Legality of lustration as a tool of transitional justice in post-communist Central Europe

BACHELOR THESIS

AUTHOR: Andrejs Anpilogovs
LL.B 2022/2023 Class
student number B020102

SUPERVISOR: Filip Cyuńczyk
PhD. in Law

DECLARATION OF HONOUR:

I declare that this paper is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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ABSTRACT

In the aftermath of communism, nations of Central Europe have opted for different methods to address their oppressive past. Lustration, *i.e.*, screening of holders of offices in the state administration, has been one of the most well-known practices of this nature. It raised a substantial body of criticism arguing against it as a measure violating rule of law principles applicable in a liberal democracy. What is more important, the use of lustration was one of the factors to ignite a discussion about the role law has in times of political and social transition which resulted in the development of the conceptual framework of transitional justice. This Thesis presents lustration as a mechanism of emerging rule of law in post-communist Central Europe aimed at securitizing fragile democracy and creating new social order committed to democratization. By highlighting the differences existing between law in consolidated and new democracies, it proves the legality of lustration laws in terms of conformity to the rule of law.

Key words: transitional justice, lustration, post-communism, Central Europe, rule of law, democratization

SUMMARY

In the early years after the communist regimes in Central European states transferred power to democratic oppositions, these countries adopted a number of legal mechanisms to address their complicated past. One of the most highly debated is a region-specific kind of vetting measure targeting former communists, secret police and its collaborators – lustration laws. This paper analyses the legality of lustration in terms of its conformity to the rule of law – such principles as non-retroactivity, individual responsibility, the presumption of innocence, *etc*. For this purpose, it places lustration within the conceptual framework of the study of transitional justice in order to ensure non-formalistic and interdisciplinary research of the subject matter.

Examination of transitional justice measures requires different conceptual standards and understandings. In times of rapid social and political transformation, law has a dual nature – on the one hand, it provides a stable framework of transition while on the other it also constitutes an instrument for achieving it. For that reason, conformity to the rule of law in transitioning societies means striking a balance between adhering to usual principles of legal certainty and advancing democratization, creating a new social order and resolving the grievances of the past. This balance will never be perfect and compromises will be made – it is an evaluation of the extent of compromise on legality and the effect on democratization which have to be weighted. Lustration in post-communist Central Europe was supposed to achieve three distinct but related objectives. Firstly, it provided moral clarity ensuring discontinuity between totalitarian regimes and the new democratizing forces. Here it also provided minimal justice for victims of communist abuses who saw their oppressors even if not punished but nonetheless sanctioned. Secondly, it was aimed as a trust-building tool to both establish trust in the new government and repair social networks of civic society destroyed by ever-present fear created by communist secret services. Thirdly, it securitized fragile democracy against the return of communists to power or them working within the new system to undermine it. These are three main justifications that are supposed to outweigh inevitable problems with legal certainty of lustration laws.

The Thesis proceeds to evaluate the most prominent substantial arguments against lustration by dividing them into two categories – non-conformity to the principles of the rule of law and potentially harmful effect on democratization. It shows that lustration, despite sanctioning past behavior, has forward-looking objectives and therefore, should not be treated as merely retroactive legislation undermining legal certainty. In addition, it explains that legal theory related to the principle of non-retroactivity provides a possibility for exceptions from the general rule. Although the Thesis finds the argument that lustration is a measure legalizing collective guilt having more merit – it also shows that this concern has counter-arguments. When it comes to democratization aspect, critical statements referring to reputational damage, court congestion, personnel problems as well as potential harmful effects on trust are examined. The Thesis finds the problem of lack of qualified civil servants as well as a massive influx of lustration disputes to the legal system overexaggerated. The problem of political misuse of lustration to destroy reputation of political opponents, when analyzed in a historical context, is rather mitigated by adoption of lustration laws than intensified. Finally, even though the precise relationship between lustration and inter-personal and institutional trust is yet unclear due to limited empirical research, it is argued

that lustration at worst, has no impact on trust or in the best-case scenario can restore social networks damaged by communists.

As the final large body of research, the paper turns to illustrate problems arising in the process and implementation of lustration laws in various Central European states. Even though lustration in abstract may not violate the rule of law and therefore, is considered legal, its practice may be found not to adhere to standards. Here the Thesis shows that reliability and therefore, admissibility of information used in lustration proceedings is questionable and has to be studied carefully. Moreover, as ECtHR case law establishes, differential access to information used to lustrate former communists and secret agents, *e.g*., if that data is classified and not made available to the accused, may constitute a due process violation. Certain measures might be invalidated on the grounds of disproportionality, for instance, lustration laws which stipulate limitations on employment in the private sector. Last but not least, operation of such laws must be limited in time and restrictions must be lifted once extraordinary conditions justifying their adoption cease to exist.

In conclusion, the Thesis suggests that lustration should be viewed as a measure that arises out of ethical and normative concerns and aims to advance the process of building a rule of-law-governed democracy. As a transitional justice mechanism, if properly formulated and carefully implemented, it should be seen as a legitimate tool showing the difference between the nature of law in times of ordinary and transition. Simultaneously, it casts some measure of doubt on the legality of lustration enforced more than 30 years after the demise of communism and urges further research in that direction.

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INTRODUCTION

The case of former communist Central Europe is praised as an unprecedented success and a great achievement of the peaceful transition of power. Communist satellites of the Soviet Union who ruled their Central European states for more than 40 years have conducted negotiations with the representatives of the opposition and civil society which led to agreements allowing peaceful (except for Romania) transfer of power. The first free elections occurred in Poland on June 4th, 1989 had a snowball effect in other countries ultimately paving the way for destruction of the repressive state apparatus and democratization. Western liberal democracies have commented on this approach as a model transfer of power for a liberal and constitutional state. Some three decades later, with societies deeply divided in the opinion about the present and the future, these countries find themselves in an uncertain place. None of them has managed to reach the standards of living present in Western Europe, none has developed into a consolidated democracy. What is more, some have even experienced the process of democratic backsliding due to populist sentiments shared by the majority of the population. Nevertheless, Central European countries formerly ruled by the communists are all members of the EU and NATO. An absolute majority of them are still counted as, albeit fragile, liberal democracies. What are the reasons for such a development? The answer to that question might be located in the realm of the past.

New democratic regimes found themselves facing a complicated question of what action should be taken in regard to members of former elites, state apparatus and security services. The long history of humanity has seen many instances of brutal retribution brought upon defeated opponents. However, such an approach would be hardly desirable in the context of post-communist Central Europe – in the region where the objective was the creation of a liberal democracy as existing in the West. Anti-communists had to create a state where conflicts are resolved by means of established procedures, where separation of powers is observed, where laws themselves are just, where human rights and procedural guarantees are respected – a rule of law-governed democracy. To this end, a new social understanding committed to the rule of law must have been created. Simultaneously, there was pressure to react to past abuses of the communists and prevent their repetition. All the more important, there was a need to securitize a new fragile democracy from the re-emergence of totalitarianism. This set of challenges required a response that could contribute to the creation of a new order while keeping consistent with human rights and rule-of-law standards a democracy is supposed to uphold.

Among different legal mechanisms adopted by Central European states to this end, one stands out as the most debated – lustration laws. Lustration, as will be explained below, is a particular kind of vetting – the practice of screening applicants to and holders of specific state positions for their involvement in the institutions of the previous regime. Individuals found involved face different non-criminal sanctions. Even though the terms lustration and vetting are sometimes used in exchange, Central European lustration is a more far-ranged process in comparison to vetting. In short, lustration is meant not only as a measure of safeguarding democracy and personnel removal but also encompassed a great symbolic element. It has been viewed as a message of moral judgment and revelation of truth about the past which contributes to the abandonment of old social patterns of distrust and creation of a commitment to democracy and the rule of law. Post-communist lustration has faced substantial criticism due to its inherent

incompatibility with the traditional understanding of the rule of law, *i.a*., retroactivity, attribution of collective responsibility, discriminatory character and neglecting the presumption of innocence. Other authors have also pointed towards potential negative social effects and the risks of political misuse. Thus, the legality of lustration has been put into question.

The present Thesis aims to examine these challenges. Its objective is to present the reasons for adoption of lustration laws and the goals they are supposed to serve. This is necessary for the establishment of the potential lustration has in advancing democratization. It also takes an inquiry into various legal and socio-political arguments brought to criticize this policy to understand their relevance in a particular historical context as well as their potential to invalidate the measure. It also searches for ways to resolve the problem of an alleged incompatibility with the principles of the rule of law to understand whether such derivations, if existing, could be excused on different grounds. In essence, thus, I am attempting to evaluate the legality of lustration in light of the circumstances of the post-communist transition in Central Europe. Legality in this sense is understood as conformity to the rule of law. A crucial characteristic of this Thesis is its examination of lustration in the framework of transitional justice – a particular field of legal scholarship studying the nature and role of law in times of rapid social and political transformation. Therefore, the question of the legality of lustration is viewed through the concepts of transitional justice. I generally start from the hypothesis that lustration laws of post-communist Central Europe *per se* are generally acceptable as an instrument of transitional justice. Nevertheless, their methods of implementation, as well as particular provisions, may very well violate procedural rights and guarantees of persons lustrated. Therefore, careful design of lustration laws is necessary. I am not making any claims as to whether a particular national lustration law is legal or not but rather trying to establish some common patterns and rules. Specific cases should be viewed only as illustrations of the problems in lustration's design or implementation possible. I adopt doctrinal research method by studying a vast body of scholarship on transitional justice and post-communist political and social studies. Jurisprudence is mainly used as a point of reference for the challenges of procedural legality.

The Thesis below is structured as follows. Chapter I introduces the concept of lustration and locates it in the realm of transitional justice, explaining particularities of character and function of law in times of rapid social and political transformation. It also examines the reasons behind lustration laws and the goals they are supposed to serve in the context of post-communist Central Europe. Chapter II is devoted to identification of substantial challenges lustration encounters as a measure of transitional justice and examines their relevance in the case of Central Europe. Chapter III proceeds with the presentation of procedural issues that were reviewed by courts and scholars in Central European national lustration laws. It serves as an illustration of possible problems which can invalidate the procedures through which lustration is carried out. Conclusion summarizes the findings, points out the limitations as well as offers directions for future research.

Chapter I: Transitional justice and lustration

Transitional justice: theoretical framework

While contemplating the historical path of Central European nations Milan Kundera once noted: "Central Europe is not a state: it is a culture or a fate."[1] He contrasted the history and cultural identity of diverse small nations of Hungarians, Poles, Czechs, Slovaks *etc*. that for centuries have been part of Roman Christianity, ideas of Enlightenment, the rise of nationalism with those of Russia, which has aimed to assimilate every small nation into its empire, based on the idea of uniformity, standard, centralized. This comparison led him to conclude that Central Europe has always been "the eastern border of the West" – the West which for decades has been "kidnapped, displaced and brainwashed" and nevertheless, fighting for its identity.[2]

Kundera's reflections have direct role in addressing the purposes of this thesis. The past has both normative and practical importance in transitioning societies. Realization of personal and collective sentiments of society which has recently freed itself from the chains of authoritarianism contributes both to resolution of people's call for justice and to transformation of social groups to create trust and facilitate co-operation. In extraordinary times law has the potential to be an instrument of this change. Such an approach, however, necessitates departure from the understanding on role of law as existing in consolidated liberal democracies and adoption of a new framework which could supplement legal considerations with these of politics and sociology. This framework is transitional justice.

Placing lustration within the framework of transitional justice is essential. As a measure aiming to overcome the problems of the past to secure democratic future, it is an example of this non-conventional use of law as an instrument of change. Formalistic view on the rule of law cannot possibly capture particularities of lustration's socio-legal character and objectives. Outright declaration of lustration laws as invalid due to their retroactive nature or collective application fails to analyze both their objectives and historic conditions under which they operate. A nuanced analysis, which is offered by transitional justice, is necessary.

In his examination of transitions in post-communist Poland in particular and Central Europe in general Czarnota[3] reflects on the distinction between historic and normal justice existing in the Western legal culture, as illustrated by two distinct goddesses in Ancient Roman pantheon – Nemesis and Justitia. He explains that while Justitia personified the human dimension of justice, *i.e.*, the matters of people's everyday lives, Nemesis dealt with divine justice of an "apocalyptic character", personification of the gods' wrath. The latter was left in God's hands, as the human time was too short for its realization. For this reason, some questions were viewed only as subjects of ethics and memory and not of law. Transitional justice, in turn, represents a refusal to leave matters of historic scope to the blind fate and attempts to address them by legal means. The

[1] Milan Kundera, "The Tragedy of Central Europe", *The New York Review of Books* 31(7) (April 1984), p.35. From author's personal library.
[2] *Ibid*., p.33.
[3] This paragraph, if not specified otherwise is based on: Adam Czarnota, "Lustration, Decommunisation and the Rule of Law", *Hague Journal on the Rule of Law* 1(2) (September 2009), p. 334. Available on: Cambridge Core. Accessed September 7, 2022.

distinction suggests not all principles rule of law-governed democracies understand as foundational cornerstones of legal certainty are to be applied similarly in the case of transitional countries.

The subject of transitional justice has been a topic of intensive scholarly research. As captured by Czarnota, this concept

> focuses on legal practices and problems faced by states and societies under transformation, particularly the tension that results from the fact that the law is typically required to serve two ambitions: to function both as a stable framework of transformation and as an instrumental means of achieving it.[4]

Teitel presents two competing positions on the relations between law and democratic development.[5] Whereas the realist approach promulgates the necessity of political change to precede establishment of the rule of law, idealists believe that certain legal steps, shall be conducted before political transition has taken place. In essence, transitional justice differs from justice in ordinary times to the extent, that legal measures taken by the new regime shall advance the process of democratization in societies coming out of clutches of their authoritarian past. Law is used to create social commitment to liberal democracy governed by the rule of law. Thus, the general aim of these measures is to achieve "a political and economic transition that is consistent with liberal and democratic commitments."[6] This "Janus"[7] nature of law as both an instrument of change and source is the defining feature of justice in transitioning countries. Once transitional justice is defined in these terms, the burning issue is: whether it is possible for legal acts in times of transition to depart from the principles each rule of law-respecting democracy shall be upholding such as principle of non-retroactivity or the requirement of individual crime?

On the one hand, it is highly important that each new regime ensures that, in words of President Havel, "we are not like them". Democracy is not merely a formalistic concept – to the contrary, this form of political system requires broad social support and respect. What Justice Cepl once named "metamorphosis of the norms of human conduct"[8] is essential for every state that aims to establish advanced liberal democracy. On the other hand, in his analysis Elster emphasizes the need to study justice as a motivation.[9] In this line of thought, an excellent German civil rights activist Barbel Bohley's statement "we wanted justice and got the rule of law"[10], expressing her disappointment with the outcome of the trials in early 1990s when former communists were acquitted, comes in handy. It reflected the sentiment of thousands who wished that punishment was brought upon those officials who had a hand, albeit indirectly, in their sufferings. I use this precedent as an illustration of an important concern the new elites shall be attentive to: a part of

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[4] Adam Czarnota, "Decommunisation and Democracy: Transitional Justice in Post-communist Central-Eastern Europe" in Sven Eliaeson, Lyudmila Harutyunyan, Larissa Titarenko (eds.) *After the Soviet Empire: Legacies and Pathways* (Brill, 2015), p. 170.

[5] Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000), p. 3.

[6] Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice", *Harvard Law Review* 117(3) (January 2004), p. 768. Available on: JSTOR. Accessed September 6, 2022.

[7] Czarnota, *supra* note 3, p. 334.

[8] Vojtěch Cepl and Mark Gillis, "Making Amends after Communism," *Journal of Democracy* 7(4) (1996), p. 119. Available on: Project Muse. Accessed January 19, 2023.

[9] John Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004), p. 79.

[10] As quoted in: Ingo von Münch, "Rule of law versus Justice?" in Josef Thesing (ed.), *The Rule of Law* (Sankt Augustin, 1997), p. 186.

those who supported the overthrow of the previous political regime may have different views on what course of action against their oppressors is just. To put it otherwise, there is always a risk that

> an emotionally based desire for revenge may in one sense be stronger than the desire to carry out impartial justice.[11]

For reasons outlined above, the nature and function of law in periods of rapid social and political transformation is different from that in ordinary times. What emerges is, as Teitel observes:

> a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change.[12]

The conception of justice is therefore, partial and non-ideal. It may not always conform to principles which are usually understood as key components of the rule of law in established democracies – generality, prospectivity, regularity[13] – to the contrary, painful compromises are made. Ordinary principles of the rule of law shall be given proper evaluation each time a policy is to be employed. However, when deciding on the legality of a particular measure of transitional justice, no less careful attention should be paid to the effect it has on the goal of democratization. Some trade-offs are inevitable – but drawbacks on either side are to be justified on the other.

In his discussion with Adam Michnik President Havel captured the necessity for every mature society striving for democratic change to come to terms with their, often complicated, past:

> [t]he history of our country shows that every time we took the approach of thinking that we should not be interested in whatever had happened in the past--that it was not important--the consequences were always severe. It meant that we did not remove an ulcer that was poisoning the whole system. The ulcer kept festering and producing new toxins.[14]

Assisting societies in dealing with their past is one of the most significant goals transitional justice serves. A careful historical inquiry documenting the evils of the past is a useful approach in solving the problem of restoration of the collective in times of revolutionary change. The general position on the matter is that disclosure of truth about previous wrongs can create a common foundation for a new political order – a state governed by the rule of law and respect to human rights. In this regard, Henkin[15] stresses the need of both knowledge and acknowledgment: whereas the latter refers to the need of official recognition of abuses while the former prescribes revelation to be public, ensuring that the message reaches the widest audience possible. "Truth-telling […] responds to the demand of justice for the victims [and] facilitates national reconciliation"[16], she concludes. To a certain extent, as Teitel notes, "history is teacher and judge, and historical truth in and of itself is justice."[17] Thus, confession may in itself contribute to realization of social demand for justice. However, this is not the only objective – after all, knowledge about the identity of a person who, *e.g.*, informed secret services about anti-communist activity of a university student

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[11] Elster, *supra* note 9, p. 83.
[12] Teitel, *supra* note 5, p. 213.
[13] Lon L. Fuller, *The Morality of Law Revised Edition* (Yale University Press, 1969), p. 39.
[14] Adam Michnik, Václav Havel, "Confronting the Past: Justice or Revenge?" *Journal of Democracy* 4(1) (January 1993), pp. 21–22. Available on: Project Muse. Accessed January 17, 2023.
[15] Alice H. Henkin, "Conference Report," in *State Crimes: Punishment or Pardon*, ed. Alice H. Henkin (Queenstown, Md.: Aspen Institute, 1989), 4–5.
[16] *Ibid*., p. 5.
[17] Teitel, *supra* note 5, p. 69.

leading to their expulsion will fully satisfy the victim. Individual justice is not the greatest concern here – broader social and political repercussions are relevant.

It seems naïve to believe that individuals who suffered at the hands of officials serving the previous regime would be able to trust the new government's promises of building a democratic state if it government will not allow victims to tell their stories to the public. In words of Czarnota,

> mature societies […] require and deserve truth about their difficult past not because the 'truth will set you free' but because it is necessary for normal public life.[18]

Political transformation is impossible without social transformation. Society can start to change politically only once citizens' understanding of the prior events change[19] – it is this construction of shared truths which allows transition to occur and gain ground. What is more, revelation of previous wrongs also can contribute to rebuilding of trust among individuals as well as between citizens and the state which facilitates dialogue and allows all the parties concerned to "come together and solve the problems of the nation."[20] Moreover, this also strengthens the ties between citizens thus improving social capital desperately needed in post-authoritarian context to reconstruct a vibrant civil society able to hold the state accountable in the future.[21] Consequently, "transitional justice measures are envisioned as explicit and implicit agents of trust building."[22] In addition, former elites still must be treated fairly. Literature suggests that at least partial reconciliation between supporters and resisters of the previous authoritarian regime is necessary for democratic consolidation, where reconciliation is referred to as an ability to meaningfully share common institutions.[23] Measures of transitional justice shall ensure citizens' respect and participation in shared democratic institutions[24] – thus, even if a candidate loses the elections, they still must trust the electoral system enough to recognize its results.

One of the defining characteristics of totalitarian rule is a rampant mistrust towards the regime and its representatives[25] – this lack of legitimacy may have spillover effects shaping the attitudes of citizens to the new regime whatever it may be.[26] In the context of post-communist

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[18] Czarnota, *supra* note 3, p. 330.
[19] Teitel, *supra* note 5, p. 112.
[20] Lavinia Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Routledge, 2009), p. 3.
[21] *Ibid*.
[22] Cynthia M. Horne, "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries. Repairing or Wresting the Ties that Bind?" *Europe-Asia Studies* 66(2) (March 2014), p. 226. Available on: Taylor & Francis Online. Accessed September 6, 2022.
[23] For example, Howard-Hassmann and Torpey stress this factor out. *See*
Rhoda E. Howard-Hassmann, *Human Rights and the Search for Community* (Boulder: Westview Press, 1995).
John C. Torpey, *Politics and the Past: On Repairing Historical Injustices* (Lanham, MD: Rowman & Littlefield, 2003).
[24] Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (Cambridge University Press, 2010), p. 9.
[25] Russell Hardin, "Trust in Government" in *Trust and Governance*, edited by Valerie Braithwaite and Margaret Levi (Russell Sage Foundation, 1998), pp. 17–19.
[26] Kornai Janos, Bo Rothstein, and Susan Rose-Ackerman, *Creating Social Trust in Post-socialist Transition* (Palgrave Macmillan, 2004), p. 436.

Europe some commentators have gone as far as to suggest that a culture of distrusts plagues these societies. A major feature of communist rule is, as Gibney put it, "perversion of civic society."[27]

> [i]n place of a sense of community, these "societies" were instead marked by a mutual distrust between the state and its people, and between the people themselves.[28]

Communist elites have created civic bodies where membership was required if one were to build a decent career[29] all the while discouraging citizens from discussing political matters. Mass non-participation was the cornerstone of these regimes. Networks of secret police informers had a major hand in creation of the atmosphere of general fear and distrust among people.[30] What is more, the longer the regime was in power, the harder it became to distinguish between the guilty and the innocent, since the infiltration has reached higher levels.[31] What if a family member was a collaborator? A colleague? A childhood friend? A person who wishes to rent the appartement? Is the informer even aware of the fact that they have disclosed some information? "The communist system is well known for its ability to turn the truth into a lie and a lie into the truth"[32], Łoś observed. This ever-present infiltration of everyday life with agents of the secret police is a defining feature of Central European societies for nearly half of the 20th century. As Nalepa noted, transitional justice in such circumstances is different from cases when the attribution of blame is almost certain.[33] In the Soviet Empire everything was controlled by the state – it could do anything, took care of everything and was responsible for everything. Therefore, even those who hated the totalitarian regime have "unintentionally become accustomed to it" [34], having spent all their lives under its machine.

Lustration in Central Europe

After the fall of communism, states of Central Europe have employed a variety of instruments to deal with this legacy. One of the most well-known and controversial measures of transitional justice Central European countries have opted to was, indeed, lustration. Early criticism directed at lustration laws on the part of international community was, as Přibáň states in case of lustration acts in Czechia, an insufficient familiarity with complex political, social and historical context, language misunderstandings as well as the effect of the legislation.[35] However, as the body of

[27] Mark Gibney, "Prosecuting Human Rights Violations from a Previous Regime: The East European Experience", *East European Quarterly*, 31(1) (March 1997), p. 95. Available on: Gale Academic OneFile. Accessed March 12, 2023.
[28] *Ibid*.
[29] For example, one of my colleagues, a now well-respected long time Latvian attorney in Soviet times had to become a member of the Communist Party's youth organizations in order to be accepted to the law faculty at the university due to their "unreliable" (*i.e*., anti-communist) relative living abroad for many years.
[30] Horne, *supra* note 22, p. 225.
[31] Nalepa, *supra* note 24, pp. 7–8.
[32] Maria Łoś, "Lustration and Truth Claims: Unfinished Revolutions in Central Europe", *Law & Social Inquiry* 20(1) (Winter 1995), p. 117. Available on: JSTOR. Accessed January 22, 2023.
[33] Nalepa, *supra* note, p. 8.
[34] Michnik, Havel, *supra* note 14, p. 21.
[35] Jiří Přibáň, "Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law" in *Justice as Prevention: Vetting Public Employees in Transitional Societies* by Alexander Mayer-Rieckh and Pablo de Greiff (eds.) (Social Science Research Council, 2007), p. 329.

literature on transitional justice grew, more and more authors came to share the conclusion that lustration was justifiable as a mechanism of democratization in post-communist society.

As a policy, lustration presents one of the most fundamental ethical and political dilemmas of public policy – "the accommodation of victors and vanquished in a decent society."[36] In Latin word *lustratio* means purification by sacrifice.[37] As Justice Cepl explains, to lustrate means "to purify ceremonially as a means of removing blood-guiltiness and cleansing a house."[38] I shall hereafter use Horne's definition of lustration as measures that

> involve the screening of individuals in public institutions […] in order to verify that personnel have the integrity and capacity to fulfill their positions in a way that supports the goals of the new regime. Individuals found lacking in certain integrity or capability criteria are compulsorily removed from their positions, prevented from taking new positions, encouraged to voluntarily resign from positions or face the public disclosure of their past.[39]

Therefore, lustration is first and foremost a vetting procedure applicable both to candidates for new posts and to civil servants already occupying specific positions in the state apparatus. In essence, Central European states have adopted laws prescribing analysis of past involvement with the Communist regime for persons seeking selected public positions.[40] These established particular groups of persons which would not be allowed to hold specific offices in the new system. However, as authors acknowledge, there is a substantial difference existing between mere vetting and lustration in post-communist Europe. The latter implies not merely stipulates banning former communist officials and secret police informers and officers from the positions of influence,[41] but also implies a process of social renewal, that of "purification of state organizations from their sins under the communist regimes."[42] Lustration is post-communist countries was designed as an essential symbolic measure – the one which would truly allow these states to "establish a break with their past"[43] and create conditions for societal reconciliation and rebuilding. Lustration is often confused with decommunization which refers to elimination of groups of people who held positions in state apparatus in the communist regime from public life.[44] While this thesis recognizes the difference existing between the two terms, it will not distinguish one from the other extensively – thus, while the scope of Czech Lustration Act makes it possible to treat it as a decommunization

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[36] Jens Meierhenrich, "The Ethics of Lustration", *Ethics & International Affairs* 20(1) (March 2006), p. 104. available on: Cambridge Core. Accessed January 20, 2023.

[37] As provided by Boed. *See* Roman Boed, "An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice" in *Post-Conflict Justice* by M. Cherif Bassiouni (ed.) (Brill | Nijhoff, 2002), p. 345.

[38] Natalia Letki, "Lustration and Democratisation in East-Central Europe", *Europe-Asia Studies* 54(4) (June 2002), pp. 530–531. Available on: Research Gate. Accessed September 7, 2022.
Vojtěch Cepl, "The Transformation of Hearts and Minds in Eastern Europe" *CATO Journal* 17(2) (Fall 1997), pp. 229–234. Available on: https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1997/11/cj17n2-7.pdf. Accessed April 2, 2023.

[39] Cynthia M. Horne, "Transitional justice: Vetting and lustration" in *Research Handbook on Transitional Justice* by Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.) (Edward Elgar Publishing, 2017), p. 424.

[40] Letki, *supra* note 38, p. 530. Available on: Research Gate. Accessed September 7, 2022.

[41] This definition of employment vetting in the region is proposed by Stan. In full: "the banning of communist officials and secret political police officers and informers from post-communist politics and positions of influence in society." *See* Stan, *supra* note 20, p. 11.

[42] Roman Boed, "An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice", *Columbia Journal of Transitional Law* 37(2) (1999): pp. 357–402.

[43] Horne in Lawther, Moffett and Jacobs, *supra* note 39, p. 424.

[44] Czarnota, *supra* note 3, p. 311.

law, I still refer to it as a lustration measure. Last but not least, lustration in post-communist Europe differs from the ordinary vetting to the extent that these laws make the names of persons positively[45] lustrated public. Therefore, one can speak about three components of lustration: (1) screening of employees in certain positions; (2) making the identities of collaborators known and (3) partially excluding groups of people from public life for a defined period of time.

The goals of lustration

As provided above, the measures of transitional justice shall advance the process of democratization. Literature identifies several objectives lustration pursuits in this context in post-communist Central Europe. The remaining part of this chapter presents three most prominent lines of reasoning behind lustration – these of morality, trust and security.

Morality: a minimal justice measure

Advocates of lustration argue that a task of putting back the moral order broken down during the communist era requires getting that "justice is done."[46] Disqualifying former officials from important posts in the new public administration is seen as a moral obligation the new government owes to citizens subjected to repressions in the past.[47] That is precisely the matter of purification of state administration Central European scholars are keen to note. If the very same people who had a hand in sustaining and executing communist rule in their states keep hold of their posts, the public may come to believe that the promises of revolution have not been fulfilled. Here I once again turn to President Havel's reflections:

> [t]here are people whose own lives and whose families have been destroyed by the regime, who spent their entire youth in concentration camps, and who will not be easily reconciled to all that – especially since many of those who had persecuted them are much better off than their victims.[48]

Cepl and Gillis follow:

> [a]fter communism fell in Czechoslovakia, the new regime recognized that while it would not be possible to make full amends for all past injustices, there were measures available that would help make good on the promise of principled and responsible government.[49]

Lustration, thus, is understood as a minimal justice solution for the victims of the prior regime. In Appel's words, it

> fulfilled the cathartic need to punish the perpetrators of past injustices without violating an individual's right to life or liberty without sufficient evidence of past crimes.[50]

[45] The relevant type of activity in the communist regime is proved.
[46] Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 20(1) (Winter 1995), p. 55. Available on: JSTOR. Accessed November 28, 2023.
[47] *Ibid*.
[48] Michnik, Havel, *supra* note 14, p. 25.
[49] Cepl and Gillis, *supra* note 8, p. 119.
[50] Hilary Appel, "Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe", *East European Politics and Societies* 19(3) (2005), p. 401. Available on: SAGE Journals. Accessed January 15, 2023.

Therefore, lustration encompasses a sanction of a kind.[51] Even though not being a criminal conviction, as will be established further, it provides satisfaction to the victims of communists by seeing that their abuses are not rewarded with privileges and public positions while also appreciating the seriousness the new regime takes violations of their rights in the past.[52] It sends a powerful message of condemnation of anyone's previous involvement with the communist regime. This is the aspect of "minimal" justice – no criminal prosecution of individuals responsible for injustices, but exclusion from positions of influence in the new regime.[53] Put otherwise, lustration exposes behavior which should be unacceptable in a decent society.

Despite the aforementioned, moral purity of lustration is far from certain. As Williams's analysis of Parliamentary debates on lustration law in then-Czechoslovakia shows, its advocates actually refrained from explicit moral reasoning since the

> wish to lustrate collided with a higher-order normative commitment to the rule of law, which was one of the defining ideas of the post-communist revolution.[54]

The idea of the rule of law encompassing such principles as prospectivity, general application, presumption of innocence reflects the understanding on the morality of law. If law is to shape human behavior, it shall respect principles which grant it legality from a moral point of view. Advocates of lustration would be correct to counter this understanding by reminding about the difference between conception of justice in transitional and ordinary contexts, the function of law as well as the repercussions these have on the rule of law. What is treated as morally right in one case can differ in the other – in words of Feldman:

> [a]n absolutist morality is out of place in situations where we are never starting from scratch, and are embedded in a set of past decisions and evolving conditions that call for us to take a position and act upon it.[55]

However, upholding the legality of lustration on the grounds of morality would require providing proof that the goals of democratization are more *morally* correct than the principles of the rule of law as existing in advanced democracies. Unfortunately, up to this day legal doctrine has failed to provide a coherent answer to this challenge. For that reason, I shall hereafter abstain from discussing the issue of morals and instead turn to two other lines of reasoning.

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[51] Thus, *e.g.*, Kritz suggests that exclusion of abusers is primarily a sanction owned to the victims. Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights", *Law and Contemporary Problems* 59(4) (Autumn 1996), p. 138. Available on: JSTOR. Accessed April 17, 2023.

[52] Alexander Mayer-Rieckh, "On Preventing Abuse: Vetting and Other Transitional Reforms" in *Justice as Prevention: Vetting Public Employees in Transitional Societies* by Alexander Mayer-Rieckh and Pablo de Greiff (eds.) (Social Science Research Council, 2007), p. 484.

[53] Nadya Nedelsky, "Czechoslovakia and the Czech and Slovak Republics" in *Transitional Justice in Eastern Europe and the Former Soviet Union* edited by Lavinia Stan (Routledge, 2009), p. 45.

[54] Kieran Williams, "Lustration as the securitization of democracy in Czechoslovakia and the Czech Republic", *Journal of Communist Studies and Transition Politics* 19(4) (2003), pp. 7–8. DOI: 10.1080/13523270300660026. Accessed November 27, 2022.

[55] Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton: Princeton University Press, 2004), p. 28.

Restoration of trust: lustration as institutional reform

The second justification is the matter of trust. Exclusion of persons from public service, *i.e.*, vetting *per se* is viewed as a method of institutional reform.[56] The United Nations (hereafter – UN) Operational guide to vetting states that exclusion of persons whose integrity is seriously questioned can "reestablish civic trust and re-legitimize public institutions."[57] Institutions of the previous regime may be either disbanded altogether to establish new ones or gradually transformed through screenings of personnel and removement of those who are found complicit in past abuses.[58] As already outlined above, mistrust was one of the consequences of the communist rule in Central Europe. This situation influences the future development of now independent nation-states: Łoś and Zybertowicz are keen to note in this regard

> [t]he new reality is built with what is available to the builders; it is constructed not on the ruins but with the ruins of communism. Any new form of social integration is conditioned by mental patters, habits, strategies and alliances formed under the previous regime.[59]

The effects on trust can be viewed in two dimensions. The first is increasing trust in government – it is related to demonstrating that the new democratic regime truly represents social pressure for democratization and condemnation of communism. The presence of members of former elites in the new system may undermine people's willingness to trust the institutions of the state.[60] If the people do not see the change of personnel or the enforcement of new standards "they are unlikely to engage in the risk-taking required for trusting behaviors."[61] In that regard Jan Sokol, the chair of the Parliament faction of the Civic Movement in the Czech Republic linked lustration to a normal practice in established democracies of resignation of officials in case of a major disaster even if they themselves were not liable to keep public confidence in officials and institutions.[62] Thus, when the government is cleaned of former bureaucracy societies "feel more confidence that their leaders are not merely mouthing democratic ideas while surreptitiously undermining the foundations of democracy."[63] The second dimension might be even more grand – it is the state of inter-personal,

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[56] Mayer-Rieckh, in Mayer-Rieckh and de Greiff, *supra* note 52, p. 485.

[57] UNDP Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform. *United Nations Development Programme, Vetting Public Employees in Post-conflict Settings: Operational Guidelines* (2006), p. 9. Available on: https://www.ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf. Accessed April 6, 2023.

[58] *Ibid.*, pp. 487–488.

[59] Maria Łoś and Andrzej Zybertowicz, *Privatizing the Police-State: The Case of Poland* (Palgrave Macmillan, 2000), p. 12.

[60] Roman David, "Transitional Injustice? Criteria for Conformity of Lustration to the Right to Political Expression", *Europe-Asia Studies* 56(6) (September 2004), p. 795. Available on: JSTOR. Accessed January 21, 2023.

[61] Cynthia M. Horne, *Building Trust and Democracy Transitional Justice in Post-Communist Countries* (Oxford University Press, 2017), p. 35.

[62] "The principle of the presumption of innocence applies in criminal matters for the citizen. In public and especially in elected offices, of course, it is not possible to punish, but on the contrary the holding of those offices is saddled by something that could be called the presumption of guilt. In democratic states it is commonplace that if, for example, there is a huge railway accident, then the minister for transport resigns. It is not because he had anything to do with the accident, but rather an emphasis is placed on it so that a public official be beyond any suspicion. And because it is not possible to exclude a possible connection, in such cases the minister must resign. It greatly contributes to the trustworthiness of public officials." As quoted in Williams, *supra* note 54, p. 12.

[63] Vojtěch Cepl, "The Transformation of Hearts and Minds in Eastern Europe," *CATO Journal* 17(2) (Fall 1997), p. 232. Available on: https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1997/11/cj17n2-7.pdf. Accessed April 2, 2023.

social trust. Here, lustration aims to break the "general tendency of distrust"[64] on all levels of public and private life. Revelation of truth about the activities of individuals who collaborated with communist-era secret services makes it possible for ordinary people to make their own judgments about the past. Moreover, lustration might be empowering to citizens removing the incentives to engage in extra-legal activities and build societal trust.[65]

On the other hand, there exists a number of arguments questioning the ability of lustration to achieve its-trust building goals. Political misuse can reduce legitimacy of the measures and damage its trust-building objectives. As an employment restriction or even merely reputation-damaging tool it may be compelling to wield against political opponents for political advantage.[66] This problem applies not only to lustration but to all measures aiming to shed light onto the communist past. Orwell's remark that "who controls the past controls the future" is relevant in this regard.[67] Thus, following her travels to Germany, Poland and Czechoslovakia, Rosenberg wrote about the enthusiasm with which post-communist parties have pushed different myths about communism, "constantly rewritten to fit the current political debate"[68] to bring additional legitimacy and harm opponents. Tismaneanu while speaking about the "fantasies of salvation" in de-communizing countries warns about the dangers of reconstructing legitimacy and legality through authoritarian methods in countries where the line between right and wrong is utterly blurred.[69] In addition, revelations about the scope of "interpersonal betrayals", as Horne put it, committed under the previous regime by neighbors, colleagues and relatives may undermine the readiness of citizens to trust each other.[70] Finally, there is scarcity of empirical evidence assessing the effect of lustration on rebuilding both inter-personal and institutional trust, while existing research delivers mixed results.[71] While there exists some data showing the positive effect of

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[64] Letki, *supra* note 38, p. 541.
[65] Horne, *supra* note 61, p. 39.
[66] There is some evidence that this has happened in post-communist countries. *See* Csilla Kiss, "The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary", *Europe-Asia Studies* 58(6) (September 2006), p. 925. Available on: JSTOR. Accessed May 2, 2023.
[67] For instance, David in his analysis of debates on lustration law in the Czech parliament remarks that creating a particular image of the past was the core aim of both advocates and opponents of the law. "It seems that the vital political interest of advocates of the lustration law was to gain control over the state apparatus, whereas many of its opponents sought to preserve the old networks and maximize their social capital. Some lustration supporters tried to cover their realpolitik intentions under the veil of morality, whereas lustration opponents considered the law im- moral. The central ideological battle was to gain control over the perception of the past: Opponents wanted to preserve a good picture of the past, conceding a few unfortunate aberrations, whereas advocates sought value discontinuity with the communist system." Roman David, "Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)", *Law & Social Inquiry* 28(2) (Spring 2003), p. 393. Available on: JSTOR. Accessed September 6, 2022.
[68] Tina Rosenberg, *The Haunted Land. Facing Europe's Ghosts after Communism* (Vintage Books, 1995), p. xviii and xiv.
[69] Vladimir Tismaneanu, *Fantasies of Salvation. Democracy, Nationalism and Myth in Post-Communist Europe* (Princeton University Press, 1998).
[70] Horne in Lawther, Moffett and Jacobs, *supra* note 39, p. 436.
[71] *Ibid*., p. 439.

lustration on the development of institutions contributed to democratization,[72] significant questions about its utility in different countries remain.[73]

Security: protecting fragile democracy

The third and final line of argumentation to be presented here is the one employed most often by politicians. Authors conducting analysis of the legislative debate preceding the adoption of lustration laws in Central Europe agree that the most widespread argument expressed by MPs supporting passage of lustration laws was that of security.[74] Here it is reasonable to recall Benda's speech during lustration debates in the Czech Parliament:

> [w]e are now on a very complicated journey from a totalitarian regime to a democratic, free and law-abiding state. This journey is not irreversible and it is far from completed. And it is precisely in this situation that we cannot allow representatives who undoubtedly took part in the crimes of the Communist Party, […], to continue to conspire against the democratic development.[75]

Due to the nature of negotiated transition in Central Europe, former communists have maintained certain power. It was a legitimate concern that some forces might wish to use that power in order to stop the process of political transformation and put the old regime back in power. One of the aims of lustration in Central Europe was, thus, exclusion of individuals potentially disloyal to the new democratic state from public administration.[76] The second reason relates to the fears of massive infiltration of opposition ranks by communist-era security services with its agents and informers. It is a fact, that communist-era secret police had performed covert operations by recruiting opposition members and using them as informants. Thus, *e.g*., in Poland SB (communist secret police) launched a special program named Jodla followed by a larger campaign called Renaissance – it targeted key Solidarity figures arrested after the declaration of martial law earlier in 1981.[77] These programs have managed to deliver broad results – thus, in a few months 186 Solidarity leaders only from the Baltic Coast had consented to collaboration.[78] After the transfer of power scandals broke out as the files started to be opened. For instance, in fall 1990 Hungarian interior minister disclosed to the Parliament's National Security Committee the existence of the list of secret security informers which included names of several MPs.[79] In Czech Republic a scandal broke after the first free elections in 1990 when Jan Ruml, the assistant of then-Interior minister found that the name of the chair of one of the key anti-communist parties Roman Bartoncik had

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[72] Horne, *supra* note 22, p. 225.

[73] Matt Killingsworth, "Lustration after totalitarianism: Poland's attempt to reconcile with its Communist past", *Communist and Post-Communist Studies* 43(3) (August 2010), p. 275. Available on: Research Gate. Accessed April 6, 2023.

[74] *E.g.*, Williams (2003) notes that the problem of conformity of lustration to the liberal understanding of the rule of law forced Czech MPs to turn their arguments not to morality but to security. *See*: Williams, *supra* note 54, p. 8.
Łoś (1995) concludes that 52% of all pro-lustration arguments law-makers made in the relevant debates in Polish Senate (upper chamber of the Parliament) relied on state security considerations. *See:* Łoś, *supra* note 32, p. 148.

[75] As referred to by Williams (2003). Williams, *supra* note 54, p. 9.

[76] Přibáň in Mayer-Rieckh and de Greiff, *supra* note 35, p. 323.

[77] Nalepa, *supra* note 24, p. 72.

[78] *Ibid*.

[79] Elizabeth Barrett, Péter Hack, and Ágnes Munkácsi, "Lustration as Political Competition: Vetting in Hungary" in *Justice as Prevention: Vetting Public Employees in Transitional Societies* by Alexander Mayer-Rieckh and Pablo de Greiff (eds.) (Social Science Research Council, 2007), p. 262.

been present on a secret police collaborators' list.[80] In Poland the first revelation of SB files which included names of members of the cabinet, senators and members of the Lower House classified as collaborators by the secret police resulted in a no-confidence vote against Prime Minister Jan Olszewski's government in spring 1992.[81] The problems this facts pose lie not only in the realm of moral and ethics or in the area of public trust in state institutions. A prevailing concern was in fact, the risk of blackmail – the possibility that previous elites, who are well aware of the identities of collaborators could threaten compromised individuals with the possibility of revelation of their past involvement with the regime to gain co-operation in achieving their interests. The need to ensure the integrity of persons holding key positions in a transitioning state is therefore, another security concern lustration addressed.

Former elites might also have used this influence to maintain their social status and wealth accumulated under the previous regime.[82] David points out:

> [t]he criminal activities of the former communist nomenklatura and the secret police members did not cease with the fall of communism.[83]

As Łoś and Zybertowicz explained in their grand analysis of processes occurred before, during and after the transfer of power, the outgoing communists in Poland have conducted an unprecedent operation of "privatization of police-state."[84] In essence, (1) the communists gave up their political power peacefully because the process of transition was designed in a way to insure their long-term economic and political interests; (2) this insurance paralyzed effective transformation and (3) lustration and decommunization were parts of the policy necessary to remove the legacy of that system and ensure the advancement of democracy.[85] These conclusions apply to other post-communist countries as well: informal connections, access to valuable information and expertise in acting in the grey area or outside the scope of the law made it possible for former elites to effectively subvert operation of the market economy.[86][87] Elster offers a perspective on the level of corruption allegedly existing in the court system – knowledge of this corruption and the overall engagement in the ways of the old regime was one of the reasons to believe they will never have to answer for their crimes.[88] Useful is the experience of Czechia and Slovakia which after the split of Czechoslovakia lustration laws was enacted in the former but not in the latter. Ash analyzed the process of democratization in both countries and concluded that whereas lustration law was able to prevent many former communists from power in the Czech Republic, "such persons remained to do much damage in Slovakia,"[89] ultimately establishing an authoritarian regime. Another example

[80] Nalepa *supra* note 24, p. 66.
[81] Łoś, *supra* note 32, p. 123.
[82] Letki, *supra* note 38, p. 540.
[83] David, *supra* note 67, p. 396.
[84] Łoś and Zybertowicz, *supra* note 59.
[85] *Ibid*., pp. 145–150.
[86] Zybertowicz (1993), quoted in Łoś, *supra* note 32, p. 151.
[87] A quote from the debates in Polish Senate: "if such a structure is not completely crushed, it has a natural tendency to re-create itself through mutual inter-personal contacts, habits, the entire mentality of these people … It is necessary to shatter the family clans of functionaries, which dominate all police post, … to destroy the whole bureaucracy, to smash what I have called mafia networks based on personal ties, various interests and their not-always-legitimate political agendas." As quoted in Łoś and Zybertowicz, *supra* note 59, p. 126.
[88] Elster, *supra* note 9, p. 191, 194.
[89] Timothy Garton Ash, *History of the Present: Essays, Sketches, and Dispatches from Europe in the 1990s* (Vintage, 2001), p. 230.

– in Bulgaria the lack of a ban for nomenklatura members to hold positions in the banking sector eventually led to its collapse.[90] For these reasons lustration in the region is also seen as an anti-corruption measure employed in the name of public interest.

Seen as a national security issue, lustration can be located not only within the framework of transitional justice, but also as a measure of "militant democracy." The principle, expressed in mid-1930s by Loewenstein who, reflecting on the Nazification of Germany, stressed the need for adjustments to the concept of liberal democracy as to arm it with instruments to deal with individuals undermining the political system.[91] Müller formulated the idea as a willingness

> to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime.[92]

As was recognized in a landmark judgment by the Czech Constitutional Court, newly democratic state has the right to apply legal measures which limit the risks of return to the previous regime.[93] Specifically in the context of Central European transition, the European Court of Human Rights (hereafter – ECtHR) has recognized the need for a democratic state to be able to protect itself "against individuals who are not ethically qualified to become representatives of a democratic state at political or administrative levels."[94] Lustration, in such a case, can also be examined as a democracy-protecting measure employed in times of external and internal risks to the new fragile regime. This task is, however, outside the scope of inquiry of this Thesis.

Final remarks

This chapter has located lustration in the world of transitional justice. It explained the difference of the nature and role law has in times of political flux of a democratizing state and in ordinary times in a consolidated democracy. Moreover, it also introduced the nature of lustration and socio-political circumstances if which post-communist countries of Central Europe chose to implement it. Finally, the aims and justification for passage of lustration laws has been presented. In the next chapter, I turn to presentation of legal and practical problems lustration faces as well as evaluate their potential to render the measure illegal.

CHAPTER II: CHALLENGES OF LUSTRATION

The previous chapter has introduced lustration as a tool of transitional justice as well as outlined the rationale behind its implementation in post-communist Central Europe. This chapter addresses challenges lustration in general and as adopted in Central Europe in particular poses to the common

[90] Letki, *supra* note 38, p. 540.
[91] Karl Loewenstein, "Militant Democracy and Fundamental Rights", *The American Political Science Review* 31(3) (June 1937): pp. 417–432. Available on: JSTOR. Accessed February 25, 2023.
[92] Jan-Werner Müller, "Militant Democracy" in *The Oxford Handbook of Comparative Constitutional Law* by Michel Rosenfeld and András Sajó (eds.), p. 1253. Available on: Oxford Academic. Accessed February 24, 2023.
[93] Decision of the Federal Court of Czech and Slovak Federal Republic No. Pl. 03/92 of 26 November 1992, p. 11. Available on: https://www.usoud.cz/en/decisions/1992-11-26-pl-us-1-92-czechoslovak-const-court-lustration. Accessed April 27, 2023.
[94] *Ždanoka* v. *Latvia* [GC], no. 58278/00, para. 100, 16 March 2006.

understanding of the rule of law. It is true, as established above, that there exists a distinction between the nature and function of law in times of rapid social and political change as contrasted with times of ordinary life of an advanced rule of law-abiding democracy. These differences between the conceptions of law as a tool of resolution of everyday conflicts on the one hand and as both an instrument and objective of political transformation in democratizing states on the other warrant some measure of diversion from ordinary principles of the rule of law. Nevertheless, a careful balance should be observed in order to ensure that drawbacks on said principles are justified and necessary for the goal of democratization and development of the rule of law-governed state. Consequently, if one were to evaluate legality of lustration as a measure of transitional justice, they should examine which rule of law principles are being compromised and to what extent. Furthermore, transitional justice also implies use of law as a tool of democratization – it is the goal which can justify temporary compromises on the core principles of legality. Therefore, examination of legality of lustration also implies analysis of its potential for democratic development. While Chapter I provided key benefits lustration can bring, the drawbacks are presented here. Identification of potential challenges to the legality of lustration in both these areas is thus, the aim of this chapter.

Legality of lustration – rule of law principles

Retrospectivity

In his struggles to develop a code of laws one of the solutions King Rex turned to was the aid of hindsight[95] – instead of creating a uniform general law he decided to adjudicate all the disputes arisen in the previous year accompanying his decisions with statements of reasons which would not be binding in all judgments to follow. This arrangement however, made impossible for his subjects to abide the law, since they could not understand in advance what the rules were. In his classic recital of this story Fuller uses this example as an illustration of the rule that laws should always be prospective and not retrospective.[96] Principle of prospectivity is thus, long since established as one of the core principles of the rule of law. Conformity or rather non-conformity of lustration laws to this principle is the issue its critics are always keen to point out.[97] Lustration in its nature is a form of justice which addresses the wrongs committed in the past either at the level of an individual or the collective. Old regime's positive law often licensed the abuses of its representatives, *i.a.*, broad violations of civil, political and property rights or did not grant said rights at all.[98] Lustration aims to remove or at least expose and condemn wrongdoers from positions of influence after the transit has taken place. Moreover, actions which did not amount to abuses *per se*, such as membership in the Communist Party, are also subject to lustration and impose sanctions on former members limiting their civil and political rights, such as the right to stand for elections. Therefore, as a measure which creates unfavorable legal and practical consequences for

[95] Fuller's presentation of these events. *See* Fuller, *supra* note 13, p. 35.
[96] *Ibid*., pp. 51–62.
[97] For arguments showing that lustration violated principle of non-retroactivity *see, e.g*., Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (3rd vol.) (U.S. Institute of Peace Press, 1995), paras. 3:322–45.
[98] Posner and Vermeule, *supra* note 6, p. 791.

acts allowed by the pre-existing positive law, lustration in Central Europe did involve "some retroactivity of law and departure from strict formalistic legalism."[99]

In the early years an important criticism in relation to transitional justice has been an alleged violation of the *nulla poena sine lege* principle.[100] Although similar objections were also made in relation to lustration in post-communist Central Europe,[101] legal literature has been able to effectively rebut this claim. The principle in question refers to punishment therefore, is applicable in the area of criminal prosecution. Lustration has however little connection with matters of criminal law – instead scholars regard it as a measure of "transitional administrative justice."[102][103] It is administrative law which forms basis for its legal grounding.[104] As put forward by Teitel, transitional societies employ administrative measures in order to redistribute power among groups of citizens.[105] Whereas the primary goal of criminal justice is to punish the wrongdoers for *past* actions, administrative justice is linked to enhancing general security of state and society in the *future*. The line Williams draws between punishment and penalty in this regard is useful:

> [w]hile liberal ideology might be able to justify exclusion with surprising ease, it is on shakier ground when justifying punishment. Owing to its neutrality on values and its commitment to equality and freedom, contemporary liberalism is much more comfortable with the idea of penalty, which involves strict liability (simply ascertaining whether someone committed an act regardless of motive and excuses), is prospective (aiming mainly to deter repetition) and […] is often accompanied by mitigating messages […]. Punishment, on the other hand, is a very public expression of 'attitudes of resentment and indignation, and of judgments of disapproval and reprobation'. It is retrospective and informed by assumptions of shared values, moral worth and standards of human excellence.[106]

Lustration in this sense is seen as a penalty to officials who are not deemed trustworthy enough to occupy positions in the new regime and not as an act of retribution for their past involvement with the Communist party, paramilitary or the secret services. During Parliamentary debates on the passage of lustration law in Czechia Benda outlined:

> what we are doing is neither revenge nor justice nor punishment. It is exclusively a question of the future. […] And it is precisely in this situation that we cannot allow representatives who undoubtedly took part in the crimes of the Communist Party, as did their high functionaries and their shock weapons in the form of State Security and the People's Militia, to continue to conspire against the democratic development.[107]

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[99] Czarnota, *supra* note 3, p. 311.

[100] No punishment without the law. *E.g.,* Elster, *supra* note 9, p. 133.

[101] Rosenberg has captured the essence of the issue faced by Central European states perfectly: "[p]eople can only legally be prosecuted for crimes that were illegal at the time of the commission. The truly hated acts of eastern European regimes-the secret police shadow, the censorship, the political criteria for all decisions-they were the very basis of the system." *See* quoted in: Hyuse, *supra* note 46, p. 60.

[102] This particular notion is proposed by Teitel. *See* Teitel, *supra* note 5, pp. 149–191.

[103] Andreu-Guzmán sees vetting as a form of administrative law. Federico Andreu-Guzmán, "Due Process and Vetting" in *Justice as Prevention: Vetting Public Employees in Transitional Societies* by Alexander Mayer-Rieckh and Pablo de Greiff (eds.) (Social Science Research Council, 2007), p. 455.

[104] United Nations Development Programme, Vetting Public Employees in Post-conflict Settings: Operational Guidelines, *supra* note 57, p. 9.

[105] Teitel, *supra* note 5, p. 150.

[106] Williams, *supra* note 54, pp. 8–9.

[107] Václav Benda, as quoted in *Ibid*., p. 9.

Thus, lustration and other vetting measures are to a significant extent preventive and not punitive in nature.[108] What is more, lustration laws have neither the severity nor the logic of criminal law. As David analyzes, whereas criminal law prescribes punishment for all its trespassers, lustration laws are much more limited both in severity – only restricting access to senior posts in the new public administration – and in scope – targeting only upper-level former communist officials, excluding low-rank members of the organizations.[109] It seems reasonable to recall Cepl's remark: "if revenge had been our motivation, there are more effective ways […] that inflict a far greater sanction."[110] In fact, lustration seen as a way to side-step criminal liability.[111] For these reasons, it should not be viewed as a punitive sanction[112] and therefore, not retrospective in terms of criminal liability thus, not infringing the *nulla poena sine lege* principle.[113]

Taking into account all the aforementioned, it is still impossible to completely exclude the possibility that lustration laws may constitute some measure of retaliatory tendencies which are natural responses to representatives of the fallen totalitarian regime.[114] Even though this fact alone cannot overrule the argumentation before, one should be advised to remember that, in words of Nalepa, for many anti-communists reconciliation-promoting objectives of transitional justice and lustration are "like the 'morning after' effect following the carnival of a revolution."[115] Essentially, it is unclear whether all its advocates truly do not wish for some sort of revenge.

Many lustration advocates have invoked arguments of similar nature in order to reject in principle or at least mitigate criticism portraying it as a measure of retroactive measure. Offe has distinguished between "backward-looking justice" and "forward-looking justification".[116] Transitional justice, despite often being described as backward-looking can also be conceptualized in forward-looking terms.[117] In the case of lustration, the latter is related to safeguarding democracy in the future from dangers past legacy poses – essentially, state security arguments already introduced. The idea that former elites,

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[108] Noted specifically by Louis Joinet, reflected in: United Nations Economic and Social Council. *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (October 2, 1997), para. 43. Available on: https://www.refworld.org/pdfid/3ae6b1210.pdf. Accessed April 10, 2023.

[109] David, *supra* note 67, p. 425.
Although in this particular article author analyses only Czech and Polish lustration laws, this finding can be easily applied to Hungary as well, since its national lustration law was even milder than these of other two countries.

[110] Cepl, *supra* note 63, p. 231.

[111] Huyse, *supra* note 46, p. 52.

[112] Welsh notes that lustration in Central Europe "was still relatively moderate by most accounts and in general not guided by revenge seeking." Helga Welsh, "Dealing with the Communist past: Central and East European Experiences after 1990", *Europe-Asia Studies* 48(3) (May 1996), p. 424. Available on: JSTOR. Accessed April 28, 2023.

[113] Přibáň in Mayer-Rieckh and de Greiff, *supra* note 35, p. 327.

[114] David, *supra* note 67, p. 405.

[115] Nalepa, *supra* note 24, p. 9. She also provides an excerpt from her 2004 interview with one Polish anti-communist politician: "[i]n a strongly alcoholic situation with lots and lots of vodka, perhaps I could picture myself reconciled with a former supporter of the communist regime. But normally, never! But jokes aside, asking about reconciliation in Poland is like asking about the AC in a car that has no wheels with the car dealer trying to convince you that AC is the car's most important feature!"

[116] Claus Offe, *Varieties of Transition: the East European and East German Experience* (Cambridge: Polity, 1996).

[117] Posner and Vermeule, *supra* note 6; Offe, *ibid*., p. 766.

> their attitudes and competence, and the networks of solidarity existing among them, would constitute a threat to the orderly functioning of the new democratic regime if they were allowed access to important political, administrative or professional positions[118]

which forms a basis for introduction of lustration laws in Central Europe is clearly embedded in a forward-looking perspective. This leads some authors to conclude that lustration, despite investigating events of the past, has no retroactive character at all.[119] Other analysts may not go so far, but still believe that prospective objectives of lustration outweigh its retroactive structure.

Finally, a response to this challenge may also be found not in transitional justice literature but in general legal theory. Fuller's and Radbruch's inquiries provide two different ways for a new government to establish liability for wrongs done by the oppressive regime. Fuller argues that retroactive legislation may be used under exceptional circumstances if it aims to uphold another crucial principle of the rule of law – that all crimes are prosecuted.[120] Radbruch, in turn, claims that while generally the conflict between justice and positive law should be resolved in favor of the latter, if the positive law is intolerable unjust it shall not be regarded as law at all.[121] Thus, authors offer two autonomous conceptions: whereas Radbruch's formula establishes natural justice as a legal remedy to an unjust positive law, Fuller grounds solution in the democratic legitimacy of the elected legislature enacting a new retrospective law.[122] This analysis shows that requirement of legal certainty and the principle of non-retrospectivity of law connected to it do not automatically exclude every retrospective legislation. In light of the aforementioned, retroactive character of lustration laws in Central Europe can be permitted if they are either necessary to prosecute previously licensed offences of communist regimes or that communist rule and its representatives are blatantly unjust.

Collective guilt

"Relation of individual to the political collective"[123] is one of the core issues lustration laws are centered around. An essential characteristic of lustration laws is the idea of foregoing individual investigation and evaluation of person's past actions. Instead of examining official's performance in order to prove particular abuses they have committed, lustration laws simply provide lists of positions in the past regime which holders are disqualified from occupying specific positions in the new administration and public sector. Thus, lustration laws discriminate against groups of people and assume responsibility of their individual members by way of association with the group, such as the communist party, the secret services and the police, the paramilitary. Consequently, quite a few authors argue that lustration laws legalize the principle of collective guilt,[124] while some even

[118] Offe, *supra* note 116, p. 93.
[119] Letki, *supra* note 38, p. 535.
[120] Fuller, *supra* note 13.
[121] As translated in: Robert Alexy, "A Defence of Radbruch's Formula," in *Recrafting the Rule of Law: The Limits of Legal Order*, David Dyzenhaus (ed.) (Hart Publishing, 1999), pp. 15–16.
[122] Přibáň in Mayer-Rieckh and de Greiff, *supra* note 35, p. 327.
[123] Teitel, *supra* note 5, p. 151.
[124] For instance, *see* Schwartz quoted in David Kosař, "Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic", *European Constitutional Law Review* 4(3) (October 2008), p. 470. Available on: Cambridge Core. Accessed November 27, 2022.

identify this principle as their main objection against lustration.[125] For the process of democratization and long-term social reconciliation, rejection of the culture of collective guilt that can produce repeating cycles of violence and retribution is necessary – therefore, establishing individual responsibility for atrocities, as it is done in criminal trials is preferrable.[126] In addition, some commentators have also claimed that such a measure in fact is similar to communist disregard to legality and application of collective guilt[127] not only in legal measures but also in its ruling ideology.[128]

This observation is worth proper consideration. First and foremost, I propose substitution of term "collective guilt" with "collective responsibility" or "collective liability". Speaking about guilt in the context of lustration is incorrect, since lustration is a measure of administrative law and not criminal, since it does not focus on punishing the wrongdoers. Therefore, criminal law term "guilt" is ill-suited in the context of Central European lustration laws and one needs to speak about collective responsibility. This, however, does not exclude the validity of this point. On the one hand, the state security argument seems to be applicable for the advocates of lustration laws. If persons who participated in previous regime's political system and repressive state apparatus are a threat to democratization and the rule of law in post-totalitarian Central European states,[129] these latter objectives may override the problem of collective responsibility. On the other hand, invocation of this argument in such context necessarily requires treating beliefs, loyalties and identities of persons in question as firmly fixed and static, how Choi and David coined it, "determined by their past behaviors, actions, and associations."[130] An approach that effectively excludes the possibility of human change[131] may be justifiable in the case of post-communist Central Europe to a greater extent in comparison to other historical situations due to the nature of totalitarianism as characterized by "repressive control pervading society."[132] In addition, this collective feature also serves the symbolic purpose of lustration as an act "of emphatic retribution for the sins of the past."[133]

[125] *E.g.*, *see* Jiŕina Šiklová, "Lustration or the Czech Way of Screening" in *The Rule of Law after Communism*, by Martin Krygier and Adam Czarnota (Routledge, 1999), pp. 254–255.
[126] Kritz (1996), *supra* note 51, p. 128.
[127] Elster in a more general context has noted: "the process of de-communization in Eastern Europe has sometimes been carried out with something like Communist disregard for individual rights." *See:* Jon Elster, "Coming to terms with the past. A framework for the study of justice in the transition to democracy", *European Journal of Sociology* 39(1) (1998), p. 46. Available on: JSTOR. Accessed April 20, 2023.
[128] Šiklová mentions that many negative reactions about the adoption of Czech lustration law came from political parties which were composed primarily from former communists. She follows: "[i]t is paradoxical that such protests were raised by the Communist Party which, in all countries where it ruled, applied the principle of collective guilt in its ruling theories (e.g., the class struggle, etc.). For opportunistic reasons, it now invokes a democratic principle that it had previously denounced." *See* Jiŕina Šiklová, "Lustration or the Czech Way of Screening", *East European Constitutional Review* 5(1) (Winter 1996), p. 59. Available on: Hein Online. Accessed April 15, 2023.
[129] Which probably is true, as discussed above.
[130] Susanne Y. P. Choi and Roman David, "Lustration Systems and Trust: Evidence from Survey Experiments in the Czech Republic, Hungary, and Poland", *American Journal of Sociology* 117(4) (January 2012), pp. 1181. Available on: JSTOR. Accessed September 6, 2022.
[131] At least in the short-term aftermath of the regime.
[132] Teitel, *supra* note 5, p. 163.
[133] Wojciech Sadurski, "Decommunization, Lustration and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe" *EUI Working Paper Law No. 2003/15* (December 2003), p. 15. Available on: https://cadmus.eui.eu/bitstream/handle/1814/1869/law03-15.pdf. Accessed April 15, 2023.

Another counter-argument is expressed by Přibáň. He offers a rather non-conventional perspective on the issue of collective responsibility and proposes to examine it not in terms of individual's membership in a particular organization but in terms of their individual decision to join that organization.

> The law presumes that a person who individually decided to become part of the communist repressive institutions should be made responsible for this decision in the present. It is by no means a statute indiscriminately hunting for all communists and members of the secret police and using the principle of collective guilt, as suggested by early moral and legal criticisms. However, the law presumes that the very act of joining higher ranks of the Communist Party organization or repressive institutions, such as the secret police and the party militia, constitutes a solid ground of prohibition to take a job subject to the lustration procedure. Individuals are held prima facie responsible for their past political engagements.[134]

Once examined in these terms, the collective guilt argument becomes less persuasive. Yes, it is true that lustration assumes that membership in the communist party or the secret police implies some measure of responsibility justifying action against their former officials. Simultaneously, it was one's personal decision to join said organs being aware of their nature – and everyone shall take some responsibility for their decision. What is more, lustration was not carried out indiscriminately and lower rank officials of the communist regime generally faced no sanction.[135] Such a view in no way solves all the problems related to this responsibility by association feature of lustration laws in general and in Central Europe in particular, however it proves that the criticism may be at least partially countered.

Legality of lustration – democratization

Depleting new regime of skilled officials

One of the practical problems often discussed in the context of regime transitions is how to staff the new administration. Whereas the public will resent being governed by the old apparatchiks and bureaucrats with new titles, finding enough adherents of the new regime to staff the positions might prove to be difficult due to their lack of specific technical and administrative expertise.[136] Therefore, the former regime's officials may possess certain skills which are necessary the implementation of liberal reforms advancing democratization. The problem becomes even more apparent when the oppressive regime was in power for a long period of time, which leaves it impossible for a new regime to recruit functionaries of democratic state which existed before the autocrats assumed power.[137] In the case of post-communist Europe this situation is even more intense since communist regimes have not only remained in power for a long period of time, but

[134] Přibáň in Mayer-Rieckh and de Greiff, *supra* note 35, p. 331.
[135] Thus, in the Czech Republic, where the measures were most harsh, Lustration Act sanctioned only the officials of the Communist Party and not its ordinary members. *See* Kosař, *supra* note 124, p. 464.
[136] Posner and Vermeule, *supra* note 6, p. 777.
[137] *Ibid*., p. 778. Example of such short-lived oppressive regimes are countries occupied by Nazi Germany during World War II – since many members of former elites who ruled their states before the war have fled their countries and then returned after Nazis were defeated, they could easily assume their previous offices in the new democratic administration.

also required mass participation of public in their activities[138] – thus, *e.g*., East German Stasi employed about 90,000 officers and 150,000 informers in a 17 million country.[139] Offe captured the risk as follows:

> "[c]ountries which rely extensively on disqualification may deprive themselves of significant portions of the managerial and administrative manpower and talent that they depend upon in the process of economic reconstruction."[140]

Thus, two issues worth consideration emerge: (1) technical capability of former regime's functionaries to conduct democracy-promoting reforms and (2) the number of persons disqualified.

In the case of post-communist Central Europe these concerns seem misplaced. Firstly, there is every reason to answer the question of suitability of former nomenklatura in the negative. One of the defining features of Central European transitions is not only its political but also economic character. It is a well-known fact that communist regimes operated a centralized command economy with no or highly limited private property, factors of production owned by the state, which had no resemblance to Western neo-liberal capitalism these states chose to restore after the transfer of power.[141] In the communist system, positions in state apparatus were filled by applicants who satisfied ideological criteria, were loyal to the party and committed to Marxism-Leninism.[142] It is relatively safe to assume thus, that former officials held no expertise in carrying out these market reforms due to a lack of proper education and experience and therefore, their dismissal would not curb the process. For example, in Germany many former bureaucrats were dismissed specifically on the grounds of technical incompetence.[143] The second argument fares no better. While the Gauck Commission in Germany presiding over 140 kilometers of secret police files[144] or similar institutions in Poland or Czechia examining SB and StB (Czechoslovakia's communist secret police) files create an image of lustration in Central Europe as a massive sweeping of former elites and collaborators, the number of persons positively lustrated is in fact rather small. Thus, Hungarian Lustration Commission by December 2003 has found incriminating data only about 126 persons out of 7 872 vetted in total.[145] In the Czech Republic, despite around 345 000 certificates being issued in the first decade of the program,[146] only in approximately 15 000[147] cases persons' involvement was proved. Moreover, a majority of these officials faced no sanction since they were

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[138] Katarína Šipulová and Hubert Smekal, "Between Human Rights and Transitional Justice: The Dilemma of Constitutional Courts in Post-Communist Central Europe", *Europe-Asia Studies* 73(1) (2021), p. 104. Available on: Taylor & Francis Online. Accessed November 27, 2022.

[139] Stan (ed.), *supra* note 20, p. 6.

[140] Offe, *supra* note 116, pp. 94–95.

[141] For instance, Eyal says that Czech architects of market reforms united with dissidents with the aim to develop a program of social, political and ultimately also economic renewal which could reintroduce the spirit of capitalism in the Czech society, with lustration being one of the centerpieces of this program. *See* Gil Eyal, "Anti-politics and the Spirit of Capitalism: Dissidents, Monetarists, and the Czech Transition to Capitalism", *Theory and Society* 29(1) (February 2000), pp. 56–57. Available on: JSTOR. Accessed April 11, 2023.

[142] Łoś and Zybertowicz, *supra* note 59, p. 232, note 3.

[143] David, *supra* note 67 p. 395.

[144] As cited in provided in Czarnota in Eliaeson, Harutyunyan, Titarenko, *supra* note 4, p. 168.

[145] As specified in Barrett, Hack, and Munkácsi in Mayer-Rieckh and de Greiff, *supra* note 79, p. 277.

[146] Appel, *supra* note 50, p. 386.

[147] Letki, *supra* note 38, p. 539.

not in positions access to which was restricted.[148] For these reasons it can be concluded that the personnel dilemma is not an issue in the researched case due to specifics of Central European post-communist transition and lustration practice.

Reputation damage and political misuse

Another argument lustration critics in Central Europe put forward is the reputational effect of lustration laws. A well-known experience of Jan Kavan, a famous Czech dissident who later became MP and the Foreign Minister of the Czech Republic whose career was put in turmoil after accusations of collaboration with the secret services and spent several years to prove in court that these claims were false is notable in this regard.[149] In a post-communist society revelation of a hidden connection of a prominent individual brings extremely serious damage to that person's reputation in the eyes of the public and professional career. The consequences are not only personal: there is a significant possibility that lustration laws could become a tool used in political battles to harm opponents[150] thus harming political competition.[151] What is more, since the communist system has exercised a wide and deep infiltration of all spheres of public and private life, its corruption "seems to implicate all but a few brave dissenters - and perhaps even them as well."[152] To a certain extent, it is argued, all participated in the communist rule, even those who felt nothing but resentment towards it. Havel's phrase is illustrative to this matter:

> [w]e are all in this together – those who directly, to a greater or lesser degree, created this regime, those who accepted it in silence, and also all of us who subconsciously became accustomed to it.[153]

Or take Jan Urban's words:

> [s]ilence [is] kept about the silent collaboration of the majority, which served [the] dictatorship out of fear or the lack of imagination. ... For many of us came the time of revenge ... The cheap substitute of real resistance against totalitarian power.[154]

Drawing a "thick line" between the past and the present keeps reputation of persons needed to move the state forward intact. In addition, Offe also warns about the risks of "witch-hunts" being provoked by exposing the truth about former informers which would haunt both the government and the public – the former could become accustomed to solving all political problems through

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[148] Aviezer Tucker, "Paranoids May Be Persecuted", *European Journal of Sociology* 40(1) (May 1999), p. 91. Available on: JSTOR. Accessed April 15, 2023.
[149] For details, *see*: Lawrence Weschler, "The Velvet Purge: The Trials of Jan Kavan", *The New Yorker* (October 11, 1992). Available on: https://www.newyorker.com/magazine/1992/10/19/the-velvet-purge-the-trials-of-jan-kavan. Accessed March 29, 2023.
[150] Renata Uitz, "Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?" *XIII Juridica International* 47 (2007), p. 53. Available on: Hein Online. Accessed April 11, 2023.
[151] Offe, *supra* note 116, p. 95.
[152] Posner and Vermeule, *supra* note 6, p. 802.
[153] Michnik and Havel, *supra* note 14, p. 21.
Another Havel's quote in that regard from his New Year's address: "we are all – though naturally to differing extent – responsible for the operation of the totalitarian machinery; none of us is just its victim: we are also its co-creators. Quoted in: Łoś, *supra* note 32, p. 142.
[154] As quoted in Łoś, *supra* note 32, p. 141.

such measures while the latter would be unable to recreate inter-personal and institutional trust.[155][156]

Criticism of lustration laws in relation to their potential in destroying reputation does not take into account political and historic context existing in Central European states after the fall of communism. Let us deal with political misuse first. Different groups of interests early on have realized access to information in secret police archives as a strategic tool in political struggle. Persons who had access to the files quickly started to use it to their advantage. So-called "wild lustrations" when names of collaborators were made public absent any legal ground, became a characteristic of Central European politics. The most prominent example of such situation was Slovakia that inherited its lustration law from the times of Czechoslovakia but chose not to enforce it. The absence of such law did not prevent Vladimir Mečiar, Slovakia's Prime Minister for six years and a former communist to regularly expose his political opponents' past involvement with the regime.[157] In Poland lists were published from 1992 to 1998 up to the introduction of lustration law. What is more, the leaks of files occurred frequently – *e.g.*, in 1992 a group of Czech students working in StB archives smuggled out and published a registry list of 160 000 names.[158] This essentially created a black market for secret police files – thus, in mid-1990s a newspaper in Bucharest "The Daily Event" that published excerpts from Romanian Securitate archives on a daily basis.[159] As one German commentator observed, by opening the files and lustrating the officials, whereas East Germany "chose a horror ending … Poland chose a horror without an end",[160] allowing the secret materials haunt its politics for years to come. Lustration laws cleaned the public space of wild lustration.[161] These laws have established a procedure respecting procedural guarantees needed as well as provided a mechanism for persons accused to clear their good names. Therefore, it actually ensured an opportunity to defend reputation and, even if the investigation proved collaboration, ensured that process was civilized.

"We all are guilty" argument is ill-suited in the context of lustration. There exists a world of difference between people who passively collaborated and did not revolt against the communist rule and those who actively participated in the new institutions. Relative value of these acts is not the same.[162] And society is capable recently freed from the chains of totalitarian rule is capable of

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[155] Offe, *supra* note 116, p. 95.
[156] Rosenberg, after travelling Central European states in 1990s has also observed some evidence of such attitude. Tina Rosenberg, *supra* note 68.
[157] Appel, supra note 50, p. 399.
[158] *Ibid*.
[159] Klingsberg, as quoted in Łoś, *supra* note 32, p. 131.
[160] Klaus Bachmann, as quoted in David, *supra* note 67, p. 400.
[161] Czarnota, *supra* note 3, p. 324.
[162] One Polish senator emphasized the moral nihilism of making such a comparison: "[w]e cannot allow a situation where the nation will perceive us to imply that everything that took place during those 45 years had relative value; that the same value can be assigned to participation in the totalitarian power structures as to resisting them, or simply refusing to participate actively in them."
George Ross also noted: "such a claim is obscene and sacrilegious; it represents a slur on the memory of the victims of communism, whom all people of integrity mourn. They are those who never sold themselves to totalitarianism, who resisted the repressive regime and who paid a heavy price for it. … Haven't we heard before that the Jews, just as the Nazis, must bear (at least some) responsibility for Holocaust?"
Both quoted in Łoś, *supra* note 32, p. 143.

making reasonable distinctions between these categories.[163] In addition, one politician has also underlined the impossibility of comparing lustration to witch-hunts:

> has anyone ever seen witches? … This analogy is mistaken. … The women who were burned centuries ago as witches were innocent. Witches never existed. The Secret Police and its collaborators did exist.[164]

The "witch-hunts" and retribution arguments seem even less persuasive once a reader notices that these "acts of violence" have been inflicted by post-communists against themselves as well – opening of secret police files are authorized by "the very persons who are implicated by them."[165]

Court congestion

One pragmatic argument invoked by opponents of lustration relates to the resources it requires. Archives' investigation, litigation, proceedings in courts or other agencies needed to lustrate former regime's officials may tie the system with backward-looking litigation and prevent it from performing other tasks advancing democratization.[166] Substantial financial resources are necessary for this process.[167] Offe summarizes this challenge:

> after the demise of the old regime, and confronted with the chaos it has left behind, we have more important things to care about than retroactive justice. Formal court procedures are costly, and the professional manpower used in them is more urgently needed for other purposes.[168]

Although denying concerns of these nature totally would not be a reasonable course of action, it is not persuasive. Offe's argument clearly overlooks the "forward-looking justification" of lustration, namely, it potential benefits and its primary concern with the future. Once these are recognized, the government's task is limited to, as Posner and Vermeule noted, "pick the forward-looking projects with the best social returns."[169] However, even staying in backward-looking terms, this position can be rebutted. Firstly, since lustration procedure in post-communist Central Europe has been carried out by specialized state agencies, the court system does not receive a flood of lustration litigation – only those rare cases when an individual accused does not agree with the decision and appeals it. Secondly, whatever the costs may be, there exists no empirical evidence to show that the costs of lustration in Central Europe[170] have slowed down democratic reforms due to personnel or financial shortages.

Trust: lessons from the empirical research

As already established above, one of the key goals of vetting in general and lustration in particular is reconstruction of interpersonal and institutional trust. Creation of new civic society capable of

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[163] Posner and Vermeule, *supra* note 6, p. 824.
[164] Vice-Minister of the Interior in Czechoslovakia in 1991, quoted in Łoś, *supra* note 32, p. 140.
[165] Marek M Kaminski and Monika Nalepa, "Judging Transitional Justice. A New Criterion For Evaluating Truth Revelation Procedures", *Journal of Conflict Resolution* 50(3) (June 2006), p. 402. Available on: SAGE Journals Online. Accessed January 20, 2023.
[166] Posner and Vermeule, *supra* note 6, p. 801.
[167] Horne in Lawther, Moffett and Jacobs, *supra* note 39, p. 429.
[168] Offe, *supra* note 116, p. 84.
[169] Posner and Vermeule, *supra* note 6, p. 802.
[170] Or other vetting practices anywhere in the world for that matter too.

exercising its rights and freedoms through sharing the truth about their legacies is the feature of lustration in Central Europe. Even though theoretical arguments supporting this view seem compelling, the matters become more blurred once empirical evidence is taken into account.

Empirical research on the impact of lustration laws in Central Europe on social trust is scarce and provides mixed results. It may be stated with relative confidence that some designs of lustration programs can have a positive effect on trust in government. Thus, Choi and David[171] in their study of Poland, Hungary and Czech Republic distinguish between different lustration systems based on a method of dealing with tainted officials:

(1) Poland's *confession* – public officials were required to submit affidavits answering the questions about their past; only if the affidavit was found false, the official was exposed and banned from office;

(2) Hungary's *exposure* – officials who were proved collaborators could retain their office on the condition of exposure;

(3) Czech's *dismissal* – the tainted official was dismissed from office.

Surveys showed that confession and dismissal increased level of citizens' trust in government, whereas exposure failed to produce any meaningful effect.[172] The question of interpersonal trust and attitude towards former collaborators which is important for social reconciliation is a different issue.[173] Horne has examined the effects of lustration on inter-personal trust and reached less inspiring results. While she found that lustration had direct positive effect on trust in social institutions, it could not increase or in some instances even had a negative effect on interpersonal trust. Therefore, "lustration appears to both repair and undermine social trust-building mechanisms",[174] she concludes.

Final remarks

This chapter has managed to show that many arguments against the legality of lustration in Central Europe are not convincing enough. Instances of the alleged incompatibility with the rule of law and infringement of its principles are either contextually ill-suited, or justified by specific circumstances of each particular case or can be remedied by means of already existing legal techniques. As regards the impact on democratization, even though not everywhere lustration seems to reach its objectives fully, it certainly does not degrade the state of affairs. Therefore, it can be concluded that in principle, lustration laws in Central European countries are, albeit

[171] Choi and David, *supra* note 130, p. 1176 and 1177.
[172] *Ibid*., p. 1192.
[173] This issue picks David's interest: "In their effort to reform state apparatuses, personnel policies pass judgment on the persons involved. They may label former personnel as trustworthy or untrustworthy, and this may in turn determine whether any civic relationship with them is possible at a societal level. Personnel policies may convey ideological messages that redefine the social standing of former personnel and transform social relationships. In the past, the former political and security elites in Chile and South Africa were credited for their patriotic struggle against communists and terrorists. Transitional personnel policies may take these credentials away. Similarly, de-Baathification may have condemned the Baathists, but in doing so it imported, and preserved, the divisions of the past into, and in, the new order." *See* Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary and Poland* (University of Pennsylvania Press, 2011), p. 5.
[174] Horne, *supra* note 22, p. 248.

controversial and requiring careful management, nonetheless legally permissible tool. This chapter, however, did not evaluate particular provisions of these laws. The next one touches upon the problem of procedural legality of lustration aiming to provide illustration of particular methods and provisions which were not treated favorably by international authorities and deemed to violate the rules of international law.

CHAPTER III: PRACTICAL PROBLEMS – ISSUES OF PROCEDURE

I her analysis of legal rulings on the matter of lustration in Central European states Horne concludes that, contrary to the wide-spread belief, international legal bodies are not *per se* anti-lustration. In fact, she points out, their decisions were related first and foremost to the "fair and appropriate implementation of lustration laws"[175] leaving the issue of substantial legality outside their scope of review. In essence, the idea is that even though lustration itself were not legally questionable, its methods very well might be. What is more, specific techniques employed in the process of lustration can not only compromise the procedural legality, but also ultimately undermine its general democratization objectives thus rendering the whole measure ineffective. If such an unfortunate development prevented the law from performing its transformative goals, the legality of a specific lustration act in the framework of transitional justice could hardly be defended. Lustration procedure may be twisted by political and economic elites to serve their self-interest. The case of Albania provides a perfect illustration of such a situation: a lustration bill passed there emerged from the political struggle between post-communist and anti-communist parties and was designed as a tool for disqualifying the political opposition. This aim, Letki noted, was visible from the act's construction, rules for composition of the screening body and timing; shortly before the elections.[176] Adoption of the law brought significant international pressure ultimately leading to the annulment of the results of elections.

Furthermore, even if lustration is not explicitly constructed to be used as a tool to harm political opponents or gain other electoral advantage, it still needs to take into account various important procedural guarantees. As UN Secretary-General's Report pointed out, "[t]he inclusion of such due process elements distinguished formal vetting processes from the wholesale purges."[177] In the view of the UN, these requirements, *i.a.*, include the right of the official or a candidate to public service to be informed about the allegations against them, the right to respond before the entity carrying out the screening process, the right to be informed about any charges within reasonable time, the right to appeal the decision to a court or other judicial body.[178] The Parliamentary Assembly of the Council of Europe, for its part, specified the following due process elements:

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[175] Cynthia M. Horne, "International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context", *Law & Social Inquiry* 34(3) (Summer 2009), p. 716. Available on: JSTOR. Accessed September 6, 2022.

[176] Letki, *supra* note 38, p. 544.

[177] United Nations Security Council. *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* (23 August 2004), para. 52. Available on: https://digitallibrary.un.org/record/527647?ln=ru#record-files-collapse-header. Accessed April 25, 2023.

[178] *Ibid*., para. 53.

> the right to counsel […], to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal.[179]

Literature also offers some useful insights. Thus, Andreu-Guzman[180] suggests several criteria to evaluate in adoption of vetting: (1) legitimacy; (2) safeguarding human rights; (3) objectivity; (4) legality; (5) individual application and; (6) relative autonomy (not replacing criminal or disciplinary sanctions). While specific circumstances of transitions in different countries may justify different interpretation, these principles need to be observed.

The following part of Chapter III provides a non-exclusive list of issues worth considering in terms of procedural legality of lustration laws in several Central European states. It both touches upon some procedural issues shared by national lustration acts of several of these countries as well as presents some particular techniques and solutions international legal bodies were wary of.

Information concerns: the files problem

One of the problems always cited in criticism of any lustration law in Central Europe is the reliability of information sources used in establishing the person's involvement with the Communist regime. The evidence about person's activities comes from the communist-era secret police files.[181] Thus, *e.g.,* Hungarian lustration law established a procedure which required the search of the former agencies' registers for specific documentation proving persons involvement with the regime.[182] Drawbacks of such an approach are both ethical and practical. In terms of ethics, reliance on the communist secret agencies' records to examine the integrity of civil servants to a certain extent validates these institutions whose legacy the society is supposed to overcome.[183] Under communism people might have become informers against their free will. Secret services might have (and indeed had) forced many collaborators by threats and coercion. In fact, sometimes there was no need to even refer to explicit threats – individuals living in the overall oppressive environment have believed that refusal to collaborate would result in action against them and therefore, made no attempt to refuse.[184]

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[179] As quoted in: Andreu-Guzmán in Mayer-Rieckh and de Greiff, *supra* note 103, p. 466.
[180] *Ibid*., p. 467 and 468.
[181] Horne, *supra* note 175, p. 721.
[182] Specifically, the following documents have been considered to constitute the necessary evidence that an individual had: (1) signed a declaration to undertake activity and submitted reports; or (2) signed a declaration to undertake activity and received a payment, favor, or premium; or (3) received a payment, favor, or premium and submitted reports; or (4) had a No. 6 card and received a payment, favor, or premium; or (4) had a No. 6 card and submitted reports. Archives of Department III/III have been the sole source of this information. *See* Barrett, Hack, and Munkácsi in Mayer-Rieckh and de Greiff, *supra* note 79, pp. 282–285.
[183] Appel, *supra* note 50, p. 397.
[184] After the declaration of the martial law in Poland in December 1981 and massive arrests of Solidarity members, secret police started a program to recruit informers among their ranks. Nalepa presents one of the strategies they used to this end: "[a]ll of the interned leaders would be offered the possibility to collaborate. The offer would be backed with some mild threats, but mostly convincing arguments. Those who declined would be released and no further repercussions would follow. After all, if a person was unwilling to cooperate, to punish him would be just a waste of resources. The goal of the secret police officer would be to present the oppositionist with a different decision problem than the one that he was in fact facing. The dissident was supposed to think that refusal would bring upon him undesirable harassment, whereas agreement would end all harassment for the mild price of disclosing some seemingly

However, these are the practical issues, which draw the most attention. First of all, the archives were not secured in the immediate aftermath of the regime change. In each and every post-communist central European state rumor about destruction of files by the former state apparatus has been present. For instance, the last East German Minister of the Interior believed that much of the material has been forged by Stasi agents before their departure and that real files are long gone.[185] In Czechoslovakia estimates show about 90% of the files were destroyed.[186] The second aspect pointed out is the possible destruction of files *after* the democratic government has come to power. There exists a compelling argument stating that in the last days of communism agents have been destroying primarily the files of former communists while largely preserving these of the opposition.[187] Democratic opposition that gained access to the files realized how many collaborators secret police had among their own ranks and decided to either close the archives or destroy this evidence. Nalepa presents the case of Adam Michnik in this light – he became a consistent lustration critic exactly after the Historic Commission he established surveyed the archives for a few months in 1990.[188] Thus, Welsh in her 1996 article alleged that approximately 20 000 files have been secretly destroyed in Poland since 1989.[189] The revelation of President's Wałesa relationship with the secret police, who had secretly taken his file from the archives and kept it locked in his private safe as well as destroyed much of the other material while in office[190] is a great illustration of this problem. The third significant challenge is credibility of secret files. Several claims have been raised to explain why information in these materials might have been deliberately forged: the incentive to create false entries due to financial rewards to recruiting officers for the number of persons recruited;[191] registering people despite their refusal to collaborate in order to discredit them;[192] false entries because of administrative pressure to reach a certain number of informers.[193] In addition, the files might not only have been over- but also under-inclusive from the very beginning as major agents were not added.[194] These and other arguments question credibility of the evidence used in the lustration process and thus, its findings.

The question of whether the files completeness and reliability are capable of invalidating lustration on procedural grounds is still open to debate. In essence, for every argument against there was given a counter-argument. For instance, head of Section for Studies and Analysis in the

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irrelevant information about the underground opposition. In reality – and this is the information that was available to the secret police officer, but not the dissident – refusal ended the game with a payoff of unconditional release. However, agreement was just the beginning of an everlasting process of harassment for more information, as the dissident would be constantly threatened that refusing to cooperate would lead to the disclosure of his or her identity to fellow dissidents."

See Nalepa, *supra* note 24, p. 136 and 137.

[185] Quoted in Łoś, *supra* note 32, p. 133.

[186] Letki, *supra* note p. 542.

[187] To use it in future blackmail. Nalepa, *supra* note 24, p. 142.

[188] *Ibid*., p. 73 and 74.

[189] Welsh, *supra* note 112, p. 418.

[190] Nalepa, *supra* note 24, p. 232.

[191] Barrett, Hack, and Munkácsi in Mayer-Rieckh and de Greiff, *supra* note 79, p. 285.

[192] This was raised by Polish post-communist Minister of the Interior Henryk Majewski, quoted in Łoś, *supra* note 32, p. 133.

[193] Łoś, *supra* note 32, p. 133.

[194] Letki, *supra* note 38, p. 542.

Ministry of Interior in Poland which performed the analysis of files in the early years after the regime change stated:

> [i]n communist Poland, a lot of things were fictitious; but not the apparatus of coercion, nor the Secret Services. As they extended their tentacles into society, with the aid of enlisted agents, these services-in order to be effective-had to operate on solid ground. Therefore, their archives could not, out of necessity, be based on fiction .... The system of registration, documentation and archival recording of the secret collaborator's work was constructed in such a way that forgery was practically impossible …. Agents were under constant control.[195]

This reasoning fares well considering that state security apparatus in 1980s was the only institution performing its tasks effectively, as different historians noted.[196] Simultaneously, it needs to be acknowledged that much of the debate over the weaknesses and strengths of the use of files has been politically motivated.[197] Supporters of lustration emphasized the latter while critics the former. Although international legal bodies have not given a specific opinion on the matter during the proceedings, one ECtHR case stands out. In *Turek* v. *Slovakia*, the court has implicitly affirmed the use of the Czechoslovak *StB* files regarding the individual's file containing only an index of documents submitted[198] and one witness testimony to prove his collaboration.[199] Thus, evidence based on information from secret police archives was deemed admissible and reliable.

Due process violations: classified information

The term due process encompasses various principles which aim to ensure fairness in legal proceedings. The problem under scrutiny most often in the context of post-communist lustration was related to differential access to information. Approaches of Central European countries differed not only in the area of sanctions imposed on former communists and the scope of positions to be screened, but also in terms of public access to secret police files. For example, lustration law in Hungary allows citizens to request data and files collected by secret services in relation to themselves as well as on former and current holders of public offices.[200] In the Czech Republic, it also allows anyone to request access to the file of any individual however,[201] some information remains anonymous.[202] In Poland, while the Institute of National Remembrance provides access to

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[195] Piotr Woyciechowski, as quoted in Łoś, *supra* note 32, p. 134.

[196] For example, take Waller's phrase: [t]he KGB was the only major Soviet institution unscathed by perestroika … Gorbachev enjoyed the strong support of the KGB leadership and vice versa. His was a conscious policy to strengthen the KGB while attempting to create the conditions for Soviet society to become more creative and dynamic. *See* Michael Waller as quoted in Los and Zybertowicz, supra note 59, p. 16 and 17.

[197] Horne (2009), *supra* note 175, p. 722.

[198] The documents themselves were destroyed in 1989.

[199] To be precise, Turek did not raise the question of credibility of the information in his application to the ECtHR, limiting his application to the disclosure of that information by the state in lustration process. Nevertheless, the court still explicitly stated that the file "proved" collaboration. *See Turek* v. *Slovakia*, no. 57986/00, para. 54, ECHR, 14 February 2006.

[200] Barrett, Hack, and Munkácsi in Mayer-Rieckh and de Greiff, *supra* note 79, p. 273.

[201] Security Services Archives. How to request archival materials. Available on: https://www.abscr.cz/en/how-to-request-archival-materials/. Accessed April 30, 2023.

[202] For instance, the names of the informers are blackened, *see* David, *supra* note 67 p. 424.

some of the files for certain categories of individuals[203] it also holds some information closed. In general, in many countries authorities have the right to deny access to documents which are classified for state security concerns.[204] The question of the availability of all files to the public or at least the person specifically concerned is important, since they may wish to supplement the existing information – for instance, The Act on the Institute of National Remembrance in Poland allows individuals to incorporate their corrections, additions, explanations and updates in the set of documents related to them.[205] In lustration proceedings these opportunities may be essential for an alleged collaborator to prove his actual non-involvement with the regime. Another disputable matter would be granting the right to read the materials classified as "top secret", but not allowing the accused to make its copies or take the notes he made outside of the premises.[206] Applications of plaintiffs to the ECtHR thus, were centered around Article 6 (right to a fair trial) and challenged fair access to information necessary to the persons who wished to object to being found collaborators to know the evidence existing against them and use it in their defence. This element was also challenged on the grounds of alleged incompatibility with the requirement to ensure equal treatment during the lustration proceedings.

ECtHR has generally recognized the relevance of arguments claiming violations of due process due to non-disclosure of information used to lustrate former communist regime officials and collaborators. Thus, in Turek, the court ruled for the plaintiff and noted that if the individual lustrated is denied access to all or a large part of the materials used to show their collaboration, their opportunity "to contradict the security agency's version of the facts would be severely curtailed."[207] While the court acknowledged that limitations on access to materials in security service-related matters might be justified, in lustration proceedings this consideration is not persuasive. Lustration proceedings, it was noted,

> are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Thus, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes.[208]

Moreover, under Slovakia's lustration law, the agency in charge of the process was the one deciding on whether the materials remain classified – this aspect was relevant in the courts' argumentation as well.[209] Considering the above, ECtHR ruled that differential access to information curbed the applicant's possibilities to challenge the legality of lustration proceedings and violated the principle

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[203] Journalists, researchers, victims of repressions and their relatives as well as the state authorities. Institute of National Remembrance. Available on: https://ipn.gov.pl/en/arch/1555,Archives.html. Accessed April 30, 2023.

[204] Edita Gruodytė, Silvija Gervienė, "Access to Archives in Post-Communist Countries: The Victim's Perspective", *Baltic Journal of European Studies* 5(2) (December 2019), p. 159. Available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933483. Accessed April 28, 2023.

[205] Article 35b. para 1. Poland. The Act on the Institute of National Remembrance (18 December 1998). Available on: https://www.legal-tools.org/doc/fc69d7/pdf/. Accessed April 30, 2023.

[206] This was one of the elements reviewed in the Polish ECHR case, *Luboch*. *Luboch* v. *Poland*, no. 37469/05, para. 63, ECHR, 15 January 2008.

[207] *Turek* v. *Slovakia*, *supra* note 199, para. 115.

[208] *Ibid*.

[209] "Finally, under the relevant laws, it is typically the security agency itself that has the power to decide what materials should remain classified and for how long. Since, it is the legality of the agency's actions which is in question in lustration proceedings, the existence of this power is not consistent with the fairness of the proceedings." *Ibid*.

of equality of arms. In three subsequent cases against Poland, the ECtHR reaffirmed its view by stating that unequal access to classified data was unfair in the sense of Article 6 ECHR.[210] In particular, it also specified that the power of Polish State Security Bureau to decide on the confidential status of the documents did not ensure fairness of lustration proceedings.[211] Simultaneously, the court has also placed the problem in historical context by noting that motivations for extraordinary secrecy were unclear in particular in the light of the considerable time period after the fall of communist regime.[212] Therefore, it can be concluded that at the earlier stage of lustration compromises on procedural grounds may be excusable, the requirements should become tougher as the process of democratization progresses.

The above has shown that differential access to classified information is likely to be considered a breach of due process principle and can invalidate lustration procedure. At the same time, it is no less important to take notice of the ECtHR reluctance to question these and other procedural issues as a reason for invalidity of lustration in substance.[213]

> It is not for the Court to speculate on what might have been the outcome of the proceedings had they complied with the fairness requirements of Article,[214]

ECtHR definitively said.

Proportionality of restrictions: private sector

The process of vetting in general and of lustration in Central Europe is generally seen as a measure targeting the civil service, the security apparatus and the political establishment. Thus, it is almost always limited to the public sector.[215] Even though post-communist lustrations share this characteristic for the most part, some exceptions in different countries exist. Thus, Lithuanian lustration law prohibits former secret police officers from working in private security and detective agencies as well as in bank institutions and from practicing law.[216] Poland's new lustration law added the categories of attorney-at-law, journalists in privately-owned press as well as private scientific and research facilities to the list of positions screened.[217] The Czech lustration law

[210] *Bobek* v. *Poland*; *Matyjek* v. *Poland*; *Luboch* v. *Poland*.
[211] "Turning to the instant case, the Court observes firstly that the Government have pointed to the series of successive laws on the basis of which the communist-era security services' materials continued to be regarded as a State secret (see paragraph 47 above). The confidential status of such materials had been upheld by the State Security Bureau. Thus, at least part of the documents relating to the applicant's lustration case had been classified as "top secret". The Head of the State Security Bureau was also empowered to lift the confidentiality rating, which, with respect to some materials relating to the applicant's case, took place in December 2000. The Court observes that it has considered the existence of a similar power of a State security agency inconsistent with the fairness of lustration proceedings, including with the principle of equality of arms." *Matyjek* v. *Poland*, no. 38184/03, para. 57, ECHR, 24 April 2007.
[212] *Luboch* v. *Poland*, *supra* note 206, para. 67.
[213] This attempt was made in Matyjek case. The judgment captured this as follows: "The applicant challenged before the Court the very essence of the lustration proceedings, in particular their allegedly unequal and secret nature, the confidentiality of the documents and the unfair procedures governing access to the case file and the conduct of hearings." *Matyjek* v. *Poland*, *supra* note 213, para. 44.
[214] *Bobek* v. *Poland*, no. 68761/01, para. 79, ECHR, 17 July 2007. Also, *Matyjek* v. *Poland*, para. 69; *Luboch* v. *Poland*, para. 83.
[215] Welsh, supra note 112, p. 424.
[216] Czarnota, supra note 3, p. 327.
[217] Valentinas Mite. "Poland: Tough Lustration Law Divides Society", Radio Free Europe/Radio Liberty (23 March 2007). Available on: https://www.rferl.org/a/1075471.html. Accessed April 27, 2023.

required the screenings in academia as well.[218] On the one hand, such an approach can be understood in democracy-promotion objectives of lustration. The reason for including academia members is the need for a reform in tertiary education contaminated by Marxist-Leninist ideology.[219] Thus, Appel emphasizes, in Czechoslovakia a majority of social science faculty was replaced after the Velvet Revolution due to their anti-Soviet sentiment and the newly appointed academics were typically unqualified.[220] As for the former security personnel, their disqualification from the public office may lead to oversupply in private sector, where they can make use of past networks to engage in semi-legal and criminal activities. At the same time, exclusion of all employment opportunities is also hardly an option, since people with security training "may drift into criminality and obstruct the reform process."[221]

In terms of procedural legality, bans on work in the private sector for former communists and their collaborators are a matter of proportionality. The need to ensure loyalty to a fragile democracy is on shakier ground here. As a matter of fact, ECtHR has been unfavorable to lustration laws in that regard. In its very first lustration case, *Sidabras* and *Džiautas* v. *Lithuania*, the court distinguished between ban on work in private companies and in state institutions. It stipulated that even though a requirement an employee's loyalty to the state is an "inherent condition" for civil service, so such requirement can be attributed to private undertakings, since the latter are not "depositaries of the sovereign power vested in the [s]tate."[222] In its subsequent judgment against Lithuania in a different case, it explicitly pointed application of this condition to private companies "disproportional."[223] The court has kept consistent to such interpretation and reiterated this reasoning in the case of Polish lustration law a few years later.[224] In the light of the above, it can be concluded that while establishing restrictions on work in private sector may have some merit, it is considered to be disproportional and therefore, not advised.

Temporal scope

The concept of transitional justice is based on the difference in circumstances under which law needs to operate in advanced liberal democracies where the legal doctrine and rule of law-culture has been established for many decades and post-authoritarian states where the commitment to democracy is fragile. Compromises on the principles of legal certainty are justified by the objective of securitizing democracy and overcome an oppressive past legacy. Such a construct naturally leads

[218] Nedelsky in Stan, *supra* note 53, p. 45.
[219] David, *supra* note 67, p. 427.
[220] Appel, *supra* note 50, p. 386.
[221] United Nations Development Programme, Vetting Public Employees in Post-conflict Settings: Operational Guidelines supra note 57, p. 18.
[222] *Sidabras* and *Džiautas* v. *Lithuania*, nos. 55480/00 and 59330/00, para. 57, ECHR, 27 July 2004.
[223] "The respondent Government have thus failed to disprove that the applicants' inability to pursue their former professions as, respectively, a lawyer in a private telecommunications company and barrister, and their continuing inability to find private-sector employment on the basis of their "former KGB officer" status under the Act, constitutes a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought after." *See Rainys* and *Gasparaviöius* v. *Lithuania*, nos. 70665/01 and 74345/01, para. 36, ECHR, 7 April 2005.
[224] "[T]he State-imposed restrictions on a person's opportunity to exercise employment in a private sector for reasons of a lack of loyalty to the State in the past could not be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service, in particular in the light of the long period which had elapsed since the fall of the communist regime." *Bobek* v. *Poland*, *supra* note 214, para. 63.

one to conclude that these compromises are acceptable only for a limited time period before the new democracy becomes stable enough.[225] Therefore, scholars of transitional justice, whatever their views on lustration are, always agree that transitional justice measures are of temporal nature.[226] Thus, *e.g.*, while disqualification from the legislature or civil service on the grounds of high-rank membership of an individual in the previous regime's institutions might be acceptable in the early years after the transfer of power, more nuanced investigation of specific actions becomes necessary at the later period.[227] A well-known judgment of the Czech Constitutional Court while validating the lustration law also pointed out that limitations of rights it prescribed should apply "only during a relatively short time period"[228] before the process of democratization was accomplished. As David Robertson captured the essence of the judgment, by 1992 "the world was judged not to have changed enough."[229] Taken together, authorities must keep statutory limitations under constant review with the aim to, as ECtHR stated, "bring it to an early end."[230]

At least initially, this understanding was applicable to lustration in Central Europe. At the time first lustration laws were adopted in the region, they were indeed recognized as "provisional and only temporary legal method[s] for protecting the new democratic regime."[231] However, even though many years have passed since democratic regimes were established, lustration laws all across the region remain intact. *E.g.*, in the Czech Republic the period of operation of lustration laws was prolonged twice – first in 1995 for five years and then in 2000 indefinitely.[232] Even though, as mentioned above the Constitutional Court has ruled the law to be of temporal nature, its second judgment in 2001 gave a broad discretion to the legislature to establish whether the exceptional conditions justifying disqualification of former agents were still in place.[233] What is more, some countries not only prolonged their lustration procedures but also amended them by including new categories of offices to be screened.[234] In addition, in some cases new lustration laws

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[225] Teitel put it as follows: "[t]hough ordinarily our intuitions about the rule of law would militate against the adoption of such political measures, special transitional concerns may well support such measures in *limited periods* [emp. added]." Teitel, *supra* note 5, p. 166.

[226] Czarnota, *supra* note 3, p. 334, Huyse, *supra* note 46, p. 59, Kritz, *supra* note 51, p. 139.

[227] *See* ECtHR reasoning in Ždanoka. *Ždanoka* v. *Latvia*, supra note 94, para. 74 and 75.

[228] Decision of the Federal Court of Czech and Slovak Federal Republic, *supra* note 93, p. 11.

[229] David Robertson, "A Problem of their Own, Solutions of their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity" in *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* by Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds.) (Springer, 2006), p. 89.

[230] *Ždanoka* v. *Latvia*, *supra* note 94, para. 135.

[231] Jiří Přibáň when analyzing the Czech Lustration Act. Jiří Přibáň *et al*. (eds.), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003), p. 45.

[232] As referred to in Kosař, *supra* note 124, p. 465.

[233] The relevant part of the judgment reads as follows: "[t]he petition from the group of deputies brings many data which convincingly document that the development of democratic changes after 1992 is stormy and that – as they expressly state – the "democratic process culminated." Nonetheless, the Constitutional Court considers it necessary to add to these data that determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question. Thus, the Constitutional Court is not able to review the claim of "culmination" or, on the contrary "nonculmination" of the democratic process by the means which it has at its disposal. However, it can, in some agreement with the petitioners, confirm that the public interest resting in the state's needs during the period of transition from totalitarianism to democracy have declined in intensity and urgency since 1992." *See* Decision of the Czech Constitutional Court No. Pl. 09/01 of 5 December 2001, p. 17. Available on: https://www.usoud.cz/en/decisions/2001-12-05-pl-us-9-01-lustration-ii. Accessed April 27, 2023.

[234] Poland embarked on a new program in 2007 (first law adopted in 1998). *See* Mite, *supra* note 217.
Romania has extended the procedure in 2006, as referred to in Horne, *supra* note 175, p. 736.

has substituted the already existing ones providing greater transparency as regards access to secret files.[235] These shifts raised a question about the appropriate end point for transitional justice.[236]

The attempt to establish the point when the transition is over runs into a number of challenges. The term "transition" itself is an abstraction, since society constantly undergoes a process of transformation, change of norms and beliefs – it has neither the beginning nor the end. It is thus impossible to point towards a specific moment when democracy becomes consolidated. What characteristics should one use? Furthermore, as Polish and Hungarian experience has proved, even if a country is on the way to create a firm commitment to liberal democracy and at some point is even praised as a success story, it can always turn back on these principles. Whether the current state of affairs can truly be used as an indicator to argue about the end of transitional justice? Thus, in 2007 ECtHR observed that employment limitation due to a lack of loyalty to the state stipulated by the Polish lustration law was not justified in "the light of the long period which had elapsed since the fall of the communist regime."[237] Would the decision be the same in 2023 after the long years of democratic backslide the country experienced? And is this development relevant for the purposes of lustration, considering that the current crisis has nothing to do with the communists?

Sadly, the question of, as Kosař called it, "the lapse of time"[238] has not received any significant scholarly attention. This is all the more unfortunate, since exactly this issue might constitute the most compelling argument against Central European lustration laws still in action. Nevertheless, it should in no way render application of lustration at the earlier stages of transition illegal – during the early years of the new democracy these concerns are certainly ill-suited.

Final remarks on procedural issues

The above by no means provides a comprehensive look at all existing challenges to lustration on procedural grounds. For instance, it did not touch upon the requirement of an effective appeal possible in the case an individual did not agree to the decision of the lustration agency declaring him an informer or an agent of the communist regime. To be fair, active Central European lustration laws do provide such an opportunity either through the regular court system or in specific lustration courts – what is more, the ECtHR in *Turek* has specifically complimented Slovak national courts for their attentive and non-formalistic approach in hearing the lustration case in question.[239] Another element worth consideration is the need for a nuanced design of selection criteria for persons and positions to be vetted. A lack of attention towards this aspect could result in non-selective application of lustration laws and thus, also render them inapplicable. This was noted by

[235] After the 2002 scandal when it was disclosed that then-Prime Minister Péter Medgyessy had served as a top-secret officer of the former counterintelligence agency at the Ministry of Interior, Hungary has adopted the new lustration act which significantly increased the possibilities for making collaborators' names public. *See* Barrett, Hack, and Munkácsi in Mayer-Rieckh and de Greiff, *supra* note 79, pp. 272–275.
[236] Horne in Lawther, Moffett and Jacobs, *supra* note 39, p. 435.
[237] *Bobek* v. *Poland*, *supra* note 214, para. 63.
[238] His article is nearly sole notable work on the matter, arguing that the extraordinary conditions calling for implementation of transitional justice measures, in particular, lustration in the Czech Republic by late 2000s have already expired. *See* Kosař, *supra* note 124, pp. 460–487.
[239] Horne, *supra* note 175, p. 274.

the court in *Rainys* and *Gasparaviëius* v. *Lithuania*, the case where the ECtHR recognized this possibility but remained silent on the specific submission.[240]

Nevertheless, this chapter managed to depict various problems, particularities of design of lustration laws in post-communist Central Europe and their implementation have triggered. Implementation of procedural guarantees is crucial and, it seems, the threshold increases as the democratization processes in transitioning societies progress. Such a position is in fact reasonable, considering that the issues lustration is supposed to respond to: threats to national security from elites of the former regime, damaged inter-personal and institutional trust and calls for justice to the victims of communism are most pressing at the initial stage of transition. As these problems are being addressed, compromises on the rule-of-law principles become less and less excusable. As democracy becomes stabilized and truth about the past accepted, historical circumstances do not require implementation of measures of transitional justice any further. The process occurs gradually. Once again, however, it should be emphasized that these and other problems do not invalidate lustration per se, but rather the means and techniques through which it is pursued.

CONCLUSION

In one of the early contributions to the field of studies, O'Donnell and Schmitter note:

> it is difficult to imagine how a society can return to some degree of functioning which would provide social and ideological support for political democracy without somehow coming to terms with the most painful elements of its own past.[241]

This feature constitutes the main difference between consolidated democracies and states only recently overthrown authoritarian or, as in the case of post-communist Central Europe, totalitarian regimes. Past mental patterns, social networks, memories of painful injustices and repressions form a challenge to the process of democratization and establishment of the rule of law. In such turbulent times, the aim of the law expands – it shall not only solve everyday conflicts but also respond to said challenges with a view to advancing the transition. Providing such "non-conventional resources", as "social awareness, collective memory, solidarity, and the overcoming of low self-esteem"[242] is a task no less important law may fulfill. Measures of transitional justice, *i.a.*, lustration, form an answer to these demands. These middle-ground solutions between forgetting the past and falling into the urges of brutal retribution form a solid basis for a future liberal

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[240] *I.a.*, the government submitted that "[t]he Act itself did not impose collective responsibility on all former KGB officers without exception. It provided for individualised restrictions on employment prospects by way of the adoption of "the list" of positions in the former KGB which warranted application of the restrictions under Article 2 of the Act. The fact that the applicants were not entitled to benefit from any of the exceptions provided for in Article 3 of the Act showed that there existed a well-founded suspicion that the applicants lacked loyalty to the Lithuanian State. Given that not all former employees of the KGB were affected by the Act, Article 14 of the Convention was not therefore applicable." The court eventually ruled for the plaintiffs, but on other grounds, not citing selectivity violations. *See Rainys* and *Gasparaviöius* v. *Lithuania*, *supra* note 223, para. 32.

[241] Guillermo O'Donnell and Phillippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (Johns Hopkins University Press, 1991), p. 30.

[242] Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar (eds.), *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford University Press, 2001), p. 25.

democracy.[243] These circumstances, logically, change the understanding of the concept of the rule of law in times of political and social transition. It requires derivation from formalistic notions of its principles and incorporation of broader social democracy-promoting objectives into the analysis. The question of whether a law is just depends on the context.

Analysis of the legality of lustration in terms of its conformity to the principles of the rule of law, therefore, necessitates a similar socio-legal approach. In their studies scholars do not limit themselves to reflection on the position of lustration laws vis-à-vis such principles as legal certainty, non-retroactivity, general application or presumption of innocence. In addition, they also contemplate on social and political effects on transitioning societies.

This Thesis by no means performed a comprehensive analysis of all aspects pertaining to the legality of lustration in post-communist Central Europe. However, it did present and reflect on the most prominent aspects pointed out by its advocates and critics. In the matter of problems with the principles of the rule of law, lustration laws were shown to be not as incompatible as many believed. Arguments relating to retroactivity are rejectable on the grounds of prospective objectives of lustration laws. Allegations of the presumption of guilt are ill-suited due to lustration's non-criminal character. It seems that the derogations in terms of application of collective responsibility are more significant and indeed pose a problem. Simultaneously, in the matter of social and political effects, lustration has some merit. Its security-related goals may justify rule of law derogations at the very least in the short-term, while potential trust-building effects contribute to democratization greatly. The aspect of minimal justice to the communist regimes' victims, however controversial, should also be kept in mind. Taken together, particularities of Central European transition, *i.a.*, the need to establish a firm symbolic and practical discontinuity with the communist totalitarian past which is foreign to these nations' identity, as well as to fulfill anti-communist sentiments of society, form a solid justification for the use of lustration.

The general conclusion of this Thesis is that lustration should be treated as, in the words of Přibáň, "a controversial element of the emerging rule of law"[244] rather than rejected altogether. Despite this, several aspects must be taken into account while lustration laws are in action. Firstly, even though derogations from the principles of the rule of law existing in normal times are justifiable, it does not exclude application of procedural guarantees and respect to procedural rights of persons lustrated. Second, the extent of the measures must be weighted carefully – in the end, as ECtHR put it, should be the exception rather than the rule even in transitional societies.[245] Thirdly, the length of the period when lustration laws are in action is unclear – there is a good reason to assume that such measures should be relatively short-term, as the process of democratic consolidation proceeds. Finally, study of practical effects of lustration on trust in the public authorities and, most importantly, its potential for severing former mental patterns and restoration of inter-personal trust is far from proven and requires further empirical research. The last two aspects form the areas where more scholarly attention will be needed in the upcoming days.

[243] Noel Calhoun, *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, (Palgrave Macmillan, 2004).
[244] Přibáň in Mayer-Rieckh and de Greiff, *supra* note 35, p. 327.
[245] *Turek* v. *Slovakia*, *supra* note 199, para. 115, *Matyjek* v. *Poland*, *supra* note 213, para. 62.

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