusively to parliamentary control.

This lustration act remained effective until the end of 2006.

Following the parliamentary elections in 2005, the Sejm passed a new Act of 18 October 2006, entitled "*on the disclosure of information on the documents of the state security authorities from 1944–1990 and the content of these documents"* (Journal of Laws 2007.63.425 as amended). The preamble to the act reads as follows:

"*We declare the work or service in the security authorities of the communist state or the aid given to these authorities [by the personal information source] consisting in combatting the democratic opposition, trade unions, associations, churches and religious associations, violation of the freedom of speech and assembly, violation of the right to life, liberty, property and security of citizens, to be permanently linked to the violation of human and civil rights for the benefit of the communist totalitarian system.*

5 The catalogue of positions included, among others, the following functions: MP, senator, local councillor, executive positions in the leading, central and local administrative bodies, judges, prosecutors, notaries public, lawyers, legal counsellors, soldiers and officers of the rank of colonel and generals in the Armed Forces, the Police, the Fire Service and the Prison Service.

6 The obstacles preventing a position from being occupied included service in the security authorities of the communist state, cooperation with these authorities, taking up positions in the Polish Workers' Party [*Polska Partia Robotnicza, PPR*] or the Polish United Workers' Party [*Polska Zjednoczona Partia Robotnicza, PZPR*].

Bearing in mind the above, as well as the need to ensure that the functions, positions and professions that require public trust should be held by persons who given their past conduct give and have given the guarantee of honesty, nobility, sense of responsibility for their own words and deeds, civil courage and righteousness, and in view of the constitutional guarantees ensuring that citizens are entitled to information on persons performing such functions, occupying such posts and performing such professions (...)"

This act expanded the list of public functions holding of which involved the lustration obligation. The persons who perform public functions within the meaning of the Act include, among others, the President of the Republic of Poland; Members of Parliaments, senators, Members of the European Parliament, top state officials, Members of the Monetary Policy Council, members of the Management Board of the National Bank of Poland, members of the Council of the Institute of National Remembrance, President of the National Health Fund and the deputies thereof, President of the Social Insurance Institution and the deputies thereof, President of the Agricultural Social Insurance Fund and the deputies thereof, Chairman, Deputy Chairpersons and members of the Financial Supervision Authority, members of the foreign service, persons appointed or nominated to the positions by the President of the Republic of Poland, the Sejm, the Presidency of the Sejm, the Senate, the Presidency of the Senate, the Sejm and the Senate, the Speaker of the Sejm, the Speaker the Senate, or the President of the Council of Ministers, Presidents of Courts; judges and prosecutors; heads of the public prosecutor's office or military unit of the prosecutor's office, members of local government, rectors and deputy rectors of state or non-state higher education institutions, directors of channels and their deputies, editors or authors of news or political shows and directors of local branches and agencies of "Telewizja Polska – Spółka Akcyjna" [*Polish Television*], "Polskie Radio – Spółka Akcyjna" [*Polish Radio*], director general of the Supreme Audit Office and the staff of the Supreme Audit Office supervising or performing inspections, persons holding managerial positions: in offices of public authorities, including central and central authorities of state administration: director of a department or an equivalent unit, deputy director and head of a department or an equivalent unit, in governmental administration in the regions: the director and deputy director, the head of the service, inspectorate, the deputies thereof, the staff of the Institute of National Remembrance, treasures of a region, county or municipality, secretaries of a county or municipality, the general director of Poczta Polska [Polish Mail] and the deputy thereof and member of the Council of Poczta Polska, members of the management board, members of the supervisory boards of state banks, directors and deputy directors of state enterprises, academics and higher education staff, state and non-state school directors, lawyers, legal counsels, notaries public; court enforcement officers, professional soldiers occupying positions of colonels (commanders) and generals (admirals).

Pursuant to the original version, the new lustration act required persons who applied for the aforementioned functions or held them at the time of the act becoming effective to submit an officially certified statement on the existence of documents of security authorities in the Institute of National Remembrance archives. The certificate was to be issued solely on the basis of documents. In addition, criminal proceedings in the manner of criminal proceedings were not to be conducted as regulated by the 1997 lustration law. The certificate could be appealed against to the court. The court was to conduct proceedings based on the provisions of the Polish administrative procedure and not the provisions of the criminal procedure as previously provided for. However, this version of the law did not enter into force because the then President of the Republic of Poland Lech Kaczyński disagreed with this model of lustration and as a result of his own legislative initiative the law was amended in 2006.

The lustration bill, put forward by the President of the Republic of Poland Lech Kaczyński, the lustration model was yet again based on the criminal procedure. For the purpose of its implementation the prosecutor's lustration section was established in the structures of Institute of National Remembrance. The criminal departments of the common courts of law retained the right to adjudicated the non-compliance with the truthfulness of the lustration declarations. On the other hand, the scope of the persons obliged to submit a lustration declaration remained the same as in the original version of the lustration act of 2006. The amended lustration law was still subject to the review of the Constitutional Tribunal, which did not raise objections to the essential form, i.e. the necessity of such a law being in force (Judgement of the Constitutional Tribunal of 11 May 2007, case file K 2/07). This law came into force at the beginning of 2007.

The current balance of the 2006 Lustration Act 2006 (as at 31 December 2016) is as follows:

More than 375,000 lustration declarations were submitted to the Lustration Bureau from 2007 to the end of 2016. Approximately 2,500 people admitted to work or cooperation. Approximately 60,000 declarations made by public officials or applicants as to their cooperation (or work) with the security authorities of the communist state or lack thereof were verified. Of these verified declarations, prosecutors questioned the veracity of almost 850 lustration declarations which were submitted to courts with a request that the courts rule that the persons referred to in these requests have filed untruthful lustration declarations by concealing their cooperation or service in the security authorities of the communist state. In more than 500 cases the courts validly and finally ruled that the persons subject to lustration concealed the fact of their cooperation (or work).

It should also be stressed that, in view of the lustration in Poland, the body of judicial decisions (of the Constitutional Tribunal and the Supreme Court) worked out the standards still in force, according to which, in order to accept that one's conduct could be classified as cooperation with the communist security intelligence, it should be proven that:

1/ the person in question contacted with the state security authorities and provided them with information;
2/ the contact of such person with representatives of the state security authorities had to be a conscious one, i.e. the person was aware of contact with a representative of the communist security intelligence;
3/ the contact of such person with security intelligence had to be of secret nature;
4/ the person's actions were to consist in operational acquisition of information;
5/ the conduct of the person could not be limited only to the declaration to cooperate, but should be materialized in particular actions for the benefit of the communist security authorities.

An additional new element introduced by the 2006 Lustration Act and the amendment to the Act on the National Remembrance Institute (IPN) of 2006 (Journal of Laws 2006.63.424, as amended) is the necessity to publish, on the website of IPN, electronic catalogues containing information on the retained public records

of persons holding such positions as: President of the Republic of Poland, MPs, senators, MEPs, ministers, judges of appellate courts and the Supreme Court, appellate prosecutors, mayors. This catalogue refers to almost 5 500 posts.

In addition, the Lustration Bureau prepares and publishes thematic catalogues: of persons subject to surveillance and repressions (currently a list of almost 10,000 people subject to surveillance by state security authorities), of officers and soldiers of state security authorities (currently including entries for more than 62,000 persons) and of persons holding managerial positions in the party and state of the former People's Republic of Poland (more than 24,000 persons included).

Finally, it is worth reciting the arguments of lustration opponents:

- the dubious quality of the archives given their partial destruction;
- the threat of destroying political, cultural, religious authorities (e.g. the case of Lech Wałęsa);
- lustration as political adventurism in the use of files.

The then President (in 2006) of the Constitutional Tribunal, Jerzy Stępień, justified the reluctance to disclose the archives of former security intelligence of the People's Republic of Poland by saying: "*A man can be destroyed with real information much more effectively than with firearms. (…) The truth as such is not the highest value in our constitutional order (…) the highest value is dignity, not truth.*"

One should, however, bear in mind Resolution 1096 of the Plenary Assembly of the Council of Europe *on measures to dismantle the heritage of former communist totalitarian systems which* reads in point 12: "*The Assembly emphasizes that in general, if several criteria were met, these measures [i.e. lustration and decommunization] may be considered compatible with the standards of a law-abiding democratic state.*"

In conclusion, the following question remains to be answered:

Is lustration understood as a procedure for disclosing information about materials created by former security authorities of the People's Republic of Poland on persons performing public functions today a good instrument to reconcile with the totalitarian past? Or would it be more appropriate, as some advocate, to pour the archives of the Institute of National Remembrance with concrete for 50 years and forget about the past and thus give the opportunity for gossip, allegations and blackmail to arise.

LESSONS LEARNT

- Thanks to the lustration in Poland, many people who intend to take public offices resign from these positions due to their past.
- The lustration prevented public persons from being blackmailed with archival materials that were preserved in the Institute of National Remembrance.
- The lustration continues to be perceived by many of its opponents only as an element of political struggle.
- The hearing of lustration proceedings before criminal courts makes judicial proceedings continue for years, and the judgments issued by these courts are debatable. In such cases, there is talk of "court truth" which deviates strongly from "historic truth".

RECOMMENDATIONS

- The most important public functions of election and appointment should be subject to lustration.
- The lustrated persons should be able to verify their statements before the common courts of law.
- The lustration procedure should be public.

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LUSTRATION

Luciana Jinga

Romania adopted several lustration law projects, but none of them was fully implemented. No politicians or other public personas ever lost official authority positions because of a juridical act condemning their past collaboration with the communist regime.

FORMS OF PROTECTION OF THE NEWLY ESTABLISHED CONSTITUTIONAL, POLITICAL AND ECONOMIC STRUCTURES

THE PROCLAMATION OF TIMIŞOARA, MARCH 1990

The Proclamation of Timișoara was published for the first time in its final form on March 8 1990 and publically presented on the 11th of March in an assembly that took place in the Opera Square, in Timișoara. The 13-point document called for continuing to build on the victory over the communist dictatorship achieved in December 16–20, 1989. The inhabitants of Timișoara, the city where the Romanian Revolution started, wanted a wider recognition of their sacrifice. The proclamation thus demanded the symbolic recognition of the city's key role in the revolution. The authors also made practical demands for economic reform and for establishing authentic democratic practices. They called for temporarily (for the first three running legislatures) banning former Communists and Securitate officers from running for office and also demanded a ban on former party activists running for the position of President of the country. Such a ban would have disqualified Ion Iliescu, and other former communists from leadership in political life.

THE EVOLUTION DURING 1990s

After The Proclamation of Timişoara, the first legislative proposals regarding the access to personal files and the disclosure of the Securitate as political Police came quite early, when Constantin Ticu Dumitrescu, the President of the Association of Former Political Prisoners made an amendment to the Electoral Law in March 1990, asking for restrictions on former members of the Romanian Communist Party. The amendment did not pass. In 1992, after the first parliamentary elections in Romania, Constantin Ticu Dumitrescu initiated a Parliamentary motion banning any person, who during 1945–1989, had worked consciously as an informer for the Securitate, delivering notes and information about other persons, to be elected, or to maintain a state office or an administrative or teaching position. This motion was signed by 114 Senators and 200 Deputies and was discussed by the Parliament, and voted by a majority. The motion never came into force. Because of this, one year later, in 1993, Ticu Dumitrescu presented a legislative proposal with the same content. It was never discussed in the Romanian Parliament during 1993–1996. In the electoral campaign of 1996, the Romanian Democratic Convention (CDR) made a promise to reveal the past. Many voted for the CDR because of this promise. It was the biggest issue separating the CDR from the other important candidate, the PDSR party.. In 1996 the Democratic Convention won both the general and the presidential elections. Emil Constantinescu, the candidate of the Democratic Convention had an incredible campaign, in which he promised the renewal of a political class, with no former communist officials and secrets agents among future politicians. The Romanians were swayed by all these promises and voted for a change. The general disappointment was as high as the hope invested in president Constantinescu when he announced that the new government wouldn't support a lustration law because such a legislative act would demonstrate the ruler's weakness, incompetence and incapacity to use the power given to them by people. Many voters felt betrayed and withdraw their support for the newly elected authorities. Between 1997 and 1999 the Democratic Convention collaborated with the Social Democrats in changing the essence of the initial law project presented by Constantin Ticu Dumitrescu.

USE OF SECRET SERVICE ARCHIVES

In 1999, a year before the general elections, the Romanian Parliament adopted Law No. 187/1999, on Access to Securitate Files and the Unveiling of the Securitate as a Political Police. The law has 26 articles that cover the following distinctive themes:

The right of any Romanian citizen to see his/her own files, and to find out the identity of the Securitate agents and collaborators who created and offered information present in that file.

The right of any Romanian Citizen, Romanian public institution, or NGO to know if those already appointed or running for certain public offices are agents or collaborators of the former Securitate and the obligation of all candidates for the named positions to give a certified declaration whether she/he worked as an agent or a collaborator for the Securitate, and if the nature of this involvement can be considered **political police**.

The law defines the terms:

- *political police* – all structures within the Securitate, created for the establishment and maintenance of the totalitarian communist power, as well as for the repression or limitation of fundamental human rights and liberties
- *Securitate agents as political police* – any person who had an operative position (formal position) within the Securitate (1945–1989), including those working undercover.
- *Securitate collaborators as political police* – persons who received money or any another benefits for his/her activity in this capacity, held a secret house or a meeting house for the use of the Securitate, was a *resident* (was not an agent, but conducted operative actions), and any other person who gave information to the Securitate, that affected, directly or indirectly, fundamental human rights and liberties. A notable exception is the information obtained during the investigation of political prisoners.

The National Council for the Study of the Securitate Archives (CNSAS), set up as an independent public institution, controlled by the Romanian Parliament, mandated to investigate the past of public officials and electoral candidates based on the secret files.

The law produced little effects because:

The law said nothing about the transfer of the archives from The Romanian Information Service (the intelligence agency) to the National Council for the Study of the Securitate. The Romanian Information Service had the right to deny access to those files that contained information concerning a "national security matter". As the law did not specify what a "national security matter" is, the SRI acted discretionary and the files of post-communist politicians were kept under lock. The transfer of the files started in 2005 and according to SRI officials, most of the archive is now stored by CNSAS.

The law did not include any sanctions for politicians who chose to lie in their declaration.

At the time, the problem was not that evident, as the law stipulated any false declaration will be punished according to the Penal Code. An example of this is the case of Dan Voiculescu, at the time of the verdict, the leader of the Conservative Party and owner of the successful media Consortium, Antena 1. The CNSAS investigated his case in 2008 and gave the official verdict of collaborator of the Securitate in 2011. This also meant that Dan Voiculescu lied in his declarations (2004, 2008) by not admitting his liaisons with the Securitate. One month after the CNSAS verdict, the General Prosecutor was petitioned to send Dan Voiculescu to trial for false statement. To a general surprise, the prosecutor ruled that Voiculescu couldn't go to trial for false statement in his declarations. The explanation was simple. His act of lying had no legal repercussions. Of course, it was an immoral, but not an illegal gesture, as the Romanian Constitution has no provisions for vetting former Securitate agents and collaborators.

ATTEMPTS FOR LEGAL REGULATION OF LUSTRATIONS

Both civil society and public opinion were divided on whether a lustration law, almost 20 years after the fall of the communist regime, would contribute to the cleansing of the political scene. President Băsescu, elected in December 2004, publically declared his support for a lustration law, while Crin Antonescu, leader of the Liberal Party, said that a late lustration law would have no real effects in the Romanian society.

Despite the general believe that Romania would never find the tools to fight former communist activists and Securitate agents still active in politics and the economy, in 2006, the Romanian presidency and government showed the political will to condemn the political past. President Traian Băsescu publically condemn the communist regime in the Romanian Parliament (December 2006);The Institute for the Investigation of Communist Crimes started its activity (May 2006), and the government approved the Emergency Governmental Ordinance No. 16/2006, which expanded confession-based lustration in Romania and entrusted the CNSAS with the task of verifying personal statements signed by public office holders and detailing their past collaboration or non-collaboration with the Securitate. The final verdicts were to be published in the state gazette, *Monitorul Oficial*. A step forward was that if the verdict differed from the public statement, the CNSAS had the authority to notify the courts, as the act of signing a false declaration is a legal offense, in the case of state representatives, punishable with the loss of public office.

According to the same Ordinance, any collaboration (not only as political police) with the Securitate of judges and prosecutors holding or seeking administrative leadership positions in the court system, or the prosecutor's offices, or elected to the Superior Council of the Magistracy, led to disqualification. This provision was in force from 2004, according to Law No. 303/2004, as well as Law No. 247/2005, concerning the professional status of judges and prosecutors. All three legislative acts affected only those appointed after the laws came into force (2005) and not those still occupying public offices, but appointed before. In practice, as the case Florica Bejenariu shows (judge elected to the Superior Council of the Magistracy; before 1989 she wrote 52 informative reports for the Securitate), the judicial system refused to apply this provisions.

One of the political leaders unveiled by the National Council as a former secret agent was Dan Voiculescu. He not only refused to apologize for his activity as secret agent of the Securitate, but contested the verdict and asked the Constitutional Court to review the constitutionality of the entire lustration legislation. In January 2008 the Court found Emergency Ordinance No. 16/2006 unconstitutional, invalidating all verdicts that the Council had handed down up to that moment, and threatened to shut down the CNSAS completely. IICCR researchers and other members of civil society joined CNSAS employees for public protest in support of the CNSAS and its activity. The government solved the situation by limiting the CNSAS mandate to storing secret documents and granting citizens access to their files, while transferring to the courts the right to decide who was (or was not) a former agent or collaborator of the Securitate.

A lustration law project was introduced in 2006 by four Liberal legislators, including Deputy Mona Muscă. After a lot of procrastination and political wrangling, in May 2010 the Chamber of Deputies adopted the proposal, while the Senate petitioned the Constitutional Court on its constitutionality. The Court agreed that lustration infringed the constitution by blocking some citizens' access to elected positions and failing to individualize guilt. As a direct consequence the law was modified only to include nominated public offices. The liberal-democrats also eliminated from the law any mention of the Communist Youth League leaders, as the Prime Minister at the time, Emil Boc, served as a Communist Youth League leader in Cluj County.

In February 2012, Mihai Răzvan Ungureanu, head of the External Information Service from 2007 to January 2012, replaced Emil Boc. Ironically, Ungureanu also served as a leader of the Communist Youth, from 1985 to 1989. The person chosen to replace Mihai Răzvan Ungureanu, as director of External Information Service, was Teodor Meleşcanu, an old school diplomat of the communist government. Soon, Romanian officials realized that the lustration law project also mentioned the vetting of communist diplomats. Subsequently this professional category was eliminated from the law.

The bill affected neither former Securitate agents who continued their activity as agents of the post-communist intelligence services (because their files were considered an issue of national security), nor those whose secret files mysteriously vanished, as in the case of presidents Ion Iliescu and Traian Băsescu, both important party leaders before 1989.

Romanians started to make jokes about the situation, saying that in its final form, the law will mention only Nicolae Ceauşescu and his wife, already dead in the Romanian Revolution.

The leaders of the Hungarian minority in the Romanian Parliament also asked for the law to include the removal of all communist prosecutors, but the proposal was rejected by the *Committee for legal matters* of the Parliament. A former political prisoner asked the Committee for a re-evaluation of the provision, offering as motivation, his own history of abuses perpetrated by communist prosecutors. In the end, the Parliament plenary adopted the amendment.

Besides the prosecutors, the law included persons who held remunerated political positions in the central and local structures of the Romanian Communist Party, full members and alternates of the party's Central Committee, ministers in the communist governments, and the directors of the publishing houses.

The law was adopted by the Romanian Parliament on 28 February 2012. Just a week later, on March 7 2012, the Constitutional Court, petitioned by the professional organizations of judges and prosecutors, found the Lustration Law unconstitutional. The project was dropped; in the last five years no other legislative initiative replaced it.

IMPLICATIONS FOR THE STATE AND SOCIETY

On March 29, 2012, the CNSAS elected a new leading structure. One of the members elected was Corneliu Turianu. Immediately, the civic organization Miliția Spirituală, responsible for revealing names of Securitate agents and collaborators, published an article showing that Corneliu Turianu, was a former member of the Romanian Communist Party, held leading political positions in the 1970s, as secretary of the party organization at one of the regional law courts in Bucharest and was responsible for the ideological and political training of the judges within Bucharest Tribunal. Andrei Muraru, a researcher at the Institute for the Investigation of Communist Crimes and the Memory of the Romanian Exile, and later president of the same institution, publically accused Turianu for his communist past and asked for his vetting from the leading structure of the CNSAS. Corneliu Turianu accused Andrei Muraru of misleading the public and won. The judges pointed out that Andrei Muraru, in his declaration, placed Turianu as secretary of the party organization of the Bucharest Tribunal, and not of the regional law court, as mentioned in the documents. Turianu kept his leading position at the CNSAS until his death, in November 2016.

Without a lustration law, Securitate agents and collaborators, communist prosecutors and judges held positions of authority in key post-revolutionary Romanian Institutions.

Two excellent political scientists, Lavinia Stan and Raluca Grosescu, in their studies, showed that the Romanian Revolution resulted in elite reproduction, not elite replacement. The second echelon of the communist leadership (local leaders, Communist Youth League leaders, party members that held authority position in different economic structures) replaced the first echelon (namely the Executive Committee of the Communist Party). The historian Marius Oprea joins the two political scientists with his analysis on how the former communist officials and the Securitate agents are the big winners of the Revolution, representing the majority of new political and economic elites.

LESSONS LEARNT AND RECOMMENDATIONS

A quick overview shows that former communist officials and Securitate agents dominated the cabinets and the Parliament after 1990, 1992 and 2000. More recently, for the elections in 2012 and 2016, mass media campaigns revealed another troubling phenomena. Former communist leaders and Securitate officers have been replaced by active officers of the Romanian Secret Service, the successor of the former Securitate. The first three post-communist presidents, Ion Iliescu, Emil Constantinescu, and Traian Băsescu, seven of the nine prime ministers (Petre Roman, Nicolae Văcăroiu, Victor Ciorbea, Mugur Isărescu, Adrian Năstase, Emil Boc, and Mihai-Răzvan Ungureanu,), were drawn from the ranks of the communist state, party, economic, or student leadership. After 2012, the concerns regarding the communist past of the President and Prime Minister were replaced by scandals of corruption that reopened the discussion about the necessity of a real lustration process in Romania. The admission process to NATO and the European Union might have been an instrument to put real pressure on Romania to keep the newly established constitutional, political and economic structures. It seems, however, that the Western partners have come to terms with the reality of a geo-strategically important country, where ubiqitous security agencies have conquered the role of political king-makers. A central issue for the next years will be how to limit the growing power of this unelected ruling elite without affecting national and regional security.

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LUSTRATION: MISSED OPPORTUNITY

Nikolai Bobrinsky

INTRODUCTION

The concept of lustration embraces a wide range of measures designed as remedial action for the repressive policy of former authoritarian regimes, including the detection of their Intelligence agents, publication of their names and various restrictions to taking public offices (normally, those of civil servants). In the post-Soviet Russia none of these measures has ever been introduced. Therefore, the chapter discussing lustration in Russia will be limited to the cases of unsuccessful attempts to launch it and the description of the effects of refusing it.

ATTEMPTS TO PUBLISH KGB AGENTS' NAMES

The start of lustration public discussions dates back to the coup d'état loss of the State Committee of the State of Emergency (GKChP) in August 1991. The winner of the political crisis, Russian President Boris Yeltsin, tried to remove the two main pillars of the Soviet Communist regime – the party and the secret services. Though it turned out rather easy to deal with the former, the latter appeared highly resistant. For this purpose, a person new to the state security bodies, Vadim Bakatin, was assigned the Head of the KGB. A number of parliamentary and ministerial committees were set up to investigate and verify the constitutionality of various Committee activities.[1] It was decided to withdraw the archives from the KGB.[2] In October 1991 a Committee for the Party and KGB archives transferring was set up. It included members of the democratic movement and representatives of the Memorial society.[3]

At that moment the idea of revealing the names of KGB secret informers became popular. Despite accepting the role of the state security bodies *liquidator*, V. Bakatin rejected the above proposal by stating just a week after the loss of the GKChP putsch that "it was not people to be blamed but the system that made them" and that the appeals to open the archives might divide the society even deeper.[4] Some members of the inspection committees working in the KGB decided to take the initiative and in early 1992 they published excerpts of the reports of KGB department 5 (ideological counterintelligence) with informers' agent names.[5]

Alongside these chaotic revelations, the Committee for the archives of the CPSU and the KGB prepared a proposal to transfer the personal records of the former members of the state security bodies (stored for at least 30 years), dossiers and agents' personal records to the state archives. However, these courageous projects did not enjoy the required public and political support. Those who objected to lustration took advantage of the situation and as early as in March 1992 they ensured the passing of the Law of the Russian Federation On criminal investigation activities in the Russian Federation.[6] It stipulated the provision of classifying the data of the organization and the tactics of criminal investigation activities (part six, article 6). Thus, the issue of disclosing the names of the KGB employees and informers was taken off the political agenda just seven months after the putsch loss.

CPSU CASE AND LUSTRATION BILL

The next opportunity to carry out lustration was related to the consideration of the so-called CPSU case in the Russian Constitutional Court, where the issue of the constitutionality of the very CPSU was raised. The recognition of the Communist Party as unconstitutional could entail the prohibition of its restoration in Russia, and, as the chief justice Valery Zorkin confessed subsequently, to lustration – the ineligibility of its members for official positions. Nevertheless, CPSU constitutionality was not considered, which gave the chief justice of the Constitutional Court the grounds to credit himself with saving the country from civil war, which, according to him, lustration could have provoken.[7] The communist party was successfully revived as the Communist Party of the Russian Federation (CPRF) and it started playing a significant part in Russian political life.

Later attempts to implement lustration in Russia were related to the name of Galina Starovoytova, who was the deputy of the Soviet and then Russian parliament for many years. It was she who was the first to put forward the bill on lustration at the end of 1992.[8] She understood lustration as a measure to fight antidemocratic revenge and a return to totalitarianism.

In one of the further versions of the bill, Starovoytova offered to introduce temporary (5–10 years) professional restrictions for the following categories of people:

- all former dismissed secretaries of party, industrial and regional organizations of the CPSU;
- former first, second and third secretaries of district, city, regional and krai committees of the CPSU;
- employees of the central republican and all-union committees of the communist parties, acting prior to the decree of President Yeltsin on the CPSU prohibition (including the secretaries of the respective central committees, but excluding service personnel).

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1 See А. Кичихин А., Привело ли расследование августовского путча к трансформациям в работе КГБ?, in *КГБ: вчера, сегодня, завтра. Сборник докладов*, Москва: Общественный фонд "Гласность", 1993.

2 Decree of the President of the RSFSR dated August 24, 1991 No. 82 On Archives of the USSR State Security Committee.

3 Resolution of the Presidium of the Supreme Soviet of the RSFSR dated October 14, 1991, No. 1746-I On establishing a committee for transferring the archives of the Communist Party of the Soviet Union (CPSU) and the KGB to the state storage and use.

4 В. В. Бакатин, *Избавление от КГБ*, Москва: Новости, 1992.

5 Н. В. Петров, Десятилетие архивных реформ в России, in *Индекс*, 2001, (14); http://index.org.ru/journal/14/petrov1401.html; *Как они работали с нами*. Блог Андрея Мальгина, 20. 6. 2007; http://avmalgin.livejournal.com/566420.html; *Штрихи к портрету*. Блог Андрея Мальгина, 26. 11. 2006; http://avmalgin.livejournal.com/695124.html

6 Law of the Russian Federation On criminal investigation activities in the Russian Federation dated 13. 3. 1992 No. 2506-1.

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8 Galina Starovoytova's bill on lustration. Website of Nizhny Novgorod regional department of RPR-PARNAS, 15. 8. 2014; http://parnasnn.ru/proekt-zakona-o-lyustracii-galiny-starovojtovoj/2014/08/

The restrictions were to be applied to these people not unconditionally, but only in one of the cases below:

- if the total work experience in these positions was at least 10 years;
- if as of the date of the GKChP putsch they were in one of the above positions and did not voluntarily declare their departure from the CPSU, or
- if they were employees of the bodies of the People's Comissariat for Internal Affairs, (NKVD) – the Ministry of State Security (MGB) – the KGB, including those in the reserve, or if they had agreed to collaborate with them, or had been working in these bodies during the last ten years prior to adopting the new Russian constitution (1993).

Professional restrictions, according to Starovoytova's bill, had to apply to the civil services (starting with the heads of district and city administrations and finishing with federal ministers), education and the mass media. At the same time for the "active carriers of totalitarian regime policy" (as those subject to lustration were jointly called) it was allowed to take directly and publicly elected offices.

The project separately specified measures to ensure loyalty to the new Russian constitution from the armed forces and intelligence services – as examinations on the knowledge of constitutional provisions and an oath of fealty to it.

FINAL FAILURE OF LUSTRATION, ITS CAUSES AND EFFECTS

Starovoytova's attempts to push the bill through parliament, the last of which was made in 1997, completely failed. A year later the very supporter of the lustration ideas was shot dead near her house in Saint-Petersburg.

The failure of her efforts was caused, inter alia, by the skeptical attitude to lustration of many respected democrats. For instance, a founder of the Memorial Society and the first human-rights ombudsman in Russia Sergey Kovalev was always against it.[9] The veteran of the Russian democratic movement Yuliy Rybakov, who was first a deputy of the Leningrad council, and then of the State Duma, later regretted this decision of his fellow-thinkers to lustration: "Both Sergey Kovalev and I, as well as dozens of democrats who had undergone repressions, knowing their people, were afraid of a wave of score-settling, which could get out of control and, as it seemed to us, would terminate the movement for freedom altogether. Today it is clear to me that the failure to support Starovoytova, to force the President to make this necessary step was our fatal mistake".[10]

Since there were no lustration measures, Russian successors of the KGB (the Ministry for State Security – the Federal Counterintelligence Service – Federal Security Service and a number of other bodies) started restoring their influence on sociopolitical life. As early as in 1993 it was reported that the security reserve officers institute would be revived in the ministries and departments and their representatives would be sent off to commercial entities. For example, in 1992 the former head of the 5th department of the KGB Filipp Bobkov became the head of the analytical department of JSC Group Most owned by oligarch Vladimir Gusinsky, who held, inter alia, the leading national TV channel NTV.

The climax of the state security staff return to the state leadership was the race for power in the second half of 1999, when Boris Yeltsin's political appointee KGB lieutenant-colonel Vladimir Putin defeated the former head of the KGB first central board Eugeny Primakov. Vladimir Putin's 17-year reign has been under the full-scale influence of the former Soviet security services on the political and economic life of the country.

During Putin's first two presidential terms lustration and decommunization became marginal ideas on the whole. The gradual return to them occurred at the end of the first decade of the 21st century. In 2011 the council for civic society and human rights development, during the tenure of Putin's successor Medvedev, offered to prohibit for civil servants the rejection or justification of totalitarian regime crimes[11] and reschedule the Federal Security Service professional day, as it was celebrated on the date of the establishing of the CheKa (All-Russian Special Commission for Combating Counter-revolution, Sabotage, and Speculation), which laid the basis of Soviet punitive agencies. However, these projects were not supported politically.

NEW RISE OF THE LUSTRATION ISSUE IN RUSSIA

Along with the advent of the political opposition to Putin's regime in Russia the issue of lustration gained new significance. Now Putin's opponents see there a means to overcome power abuse and systematic impunity, which became established in the governmental machine. There are attempts to carry out "public lustration" or at least prepare the materials for it in the future. In 2012 the Yabloko party and an informal association "The League of Voters" collected data on over 1000 persons, involved, according to the observers, in falsification at the elections.[12] One of the leading opposition leaders of Russia, Aleksey Navalny, who announced his intent to race for the presidential post in 2018, launched a special website "The Black Notebook", which includes judges and officers of law-enforcement bodies, participating in violations of human rights.[13]

LESSONS LEARNT

The lack of any lustration in post-Soviet Russia is an independent and important symbol of the country's failure to transit to democracy. The Communist Party power was, actually, replaced by the power of its major intelligence service, which for nearly eight decades eradicated domestic foes of the party and, finally, took its place. Perhaps, it was the rejection of lustration and the dismissal of the Soviet punitive agencies that was one of the main causes of the democracy loss in Russia.

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