JAKUB J. SZCZERBOWSKI & PAULINA PIOTROWSKA
(University of Warmia and Mazury, Olsztyn, Poland)

Measures to Dismantle the Heritage of Communism in Central and Eastern Europe. Human Rights' Context

1. INTRODUCTION

Transition from communism to democracy has been a multilayered process. On the surface there appears to be a change of government and economy, but deeper there can be found deep changes in the philosophy of the legal system, by means of which a set of bureaucratic centralized institutions have been replaced by the institutions of a civil society. The principles of social justice have been superseded by the principles of nondiscrimination, while the rules of legal interpretation were changed from the strict model of positivistic interpretation to the argumentative model, in which the Constitution is a set of competing values and the law is a tool for finding the right balances between them. This evolution has amounted to a fascinating merger of politics and law, previously unseen in our legal history.

It took a long time for Central and Eastern European countries to reach the point where human rights could not only be acknowledged but also respected. Forty years of a totalitarian regime was a way too long period of lack of recognition for many human rights. The interest in the issue of dismantling the heritage of the communist system has been since increased by the needs of the general public, which does not consider the transition process as finished, until that past is dealt with. Although 20 years have already passed since the collapse of the communist regime in Eastern Europe took place, society still calls for a fair settlement with the past.

In the countries liberated from totalitarian regimes the first thing to do was to reconstruct the organization of the state, to establish democratic authorities and to reform the economy. But immediately afterwards, came the need to deal with the past, and it seems that this stage of transition was and is still unavoidable. This is why we find ourselves in a position where we need to deal with all the

injustice and harm from the past, without rejecting benefits that the concept of human rights provides.

The question «why it is so important that the heritage of former communist regimes be dismantled» was indeed asked at the beginning of the transition process. It brought then an easy answer: to protect democracy. But the same question asked after twenty years of rather successful democratic life raises doubts about its fairness and timeliness. Even if it is clear that the nation demands and even needs the former regime to be totally dismantled, the question of how to achieve this without violating human rights is still a formidable one. During twenty years of democracy, Europeans have changed their mentalities and what seemed to be ethical at the beginning, is now considered inappropriate. In 1989 hardly anyone asked the question how to overcome totalitarian heritage without violating human rights, but now this is something that cannot be even dreamed.

When asked about the way of dealing with the communist past in the Czechoslovakia former President and opposition hero Vaclav Havel said: «It is important to find a fair balance, the right approach, which would be humane and civilized, but would not try to evade the past.» [1]

2. THE BACKGROUND OF HUMAN RIGHTS RECOGNITION IN EASTERN EUROPE

The idea of human rights was promoted after World War II in order to give emphasis to international peace and to the prevention of military conflicts. Most of Central and East European countries were founding members of the United Nations since 1945, though Hungary and Romania joined only in 1955. But when on December 10, 1948, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations, by a vote of 48 in favor, 0 against, and 8 abstaining votes, among those eight countries which decided to abstain counted the communist countries of Eastern Europe. [2] The 30 articles of the Declaration contained rights to freedom of thought, conscience and religion; the right to own property; the right to form and to join trade unions for the protection of own interests –all of them rights the Soviet Union and its satellite countries were not ready yet to grant to their citizens.

History shows that security of a legal systems is a necessary background condition to human rights development and «the first step toward human rights is

---

1 Citation from the interview of Vaclav Havel with Adam Michnik: «La extraña época del postcomunismo», in *Ensayos sobre la justicia transicional*, International Center for Transitional Justice, New York, NY, 2003, p. 65

2 Poland, Czechoslovakia, Yugoslavia and the Soviet Republics holding a seat in the General Assembly.

worked out in terms of the problem of political freedom». [3] Political freedom only arrived to this portion of Europe when Gorbachev's *perestroika* gave the chance for Eastern European nations to make their own choices and to enter into the process of democratization. [4] The democratization of political and public life which followed the collapse of the Socialist regimes in 1989 accelerated this process. The rights mentioned in the Universal Declaration started slowly to become a reality, while the newly adopted political systems allowed the incorporation of international regulations for the protection of human rights.

These political changes led to the ratification of many international agreements and to the adoption of several international monitoring procedures. As the democratic system became stabilized, and the rule of law and respect for human rights increased, these developments constituted an important step towards membership of post-communist countries in the Council of Europe, the North Atlantic Treaty Organization and the European Union. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (which Poland, Ukraine, Hungary and Romania had ratified as early as in 1976) could be then ratified by the Republics of the former Soviet Union (e.g. the Baltic countries became their parties in 1992). [5]

Post-communist countries joined Council of Europe at the beginning of the nineties having fulfilled in a very short time its three statutory requirements: 1) the introduction of a representative and pluralist democracy; 2) the rule of law; and 3) fundamental human rights and freedoms. On its official admission to the Council of Europe, these countries adopted the European Convention on Human Rights and Fundamental Freedoms, and subsequently submitted a declaration of recognition of the power of the European Commission of Human Rights and the European Court of Human Rights.

The ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms provided East European citizens with a right to submit individual complaints to the European Court of Human Rights, and thanks to the sentences of that Court, there are still working in the development of their human rights protection system.

---

3 Richard P. Claude: «The Classical Model of Human Rights Development», in Richard P. Claude (ed.): *Comparative Human Rights*, The Johns Hopkins University Press, Baltimore, Md., 1976, p. 10.

4 Mihail S. Gorbachev: «A landmark in the History of Moral, Legal and Political Culture», in Barend Van der Heijden & Bahia Tahzib-Lie (eds.): *Reflections on the Universal Declaration of Human Rights: a Fiftieth Anniversary Anthology,* Martinus Nijhoff Publishers, The Hague, 1998, p. 134.

5 UN database (available on-line at *http://tinyurl.com/2annnjq*).

3. TRANSITION TO DEMOCRACY IN CENTRAL AND EASTERN EUROPEAN COUNTRIES

«Autumn of the peoples» and «autumn of the nations» are some of the names that have been given to the process leading to the collapse of communist governments in Eastern and Central Europe in the late eighties and early nineties. The events of the autumn of 1989 brought the period initiated in Yalta to an end, opening a new order in Central and Eastern Europe. Further changes, until 1991 diminished the participation of communist parties in exercising power and opened the transition process towars a full-fledged and estable democracy.

The goals of newborn democratic countries were at that point to create pluralist democracies, based on the rule of law and the respect for human rights and diversity, the principles of subsidiarity, freedom of choice, equal opportunities, economic pluralism and transparency of the decision-making processes. Consequently, the separation of powers, freedom of the media, protection of private property and the development of a civil society were some of the means which could be used to achieve these goals, as are decentralization, demilitarization, demonopolization and debureaucratization.

4. OVERCOMING TOTALITARIAN HERITAGE VERSUS VIOLATING HUMAN RIGHTS

When a democratic state based on the rule of law chooses to dismantle the heritage of a previous communist system, it is obliged to preserve human rights in the process. It cannot apply any means in order to eradicate the legacy of communism, since a violation of individual rights would then make the new regime no better than the totalitarian regime which is pretending to leave behind. Fortunately, a democratic state based on the rule of law has sufficient means at its disposal to ensure that justice is served and the guilty are punished, so it does not have to –and should not– cater to the desires for revenge of a few, instead of the demands for justice of the majority. [6]. It must instead respect human rights and fundamental freedoms, such as the right to fair trial, and it must apply them even to those people who, while in power, did not care for the human rights in any way.

Academic literature has thoroughly examined the issue of the dismantling of a legal system of a given political regime in connection with broader issues of legal, historical and political nature, specifically in the cases of the newly democratic countries of Central and Eastern Europe, South America or Africa. In the first of these categories, the Czech Republic was the only country to pass a bill on the

---

6 See the recommendation from the Document No. 7568 of 3 June 1996 of the Parliamentary Assambly of Council of Europe: «Measures to dismantle the heritage of former communist totalitarian systems».

delegalization of the Communist regime. The problem of delegalization of a political system will be included as part of a more general reflection on the concepts and methods of achieving justice in the period of transformation.

The importance of the problem of finding a settlement with the past in postcommunist European countries has been acknowledged by the most important European forum aimed at the protection of human rights, that is the Council of Europe. Resolution No 1096 (1996) of the Parliamentary Assembly of the Council of Europe on the Measures for the Dismantling of the Former Totalitarian Communist System set an international standard of human rights for this purpose, which should be preserved when adopting national regulations aimed to settle with the past.

The resolution of the Parliamentary Assembly confirmed the need for the dismantling of the remnants of the former communist regimes. The lack of protection mechanisms for democratic stability and the survival of past methods of exercising power may result in the development of corruption and the extension of oligarchical practices in the countries of Central and Eastern Europe, and consequently in the destabilization of the entire region. The resolution explicitly authorized the use of criminal justice and administrative measures to settle with the past.

The Parliamentary Assembly recommended that member states dismantled the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems, a process which should be based on the principles of:

- Demilitarization, to ensure that the militarization of essentially civilian institutions, revealed by the existence of a military prison administration or troops of the Ministry of the Interior, which was typical of communist totalitarian systems, comes to an end;
- Decentralization, especially at local and regional levels and within state institutions;
- Demonopolization and privatization, which are central to the construction of some kind of a market economy and of a pluralist society;
- Debureaucratization, which should reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the citizens.

The above postulates refer to the outer layer of transformation and its *tempo* does not necessarily match that of changes in human mentality and social customs.

A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based on the use of both criminal justice and administrative measures.

Anyway, the issue of retrospective justice is bound to open a wide range of debates. To begin with, the typology proposed by McAdams about retrospective justice distinguishes among: [7]

- Criminal justice, i. e.: the individual criminal responsibility administered by the courts
- Disqualifying justice, i. e.: the individual administrative and political responsibility.
- Moral justice, i. e.: the moral and historical responsibility, under which public discourse may introduce some sort of evaluation of actions of the past.
- Corrective justice, which aims to redress wrongs and repair the damage to property.

Each country should choose its own way to deal with previous systems, the options ranging from short and violent revolution like the one occurred in Romania, to a long lasting negotiation like in Poland. [8]

In the Polish literature one of the typologies has been proposed by Skapska. [9] According to her view four forms of the justice of transition can be recognized:

- Criminal responsibility.
- Financial and moral compensation to the victims and the rehabilitation of the victims.
- Dealing with the past in administrative proceedings.
- Reconciliation of victims and perpetrators.

This gradation of kinds of responsibility does, more or less, match the needs of society from the perspective of time.

Nowadays, all authors recognize the need in the application of other than criminal measures. It is stressed that the choice of methods and means of settlement with the past is to be decided according to the preset political objectives which, in turn, ought to be determined by historical, religious and cultural factors, the degree of determination of political elites, efficiency of the

---

7 Jan Morwinski: «O mozliwosci podwazenia legalnosci systemu ustrojowego PRL wraz z organizacjami i sluzbami w kontekscie prawa krajowego i miedzynarodowego [On the possibility of challenging the legality of the political system of PRP with its organizations and agencies in the context of national and international law]», *Zeszty prawnicze* No. 2 (14) 2007.

8 As in Romania, the first step to deal with the previous regime was to subject to trial and impose death penalty on to the previous Readers. In other post-communism countries different means were applied because of the specificities of their own transition process. There could be observed different administrative and persecutive measures.

9 Grazina Skapska: «Rozliczenie lamania praw czlowieka w przeszlosci [Settlement of human rights violations in the past]» *Ius et Lex,* cit., p. 74.

justice system, maturity of democracy, attitude of society, and influenced by the size and nature of crimes committed under the previous regime.

5. DECOMMUNIZATION VERSUS LUSTRATION

The ways of achieving decommunization have varied from country to country, as also their paths towards transition were different. [10] Authors often use the two almost synonimous terms of «purification» and «decommunization», though in the post-communist countries the term «lustration» is also used. We must distinguish the notions of purification and decommunization from the term «lustration», [11] since the latter refers to the disclosure of cooperation with security services of the communist regime (with different nuances and implications in each country), while decommunization refers to the elimination of former collaborators with the Communist system from the political life of the new democratic regime. Of course, decommunization is difficult to achieve without having previously carried out a lustration process.

Decommunization involves such things as the adoption of measures for the protection of the new democracy against the seizure of power by people still attached to the previous totalitarian regime, the introduction in the scholarly curricula of contents aimed at spreading the disapproval to the former regime, and the creation of the institutional pillars needed for the new democracy. We can talk about cleaning or purifying physically institutions from people with the communist past, but it would be more correct to speak of protecting the pillars of democracy.

Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with Paragraph 7 of Resolution 1096, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunization laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to, or belief in them in the past, and have no interest or motivation to make the transition to them now.

The main difference between criminal measures and administrative measures is that the criminal involve criminal courts activity in individual cases, including sentences of imprisonment Administrative precautions should not exceed the sanction of removing the lustrated official from public offices.

Resolution n. 1096 (1996) on measures to dismantle the heritage of former communist totalitarian system stresses that, in general, these measures can be

---

10 Graeme Gill: *Democracy and Post-comunism. Political Change in the Post-communist World*, Routledge, London and New York, 2002, p. 178-203.

11 Andrzej Antoszewski: *Systemy polityczne Europy Srodkowej i Wschodniej. Perspektywa porównawcza [Political Systems of Central and Eastern Europe. A comparative perspective],* Wroclaw, 2006, p. 250.

compatible with a democratic state under the rule of law if at least two criteria are met: firstly, guilt, being individual, rather than collective, must be proven in each individual case –this emphasizes the need for an individual, and not collective, application of lustration laws–; and secondly, the right of defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed.

It is stressed that one of the chief administrative measures is publication of archives from secret security: lustration laws should serve for the protection of a democratic society, and not for the punishment or rehabilitation of persons and their actions from the previous regime. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty –this is the task of prosecutors using criminal law and criminal justice measures– but to protect the newly emerged democracy from the action of such persons. The Assembly recommends that the authorities of the countries concerned verify that their laws, regulations and procedures comply with the principles contained in the resolution, and revise them, if necessary.

6. EXPERIENCES FROM SELECTED COUNTRIES

6.1 The Czech Republic

The question of dealing with the communist past was dealt with in a very comprehensive –albeit radical– manner in the law of Czech Republic. Among others, acts were passed for the creation of a special organ managing all the documentation of the crimes of communism; for the dissolution of the former security bureau; for the delegalization of communist government and the legalization of resistance against it; for the rehabilitation of the victims of communism; declaring the public access to documentation of the former socialist regime; and arranging lustration.

The way of reckoning with the past in the Czech and Slovak Federal Republic was defined as «preventive forgiveness». [12] The Lustration Act of 1991, [13] did not mandate a punishment for collaborators of the communist regime, but was designed to protect the new democracy. In the Czech Republic it was even said that the former communist officials instead of returning to power in the government, had preferred to start their careers in the private sector, using their

---

12 Timothy Garton Ash: «Juicios, purgas y lecciones de historia», in *Ensayos sobre la justicia transicional,* cit., p. 46.

13 Act No. 451/1991, laying down some of the other prerequisites for certain positions in state bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and Slovak Republic.

personal relationships and contacts to make more money and influence in the private sector than in politics. [14]

Even though a part of the Czech society called for a change in the lustration «without revenge» model in order to impose punishment for the former communist activists, and to prevent access of former communist officials to some public offices, another part of the society opted for transparency and full pardon. Hundreds of journalists, teachers and employees of administration had no certainty on whether or not they had not been included in the lists of collaborators of the secret service. The doubts and the voices for and against could be heard from the time of debate on the text in the Federal Parliament until recent days, when the Institute for the Study of Totalitarian Regimes was instituted.

6.2 Poland

In the current state of Polish law, there is a threefold model of lustration and a regulation of access to archives of the organs of state security.

The first pillar is the system of declarations of persons who are candidates for certain public offices (and person in this offices). The declarations have to be verified by the Lustration Office of the Institute of National Remembrance (IPN) and lustration courts. The Act on disclosing information regarding security services documents from 1944-1990 and the contents of those documents, the Act of 11 April 1997 on the disclosure of work, service or collaboration with State security agencies between the years 1944-1990 by persons performing public functions (Old Lustration Act), and the Act of 18 October 2006 on the disclosure of information concerning documents of State security agencies between the years 1944-1990, and the content of such documents (New Lustration Act) have been the key legal references on this issue.

The second pillar is the access to documentation in the archive of the Institute of National Remembrance regarding persons in public service, which is regulated by the Act of 18 December 1998 on the Institute of National Remembrance –the Commission for Prosecution of Crimes against the Polish Nation (IPN Act).

Poland opted for using administrative measures rather than court administered justice. During a survey made by CBOS a decade ago, a majority of 62% Poles held the opinion that former collaborators should be removed from public offices. In this group 33% did not even have any doubts about this, while 29% believed that the former collaborators should rather be removed. Young people are more tolerant to leaving the former collaborator at the offices. [15]

---

[14] Jerzy Tomaszewski: *Czechy i Słowacja [Czech Republic and Slovak Republic]*, Warsaw, 2006, p. 289-290.

[15] CBOS, BS/12/12/98, *Co myslimy o lustracji? Komunikat z badan [What we think about lustration? Research report],* Warsaw, 1998.

However, the percentage of people who think that the lustration is only a political fight instrument has increased to 69% in recent years. [16]

6.3 Hungary

On 4 of November of 1991 the Hungarian parliament passed the Zétényi-Takács Law [17] on the prosecution of criminal offenses committed between December 21, 1944 and May 2, 1990. Because of political and social disputes, the president Arpád Göncz subjected the law to revision by Constitutional Court. As a result of the decision 11/1992 (III.5.) AB the law was declared unconstitutional, arguing that «retroactive suspension statute would violate the principle of the prohibition of retroactive amendment of the law and because it would violate the principle of legal certainty in particular». [18]

6.4 East Germany

The German Democratic Republic got reunified with Western Germany soon after the fall of Berlin Wall, by means of the Unification Treaty of 1990. In 1990 the Parliament enacted the law [19] on the protection of the *Stasi* (the GDR's State Security) archives, [20] marking the beginning of the so-called *Vergangenheitsbewältigung* –the overcoming of the past process–. The Act granted the right for every individual to request from the Federal Commissioner information on the presence of his name in the records. In case of the presence, an individual could obtain access and release of the records including the information referring to him.

7. CONSEQUENCES OF DECOMMUNIZATION IN THE FIELD OF HUMAN RIGHTS

Allowing the communist regime's residue to stain the mechanisms of a young democracy is a threat to society. However, a state based on the rule of law should be able to defend itself against a resurgence of the communist totalitarian

---

16 CBOS, data from 1-4 June of 2007.

17 Ruth A. Kok: *Statutory Limitations in International Criminal Law*, TMC Asser Press, The Hague, 2007, p. 202.

18 Ruth A. Kok, *Statutory Limitations in International Criminal Law*, cit., p.198.

19 Act regarding the records of the state security service of the former German Democratic Republic of 20 December 1991.

20 P. Bukalska, M. Bocian, M. Nowakowski: *Problem lustracji w europie srodkowej i krajach batyckich [The problem of lustration in Central Europe and the Baltic Countries],* Osrodek Studiów Wschodnich, Warsaw, 2005 p. 43.

threat, using the many ample means at its disposal which do not conflict with human rights and the rule of law. This is one of the limits which enables a country to keep democracy and respect human rights.

In a democratic country all legislative measures referred to decommunization should respect the system of human rights protection. This includes the jurisdiction of such institutions like Constitutional Courts, the institution of the Ombudsman, The European Court of Human Rights and a the even most important institution as is the public opinion of the generation educated in human rights achievements.

7.1 Constitutional Court Decissions

It is often –and accurately– indicated in the academic literature that the jurisprudence of Constitutional Courts is determined in this area by the requirement of a sense of justice and by the citizens' trust in the state protection of individual rights. Constitutional Courts' position in the political system is characterized by the principle of independence. As an organ of judicial authority, these Courts are independent from both the legislative and the executive powers –albeit not immune to social influence. In all postcommunist countries Constitutional Courts have recognized the need of lustration, especially regarding persons exercising public authority in the Communist period. The main argumentation was to provide transparency of the public sphere.

In the analysis of the concordance of the Act on Lustration with the Constitution of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms, the Polish Constitutional Court included international human rights legislation as a source of binding jurisprudence. In the decision promulgated May 11th, 2007, [21] the Constitutional Court recognized that a number of provisions of the Lustration Act and the Act on the Institute of National Remembrance was not in concordance with the Constitution or European Convention on Human Rights.

The Court stressed the need to apply the term «collaboration with the security services» (as understood in the Act of 11 April 1997 on the disclosure of work, service or collaboration with State security agencies between the years 1944-1990 by persons discharging public functions, hereinafter referred to as the «Lustration Act») [22] for the purpose of determining victim status. The Act of 18 October 2006 on the disclosure of information concerning documents of state security agencies between the years 1944-1990, and the content of such documents [23] –referred to as the «New Lustration Act»– introduced revolutionary changes to the Act on the IPN. It introduced, among other changes, new principles

21 *Dziennik Ustaw* No. 85, 15.05.2007 r. poz. 571.
22 *Dziennik Ustaw* No. 42, 1999 poz. 428, as amended
23 *Dziennik Ustaw* No. 218, poz. 1592, as amended

of access to the archival materials kept by the IPN. The amendments to the Act on the IPN included the removal of «victim status».

Immediately after the announcement of these sentences discussions began on the future of the lustration law and lustration in general. The first ideas for an amendment of the Act, among others, the so-called small amendment to the lustration act. There is sill some ethical controversy about the law.

7.2 Decisions of the European Court of Human Rights

The European Court of Human Rights (ECHR) applies general values and standards accepted among all liberal and democratic states and it constitutes the enforcement machinery of the European Convention on Human Rights. Recognition of jurisdiction of ECHR brings a list of sentences confirming existing cases of violation of the articles of the European Convention of Human Rights in application of measures of decommunization. The chosen cases relate to administrative decisions on disclosures of archives, lustrations and other means applied in order to dismantle the communist heritage.

7.2.1 *Turek v. Slovakia*

The Strasbourg proceeding require fulfilling all possible local allegations measures. After the decommunization laws movement started in the 1990's, first cases were presented in ECHR in the middle of the decade, some three to five years after the violations occurred.

The most relevant case of a decommunization-related decision was *Turek v. Slovakia,* [24] as it laid a foundation for future jurisprudence. Mr. Ivan Turek occupied a post in scholarly state administration that was subject to section 1 of Act No. 451/1991 –«the Lustration Act»– which defined some requirements for holding positions in public administration.

These provisions of the Lustration Act defined six categories of collaborators of the communist state security. If a person was registered as such collaborator with the state security's archives in the period from 25 February 1948 to 17 November 1989, he should become disqualified from holding some specific positions in the public administration. Turek alleged his registration in those archives claiming that registration and the resultant effects constituted a violation of his right to privacy, pursuant to Article 8 of the Convention. He also complained that the length of the proceedings in his case was incompatible with the «reasonable time» requirement of Article 6 § 1 of the Convention and that he couldn't participate in the proceeding because of many legal obstacles which prevented him from accessing to his files.

---

24 *Turek v. Slovakia*, case No. 57986/00, 13.09.2006.

In its decision, the Court held that it could not be assumed that there remained a continuing and actual public interest in imposing limitations on access to materials classified as confidential under the former regime. This was because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. [25] The Court confirmed the violation of Article 8 of the Convention on the ground that there was no procedure by which the applicant could find effective protection of his right to respect for his private life and that the domestic proceedings were unfair because the principle of equality was not respected and an unrealistic burden was placed on the applicant.

7.2.2 *Sidabras and Džiautas v. Lithuania*

In this case, the applicants were disqualified from holding employment positions as a result of the application of the Law on the evaluation of the USSR State Security Committee (successively, NKVD, NKGB, MGB, KGB) and of the present activities of the former permanent employees of these organization, and in consequence they had suffered constant embarrassment as a result of their past activities. The stigmatization of former KGB officers affected their employment possibilities, their reputation and as alleged, even the enjoyment of their private lives.

The Court concluded that the ban on the applicants seeking employment in various branches of the private sector, in application of Section 2 of the KGB Act, constituted a disproportionate measure, even having regard to the legitimacy of the aims pursued by that ban, [26] and also confirmed that the enjoyment of their right to respect for their «private life» within the meaning of Article 8 suffered as a result of violation of the articles of the Convention.

7.2.3 *Matyjek v. Poland*

The entry into force of the Law of April 11, 1997 on the disclosure of the work for, or service in, or collaboration with the State's security services, between 1944 and 1990 by persons exercising public functions, caused that the applicant in consequence of the lustration procedure had lost his seat in Parliament. Therefore he alleged the violation of procedural guarantees under the Convention in his attempt to defend his position.

Through the analysis of the legal proceedings in the case, the Court noticed that according to the principle of the equality of arms, each party must be afforded a reasonable opportunity to present his case under conditions that do not place

---

25 *Ibid*.

26 *Sidabras and Dziautas v. Lithuania*, cases No. 55480/00 and No. 59330/00.

him at a substantial disadvantage vis à vis his opponent. [27] The Court stressed that all procedural guarantees in respect of any proceedings relating to the application of decommunization measures must comply with the Convention, especially when the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will create a situation in which the lustrated person was put at a clear disadvantage. [28] In its decision, the Court sentenced that the lustration proceedings against the applicant, taken as a whole, could not be considered as fair within the meaning of Article 6§1 of the Convention, interpreted together with Article 6§3.

7.2.4 *Luboch v. Poland*

In the case of Luboch the violation affected the principle of fair trial. The applicant claimed that in the 1980s he had gone abroad to visit his family and to work, and in that period he kept a friendship relation with an old colleague, who claimed to be working as a teacher, but in fact worked as an secret officer of the Security Service. When Luboch became aware of this fact, he cut the relation, but his name had already been filed as a secret service collaborator, which some years later put his name in the lustration files, as well.

Applying to the Strasbourg Court, Luboch complained under Article 6 of the Convention regarding the unfairness of the proceedings and the lack of a public hearing, and he also alleged that the courts had refused to call all his witnesses and didn't allow to take notes outside of the court. The allegation that the lustration proceedings in his case had been unfair, in violation of Article 6 of the Convention was confirmed by the Court as a violation of Article 6§1 of the Convention taken in conjunction with Article 6§3.

7.2.5 *Rekvényi v. Hungary*

Hungarian Law No. 107 of 1993 [29] on certain amendments to the Constitution, amended the Article 40/B § 4 of the Constitution to the effect that the members of the armed forces, the police and security services were prohibited from joining any political party and from engaging in any political activity.

László Rekvényi claimed that the prohibition on engaging in political activities was an unjustified interference with his right to freedom of expression, in violation of Article 10 of the Convention. [30] Even that the Court did not declare

---

27 *Matyjek v. Poland*, case No. 38184/03, 24.09.2007.

28 *Ibid*.

29 *Az Alkotmány módosításáról szóló 1993. évi CVII. törvény.*

30 Case No. 25390/94, 20/5/99.

the violation of Article 10 in the sentence, he found that there has been an interference with the applicant's right to freedom of expression.

8. CONCLUSIONS

After twenty years of democratic experience and many attempts to accomplish lustration, the results have not been entirely satisfactory. The victims have not been fully rehabilitated, or at least they do not feel this way as a result of the lustration effort. The social opinion on lustration is divided, and doubts have been raised regarding both the goal of lustration and the methods of performing it. An additional source of concern derives from the above-mentioned cases, which shed some light on the concordance of lustration laws with the human rights.

The cases mentioned in this paper are just a small part of the many consequences of the decommunization process in Eastern Europe. The list of those effects which violated human rights contains repressions against teachers and professors in Eastern Germany, work prohibition for former KGB agents in Baltic countries, or the Act on Pension Reduction for Former Policemen's and State Security's Workers in Poland. As the ECHR jurisprudence has shown, the administrative measures can become contrary to democratic values and principles like fair trial, freedom of private life, freedom to choose a profession, freedom of association, etc.

If we juxtapose the Polish administrative measures with the guidelines of the Councl of Europe Resolution 1096, we can draw the following conclusions:

- Due to the long period of transition in countries like Poland, the Czech Republic, or the Slovak Republic, which involved many negotiations, it would be a difficult task to create a supervising commission of distinguished citizens to monitor and ensure a high ethical quality of the lustration process. Lack of this element inspires claims that lustration is a part of a political struggle.
- One of the principal ideas of lustration was to protect democracy against the threat posed by the lustration subjects; however, the violations of human rights pose a threat to democracy as well. In democratic countries those rights have to be protected by a system of internal and international guarantees, protected either by internal –Constitutional Courts, Ombudsmen or their equivalents, and Supreme Courts– and by international mechanisms.
- The postulate that lustration may not be a measure of punishment, retribution or revenge does not cohere with the provisions of the new Polish Lustration Act. Lustration subjects obligated to provide a declaration in the matter of their collaboration are threatened to loose their jobs if they do not confirm that they were collaborating, but on the other hand they might eventually loose their jobs if they confirm that they were collaborating. This leads to retrospective punishment, at the administrative

level, based not on the deed they committed but solely on who they were in the opinion of security service officials.

• The protective character of lustration suggests that only the persons who pose a real threat to democracy should be subject to it, while some lustration decissions had a very wide range of subjects. The most protests were inspired by the lustration of journalists, teachers and scientists.

• Lustration of «conscious collaborators» is permissible only with respect to individuals who actually and actively collaborated with governmental officials (such as those belonging to intelligence services) in serious human rights violations that actually harmed others and who knew or should have known that their behavior would cause harm. Due to the Polish Act, a «collaboration» is also any conscious conduct, which was required by the law in force in connection with the public function or a professional position, or service performed, if the information provided to the security organs was aimed at infringing human rights and freedoms. In some Acts especially those that refer more to disclosure of secret services archives, the category of collaborator that may de defaming not depends on actual actions of the subject, but the category that was put buy a internal security officer.

After twenty years of differences in the approaches to lustration, the emphasis is still put on people who had given information, and not on the real criminals who had performed violations of human rights. Without diminishing the power of information, it still seems unjust that the law seeks to punish simple informants, not the authors of the crimes, imprisonment, or other forms of repression. The focus of the legislature should be more on the group of former leaders or senior officials, who by their decisions, caused economic or social damages. [31]

The idea of lustration and settlement with the past cannot be put aside. In particular one cannot discredit the right to transparency in the public life, the right of the public to know if individuals in power now have contributed to the communist system and what was their role. But we we need to deal with all the injustice and harm from the past, without rejecting benefits that the concept human rights provide us.

---

31 See Carmen González Enríquez: «Depuración y justicia políticas en el Este de Europa», in A. Barahona de Brito, Paloma Aguilar Fernández & Carmen González Enríquez (eds.): *Las políticas hacia el pasado: juicios, depuraciones, perdón y olvido en las nuevas democracias*, Istmo, Madrid, 2002, p. 329.