

CHAPTER 6

The Politics of the Lustration Law in Poland,  
1989–2006

*Adam Czarnota*

## INTRODUCTION

The Polish lustration law is a brief text, and is not particularly unusual in comparison to lustration legislation in other former communist states. It is, in fact, rather dull and boring. The law was the outcome of a legislative compromise. It is not radical in terms of penalties, but it is broad in terms of the groups required to undergo the lustration procedure. It penalizes specifically only the telling of a “lustration lie,” rather than membership in or collaboration with communist secret services. The most interesting, if not fascinating, part of the law is its political context or, in other words, the politics of the lustration law in Poland. A “black letter” analysis of the law alone cannot provide answers to questions about why the lustration law was adopted so late, why it is so “soft,” to what preliminary outcome its introduction has led, and what obstacles it has faced to its full implementation. It is difficult, if not impossible, to access all the data necessary to answer these questions because the process remains under way. Even describing what direction to look in order to find answers is not an easy task and requires the application of different methods—hence the hybrid structure and methodology of this chapter. Lustration is a very contested issue; it is nearly impossible to adopt a neutral position toward it.

Importantly, in the context of a project such as this one, the discussion about “lustration”—which in other places goes by “vetting”—in Poland, as in other post-communist countries, focused narrowly on electoral and some other highly public offices (in the sense of those institutions’ role in public opinion formation) plus the judiciary and advocates, but not on processes of personnel renewal in, for example, security sector institutions. This is so despite the fact that, as I will show below, some of these institutions in fact established rather ambitious personnel screening procedures.<sup>1</sup> Screening for human rights abuses and other forms of misconduct that took place, on a fairly large scale, within some areas of the security sector was not called “lustration” *sensu stricto*. It was called “verification of personnel” [*weryfikacja*],

and I refer to it later as “vetting.” In public discourse, the term “lustration” was used in the restrictive sense explained here, and this will be the real focus of this chapter.

The Polish lustration law has been in operation for just six years. The lustration law adopted by the Polish Parliament on April 11, 1997 (uniform text *Dziennik Ustaw*, 1999, Nr 42, poz. 428), formally became valid law on August 3, 1997, but could not be enforced without the creation of a Lustration Court. After the amendments of June 18, 1998 (*Dziennik Ustaw*, Nr 131, poz. 860), which entered into effect on November 27, 1998, verification of lustration declarations was made possible. Full enforcement became possible on December 1, 1998, with the creation of the V Department (Lustration Court) in the Warsaw Appellate Court. A commissioner for the public interest was nominated by the chief justice of the Supreme Court, Adam Strzembosz, on October 16, 1998, and formally took office on January 1, 1999.

In the next section, I describe the sometimes dramatic history of the lustration debate and legislation in the Polish III Republic. I then provide an overview of the lustration law itself, and examine the functioning of the law over the past six years. In the following two sections, I evaluate the lustration law from both a public opinion perspective and in terms of its success in achieving its stated aims. In the final section I analyze the Polish lustration law from the point of view of a post-communist social theory.

## HISTORY OF LUSTRATION IN POST-1989 POLAND

### INTRODUCTION

The present lustration law is the result of many years of debate regarding lustration, its form, and its substance. This debate was conducted both within and outside of Parliament. The question of dealing with the communist past in some form, formulated broadly as the “lustration issue,” crystallized during the debate around three points:

- lustration proper, which means screening and barring from public office former collaborators and members of secret services who committed “lustration lies”;
- access to secret services files; and
- decommunization, which refers to all political and legal strategies aimed at eradicating the legacies of communism in the social and political system. Lustration is part of decommunization but is analytically narrower in scope. In particular, decommunization includes

a legal ban of communist parties, the confiscation of the property of communist parties, the penalization of the use of communist propaganda, the use of criminal law against former communist officials, and so on.<sup>2</sup>

These issues, together with other legal strategies, such as restitution of property and retributive justice for former communist crimes, constitute the legal dimension of the crucial problem euphemistically called “dealing with the past.” In the case of the peaceful transition of power in Poland, these issues were and are hotly debated. Quite often it is very difficult to separate them, even analytically, especially lustration from decommunization. The aim of this chapter is to focus on the lustration law alone. It is puzzling that the first country to break with the monopoly of Communist Party rule was not the first to adopt a lustration law. There is no shortage of explanations, however, some of which are explored throughout this chapter.

Since 1989 it is possible to distinguish three different phases in Poland's approach to the lustration issue, legislation, and legal implementation. The discussion about lustration can be seen as a process of growing awareness of the nature of lustration and of differentiating it from other transitional justice measures. The first phase, between 1989 and 1992, was characterized by broad and chaotic debates about dealing with the past, only part of which concerned lustration. The second phase, between 1993 and 2001, was occupied by attempts to clarify the lustration issue and create the legal-institutional framework to deal with it. The main result of this phase was the adoption of the lustration statute of April 11, 1997, as a result of compromise between political forces in the Sejm, the lower house of the Polish Parliament. The third phase, which began in 2001, is a by-product of the change in the configuration of political forces that followed the 2001 election, won by the post-communist Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] (SLD).<sup>3</sup> This phase has been characterized primarily by legislative attempts to restrict the scope of lustration.

#### HISTORY OF THE ISSUE<sup>4</sup>

The first suggestions that some sort of lustration was necessary came in 1990 from the Citizen's Parliamentary Club [*Obywatelski Klub Parlamentarny*] (OKP), which included all members of the so-called contract parliament (meaning it was not fully freely elected) from the anti-communist opposition. Roman Bartoszcze, a Member of Parliament (MP) from OKP, and one of the leaders of the independent peasant's movement, argued the necessity of screening secret

police files for reasons of state security and to critically deal with Poland's communist past. Bartoszcze created a political storm within the opposition political forces by urging the investigation of the relationship between some members of the OKP and the communist secret police, the Security Service [*Służba Bezpieczeństwa*], well known by the abbreviation SB.<sup>5</sup> The first post-communist governments—the political base of which was in the OKP—such as Tadeusz Mazowiecki's and then Krzysztof Bielecki's, failed to take up Bartoszcze's suggestion.

The Senate, the upper chamber of the Polish Parliament, prepared a draft verification procedure for candidates running for election to Parliament in 1991. The draft, which suggested screening candidates for collaboration with the communist secret services, was voted down. Another attempt involved a secret list of parliamentary candidates who had collaborated with the secret police during the communist period, prepared in 1991 by Andrzej Mielczanowski, the head of the State Security Office [*Urząd Ochrony Państwa*] (UOP). The justification for compiling this list was the security of the state; it was treated as part of the security screening mechanism presumed to exist in all democratic states. If we take into account the fragility of the political situation in 1991, the close connection between Mielczanowski and President Lech Wałęsa, and especially Mielczanowski's role in the so-called Józef Oleksy scandal in 1995,<sup>6</sup> it is highly probable that this list played an important political role as part of the efforts of Wałęsa's political camp to discredit its opponents and improve its own position.

Right-wing-oriented political parties supported lustration and decommunization. A new impetus for dealing with the issue of lustration came after the election in 1991, when Antoni Maciarewicz became the minister of internal affairs in the right-wing Olszewski government. Maciarewicz had been a member of the anti-communist opposition since 1976 and a member of the famous Workers' Defense Committee [*Komitet Obrony Robotników*] (KOR), together with Jacek Kuroń and Adam Michnik. From the very beginning, Maciarewicz represented nationalist and Catholic ideology in the opposition movement. He was also editor of the influential samizdat journal *Głos*. In his new position, Maciarewicz organized a department of studies in the cabinet of the minister of internal affairs that focused on the archival resources of the secret police of the Polish People's Republic.<sup>7</sup> The aim of the unit was to prepare a report that would show the danger to state structures if lustration were to be abandoned.

The next dramatic act took place in May and June 1992. On May 28, the Sejm adopted a motion proposed by Janusz Korwin-Mikke, leader of the radi-

cally liberal libertarian political party, which obliged the minister of internal affairs to present full information to the Sejm by June 6 about higher civil servants and members of both parliamentary chambers who were secret collaborators with the communist secret police between 1945 and 1990. The motion required Maciarewicz to provide full information about judges, public prosecutors, and advocates within two months, and information about representatives of local territorial self-governing bodies at different administrative levels within six months. This motion, adopted by the Sejm, became the legal basis for the minister's actions. On June 4, Maciarewicz presented to the MPs a document from the archival resources of the Ministry of Internal Affairs in relation to MPs, senators, and persons holding high-level offices in the state. The list of sixty-four names included: the new president of Poland, Lech Wałęsa; three ministers; eight deputy ministers; three officers from the president's office; thirty-nine members of Parliament; and eleven senators. It is not surprising that making such a list public created a political storm. The minister stressed that the list was not one of collaborators with the communist secret police; rather it referred to individuals about whom information was available in the ministry's archives. He suggested that a special commission be organized, with the chief justice of the Supreme Court as head, to verify these materials. The idea of lustration, however, was compromised by the ensuing political scandal.<sup>8</sup>

Opponents of the idea argued that it was purely an act of political revenge. The transformed communist party opposed lustration and claimed that, for the sake of reconciliation, all lustration efforts should be abandoned. Another argument used by liberal-democratic forces, represented mainly by the Democratic Union [*Unia Demokratyczna*], stressed the legal continuity between the communist Polish People's Republic and the post-communist Third Republic, which, they argued, precluded any act of political revenge. This position, expressed quite often by Adam Michnik and his newspaper *Gazeta Wyborcza*, stressed the transfer of power through round-table talks as a decisive moment. The former communists had recognized the opposition, and, as a result, the political agreements achieved at the round-table talks between the two sides (the communists and the opposition) were translated into constitutional and legal language.

The consequence that Michnik derived from this peaceful form of transfer of power was a sort of self-limitation of both the former communists and the opposition. The new post-communist period began not as a result of revolution but of cooperation between two political camps through legal reforms. One of the first amendments to the communist constitution was a provision

that Poland was a law-governed state [*Rechtsstaat*]. This had its own consequences. This legal argument had a political dimension in the Polish sociopolitical landscape. Some of the leading political forces in the Democratic Union looked for a coalition between reformist elements in the former communist party and liberal-democratic forces as a necessary political precondition for the successful modernization and democratization of society and the state. For members or sympathizers of the right-oriented political parties, by contrast, the political compromise—which was a virtue for the liberal left—was the original sin of the Polish III Republic, a corrupt foundation upon which it was impossible to build a new democratic society and its political institutions. The right-oriented political forces looked to lustration as a partial remedy for this original mistake.

In order to understand the discussion about lustration and decommunization, and the position of particular political forces in these debates, it is also necessary to take into account the economic dimension. The transfer of power in Poland was preceded by the accumulation of economic power by some people from the former political apparatus who were especially connected with the secret services. By 1989 these people were able to translate their political position into being able to extract economic rent. The law-governed-state formula, that is, the rule of law, was then crucial in legally safeguarding the new private property acquired on quite dubious legal grounds. This economic background played a very important, but not always articulated, role in the debate about lustration and decommunization.

Resistance to lustration also came from post-Solidarity<sup>9</sup> political groupings, such as parts of the Democratic Union and the Liberal-Democratic Congress [*Kongres Liberalno-Demokratyczny*], which used technical arguments to claim that, due to the nature of the documents on which lustration would inevitably be based, it would be impossible to create a just process. Supporters of lustration came from the same Solidarity circles, and looked at lustration as a sort of medicine for the pathologies and problems of transformation. An important part of their arguments focused on the continuation of informal communist structures concentrated around people from the former communist secret services.<sup>10</sup>

On June 19, 1992, the Constitutional Tribunal ruled that the minister of internal affairs' action, based on the motion adopted by the Sejm, was unconstitutional. The tribunal found that the Sejm's resolution violated individual dignity and at the same time did not provide any means of protection for persons screened. This led "to the violation of the good name of the persons to whom the information applies and creates a *sui generis* penalty of infamy."<sup>11</sup>

According to the Constitutional Tribunal, this was inconsistent with the formula of a law-governed state expressed in article 1 of the so-called Little Constitution, the constitutional law in force at the time.

These events had an enduring effect on the public perception of the lustration process in Poland. Generally the mass media presented lustration as one of the following: (1) part of a conspiracy aimed at a coup d'état by right-wing political parties; (2) a conspiracy of political forces connected with the former communist regime and some elements of the post-Solidarity parties to eliminate Jan Olszewski's<sup>12</sup> government; or (3) a totally discredited idea in whatever form.<sup>13</sup> The events of June 1992, as well as the work of a special parliamentary commission to investigate the execution of the Sejm's lustration motion, which cleared Minister Maciarewicz of the accusation of using the motion for political purposes, created a situation that forced the legislature to address the lustration issue.

In September 1992 the Sejm started debate on six different drafts of a lustration law, prepared by various political parties (including the Solidarity trade union), one of which came from the Senate. Two drafts were, let us say, "soft," proposing only verification and making public knowledge of instances of collaboration with secret services. Other drafts were more severe, proposing lustration and decommunization together; these would ban collaborators and persons who held positions as executive officers at all levels of the Communist Party from holding public positions in the new state. Parliamentary debate thus slid into discussion of decommunization rather than lustration per se.

Lustration as a topic of public debate continued during the parliamentary election campaign of 1993. After the election the majority in the new Parliament was held by a coalition of the post-communist Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] (SLD) and Polish People's Party [*Polskie Stronictwo Ludowe*] (PSL)—both opponents of lustration. In July 1994 there was debate in the Sejm on eight drafts of a lustration law. Some of these were old drafts prepared before the election and some were new. In this debate one could distinguish not two but three positions.<sup>14</sup> One was held by a group of strong opponents of lustration based around the SLD party. The second was held by a group that consisted of strong advocates of radical lustration represented by the Confederation for an Independent Poland [*Konfederacja Polski Niepodległej*] (KPN); radical lustration, based on the Czechoslovak model, was actually close to decommunization. The third position, held by a centrist group, favored restricted lustration, which meant limiting the group of people to be screened to the top echelon of the former communist state. The radical

opponents succeeded in blocking lustration and for a long time the drafts disappeared from public view.

In June 1996, following internal decisions in the Sejm, when the legislative process started four new drafts were discussed.<sup>15</sup> The basis for the work of the special parliamentary commission for a lustration law was a draft prepared by the post-Solidarity Union of Freedom [*Unia Wolności*], the Union of Labor [*Unia Pracy*], and part of the post-communist PSL. The resulting lustration law was adopted by the Sejm on April 11, 1997. The statute, containing thirty articles, established a mixed model of broad (in the sense that a broad range of people became the object of the law), but not radical, lustration. The radical model was based on a connection between lustration and decommunization. The final outcome was a compromise, and the law only punished the telling of a “lustration lie,” but not conscious collaboration. It did not punish people who consciously collaborated with the secret services but had admitted this publicly. The majority in the Sejm refused to use lustration as a tool for decommunization; the radical Czech model of lustration was turned down. The next year, however, after a parliamentary election in which post-Solidarity forces won, the lustration statute was amended. The amendment adopted on June 18, 1998, made the lustration law more radical and changed its institutional design. Only eight articles remained unchanged.

After its adoption, the political opposition to lustration, mainly former communists and Adam Michnik’s *Gazeta Wyborcza*, mobilized forces to soften the law as much as possible. The first attempt was made by President Aleksander Kwaśniewski.<sup>16</sup> Before signing the new law, Kwaśniewski sent it to the Constitutional Tribunal to determine its constitutionality. The Constitutional Tribunal, in two rulings, confirmed the constitutionality of the law, questioning only two articles. The first was an article that made it possible to restart lustration procedures against persons who had already gone through the process. The tribunal said that, because there were no provisions regarding time limitation on restarting the procedure, the article created a state of permanent insecurity and limitation of freedom. The second article related to the removal of a candidate for the presidency who made a false lustration declaration, which the tribunal said amounted to a limitation of voting rights.<sup>17</sup> At the same time, however, an unexpected obstacle to the implementation of the law came from the judiciary. One of the law’s provisions created a Lustration Court, to which judges would be elected by the judges’ own self-governing bodies. The required judges had not been elected by the deadline. Further amendments were necessary to address difficulties in creating the Lustration Court.

In terms of the operation of the amended lustration law, the most important trend occurred during the third phase of the history of lustration in Poland. After the post-communists won the next election, they initiated a series of amendments aimed at making lustration meaningless. The most important of these was an attempt to restrict the types of facts that could be used as evidence of “collaboration” or “service.” The first step in this direction was an amendment of February 15, 2002, which limited the scope of application of the law by removing from it former collaborators with military intelligence and counterintelligence. Additionally, the amendment introduced a very imprecise clause that exempted from the list of objectionable collaborations actions that did not endanger personal and civil rights and freedoms. The majority of that amendment was struck down by the Constitutional Tribunal’s verdict of June 19, 2002 (K11/02), on purely procedural grounds.<sup>18</sup>

Another attempt to limit the impact of lustration came in an amendment of September 13, 2002, which limited the definition of “collaboration” in such a way that, in effect, most forms of what is commonly understood as collaboration were excluded. “Collaboration,” as defined in the amendment, did not include gathering and passing information for intelligence, counterintelligence activities, or activities conducted in defense of the state borders. It also protected those individuals who alleged that they only “pretended” to collaborate, despite their fulfillment of all formal requirements expected from the secret services. This second restriction was inspired by a Supreme Court judgment of October 2, 2002 (Syg. Akt II KKN 311/01), in the cassation<sup>19</sup> case of Marian Jurczyk, one of the leaders of Solidarity in Szczecin, in which the court moved towards a material — meaning substantive — understanding of collaboration.<sup>20</sup> In making an evaluation of the outcome of collaboration and not restricting itself to the establishment of the fact of collaboration, the court moved outside the formal application of the legal definition of “collaboration” as stated in the lustration law. The judgment was rightly criticized as unjustified judicial activism.

## THE POLISH LUSTRATION LAW

### OVERVIEW OF THE LAW

The lustration statute is composed of forty articles in six chapters, plus an annex. There is no legal definition of “lustration” in the text of the statute. The term itself is confusing and has different definitions in different countries. The word lustration became well known after Czechoslovakia’s so-called velvet

revolution. In Czechoslovakia, and then the Czech Republic, *lustrace* meant a ban on the holding of a public position by functionaries of the Communist Party or political police. The application of the term was broad and radical. It included decommunization as such. It meant banning office holders in the communist regimes from public life in new democratic regimes for some time. This broad definition was not, however, adopted by other post-communist countries. They preserved the word “lustration” but, due to their political contexts, gave it a different meaning. This explains part of the confusion in analyses of the lustration laws in post-communist countries.

In the Polish context, lustration means something different and is used in a narrow sense, as the public unveiling of individual connections with the secret services, and only with the secret services, by persons holding public office or candidates for public offices in the newly democratic state. The aim was to cleanse the public space of “wild lustration” — the periodic publication of lists of collaborators and accusations of collaboration with former communist secret services, accusations from which those who suffered them had no means to defend their good names. Wild lustrations had become a powerful weapon in political life in Poland. Those who supported the introduction of a lustration law believed that it would guarantee a minimum level of civility in political discourse, provide citizens with the necessary information to make informed political choices, and defend the categories of people affected by the lustration procedure from manipulation and blackmail. Generally speaking, they thought it would clean up the poisoned atmosphere of public life after communism.

The statute of April 11, 1997, imposes a duty on people born before May 11, 1972 — which means all those who were adults according to law before the transfer of power took place in 1989 — who hold or are candidates for enumerated public positions in the state, to make a statement regarding their work for or collaboration with secret services (institutions of state security) between 1944 and 1990. The obligation to make a positive or negative lustration statement is imposed on a broad range of people holding executive positions in the state or important positions in the state administration, including the president of the republic, MPs, senators, judges, procurators, advocates, and people holding key positions in Polish Public Television, Polish Public Radio, the Polish Press Agency, and the Polish Information Agency.

Lustration statements consist of parts A and B, as stated in the annex to the statute. Part A is simply a declaration that a person did or did not work for or collaborate with institutions of state security. Part B (not made public)

includes details of work or collaboration in the case of a positive statement. The names of those who make positive statements are published in the official gazette, *Monitor Polski*, or, in the case of candidates for the presidency and the lower or upper houses of Parliament, in electoral proclamations. The names appear without details of the type of collaboration. In this way, those who declare that they were members of or consciously collaborated with the secret services can still be candidates for public office, and the decision about their future is left in the hands of the electorate. The Polish lustration law penalizes only a lie about collaboration, not the collaboration itself.

Verification of a negative lustration statement is performed by the commissioner for the public interest. If there is suspicion of a lie in the lustration statement, the commissioner initiates a case before the Lustration Court. Court rulings confirming lustration lies are made public. The legal effects of such court rulings are different depending on the position held by the person involved. MPs or senators will lose their seats but can run as candidates in the next election. In the case of judges, an additional ruling of the disciplinary court is required.

## DEFINITIONS

Despite the lack of a legal definition of “lustration,” the law clearly designates three necessary elements in the lustration process, namely: institutions of state security during the communist regime between 1944 and 1990; persons holding public office; and past collaboration with institutions of state security under the communist regime. Some combination of holding public office or aspiring to hold public office and former employment in or collaboration with the institutions of state security under the communist regime has to exist. The definitions of these elements are therefore crucial.

Article 2 of the statute defines the *security institutions of the state* as all secret services in Poland, including intelligence and counterintelligence, between 1944 and 1990. Article 2, subsection 11.2, also includes the military and civil institutions of foreign countries that fulfill the same function as the above-mentioned Polish institutions.

Article 3 enumerates the category of *persons holding public offices*. As mentioned above, these are: the president of the republic, MPs, senators, and persons nominated or elected to executive functions in the state; head of the civil service; directors in ministries, central offices, and *voivodeship* offices (state regional administration);<sup>21</sup> judges, procurators, and advocates; members of

the board of Polish Public TV and Radio; directors of regional TV and radio centers; the director of the Polish Press Agency; and the director of the Polish Information Agency.

The last definition is *collaboration*. According to article 4.1, “collaboration is conscious and secret collaboration with operational or investigating units or organs of the state security as a secret informer or helper with the gathering of information.” In its 1997 decision the Constitutional Tribunal provided binding interpretation of the notion of “collaboration.” The tribunal stated that a simple commitment to collaborate, even evidenced by a signature, is not sufficient, and that what constitutes collaboration are specific actions such as operational gathering of information and passing it to officers of the secret services.<sup>22</sup> Subsections 2 and 4 of article 4 contain limitations on the definition of “collaboration.” These state that collaboration is not an activity that was imposed by statutes, and that “fake collaboration” does not count as collaboration.

An amendment excluded collaboration with state security institutions imposed by law, a situation that could occur when categories of persons (for instance, border guard officers) were obliged by law to collaborate in order to preserve state security. The limitation was based on the idea that collaboration in such cases was a legal duty imposed on individuals, who had to do it even if it was against their will. The counterargument, of a moral nature and put forward by the opposition to the amendment, was that nobody forced people to work in these institutions.

More difficult is the question of so-called fake collaboration, in which a person claims to have signed a document that she or he would collaborate with the secret services without any intention to actually collaborate and that she or he never passed on any information or passed on only unimportant information. Fake collaboration is difficult to prove because of the secret nature of collaboration in general. Due to limited evidence, it is nearly impossible to make any judgment about whether alleged collaboration is fake or not. Furthermore, considering how secret services operate throughout the world, it is safe to say that for them there is no such thing as unimportant information. All information is important and can be put to use at the proper time.

The Polish lustration law is aimed at categories of people who have a special, delineated connection between past and present. The past element is the relation to state security institutions, as employment or collaboration. This group of people is in turn limited, from the point of view of lustration, by another criterion: that they hold specific public offices in the present. In other

words, collaborators with the secret services or former officers of state security institutions who do not hold public offices at present or are not candidates for such offices are outside the purview of the lustration law.

#### ~~THE OFFICE OF THE COMMISSIONER FOR THE PUBLIC INTEREST~~

~~The institution of the Office for the Commissioner for the Public Interest plays a crucial role in the Polish lustration law. The commissioner and two deputy commissioners are nominated by the chief justice of the Supreme Court from among the candidates eligible to become judges who have broad legal knowledge and who were not collaborators with the secret services according to the understanding of the statute. Candidates who agree to be nominated are obliged to make a lustration declaration, which is first analyzed by the chief justice and then sent to the Lustration Court for verification. After verification the commissioner and deputy commissioners are formally nominated for a six-year term in office. They cannot be members of political parties or be involved in any activities that are incompatible with the dignity of the office. They can be removed from office by the chief justice of the Supreme Court only in circumstances strictly enumerated in article 17c. The statute creating this office is meant to guarantee independence for the commissioners on the same level as for judges.~~

~~The commissioner, who is involved in all phases of the process, represents the public interest in the lustration procedure. In the initial stage the commissioner evaluates the lustration statement and is responsible for deciding whether it should be sent to the Lustration Court. After the Lustration Court issues a ruling the commissioner is entitled to appeal the decision. The functions of the commissioner are analysis of the lustration declaration; gathering information necessary for evaluation of the declaration; and starting the lustration procedure, described below, before the Lustration Court. The commissioner is also obliged to provide a report of his or her activity annually to the president, Sejm, Senate, prime minister, and chief justice of the Supreme Court.~~

~~The commissioner has a supporting office, which by the end of 2001 employed thirty-seven people (including the commissioner and two deputies). Employed staff included nineteen specialists dealing with the lustration verification process (lawyers, historians, political scientists, etc.) and thirteen secretarial staff. The budget of the commissioner's office in 2001 was 4,308,000 Polish zlotys (PLZ) (approximately US\$1,250,000).~~

## INITIATING THE LUSTRATION PROCEDURE

The lustration procedure can be initiated by the commissioner or a deputy commissioner when the standard investigation indicates there is justifiable doubt that a lustration declaration is true. Another option is for the Lustration Court to start the lustration procedure *ex officio* in relation to the commissioner. The Lustration Court can also begin the procedure based on a petition by a person who stated that he or she worked or collaborated under pressure, including threats to the life and health of that person or close relatives.

## PROCEDURE BEFORE THE LUSTRATION COURT

Each case is heard by three professional judges (normally, in criminal cases, a hearing by three judges is reserved for serious crimes). In the original lustration law there was a provision for the creation of a separate Lustration Court. After the failure to delegate judges to this court, as described above, an amendment named the Warsaw Appellate Court as the Lustration Court. The judges sitting on the Lustration Court bench are designated by the president of the appellate court. The lustration law includes a provision that judges from the *voivodeship* courts (second level in the hierarchy of courts) can also be delegated to sit on the Lustration Court.

According to article 19 of the law, the lustration procedure is regulated by the Code of Criminal Procedure, with necessary changes as stipulated by the lustration law of April 11, 1997. All provisions of the code apply to the person accused of collaboration. The court, on its own initiative or that of parties to the proceedings, can hold hearings closed to the public. The procedure ends with the written decision of the court, which can be one of three types: stating that a lustration declaration was untrue; stating that a declaration was true; or making a decision to terminate a procedure due to lack of evidence on the basis of which to evaluate the veracity of the lustration declaration. The nonsecret part of the judgment is published in *Monitor Polski*, the official government gazette.

## APPEAL AND CASSATION

Within fourteen days of the judgment, parties can appeal the decision of the Lustration Court of first instance. The appeal is then heard by three professional judges, at least two of whom, including the presiding judge, must be appellate court judges. Technically, an appeal is heard at the same Lustration

Court but with different judges. From the decision of the court of the second instance, parties have a right to cassation. Cassation is heard by the Supreme Court within three months.

#### REOPENING THE PROCEDURE

The lustration procedure can be reopened, after a legally valid judgment is made, in two cases: *ex delicto*, when an illegal act took place with impact on the Lustration Court judgment; or *de novo*, when, after promulgation of a legally valid judgment, new facts are discovered which put in doubt a lustration declaration.

#### SANCTIONS

The only sanction for an untrue lustration declaration is the loss of moral qualification to hold public office and a ban on holding one for ten years. The statutory requirement for holding public office is moral qualification to do so. Individuals currently in office who are found to have made an untrue declaration automatically lose their position. In the case of some professions, for instance retired judges, individuals also lose what amounts to their retirement pensions. This is due to the legal construction that judges do not retire but rather, after reaching retirement age, are not in active service. They do not receive a pension as such but a percentage of their actual salary.

#### FUNCTIONING OF THE LUSTRATION LAW

Lustration as a topic in the context of transformation and decommunization in Central and Eastern Europe has a history of more than sixteen years. The lustration law in Poland, by contrast, has only been in force for six years. It is thus easier to illustrate some of the problems with the functioning of the lustration law than to make an overall holistic evaluation.

It must be kept in mind that the stated aim of the lustration law was the security of the state and the elimination of potential political blackmail. However, in Polish public opinion there is another aim that is not explicitly stated in the statute, namely, the realization of some sort of transitional justice. Lustration in public opinion is a substitute for decommunization, in this instance in the sense of major personnel turnover in the various state institutions. It is doubtful, however, whether this aim is being achieved, even in part, by the lustration law as it was designed by the Polish Parliament. This is due to the

limited nature of the law, the sanctions of which are restricted only to lustration lies. Nevertheless, the connection of lustration with transitional justice made the topic not only “hot” but sometimes explosive. In arguments made in the media, both supporters and opponents disregard the actual provisions of the statute and present the issue as highly normatively charged.

From the very beginning, however, the leading opinion makers in the media, especially the influential newspaper *Gazeta Wyborcza*, covered the lustration process in a critical, if not negative, way, with the aim of turning the public against it. A crucial point in the lustration debate concerned the appointments of retired judge Bogusław Nizieński as commissioner for the public interest and Krzysztof Kauba as deputy commissioner. They were appointed by a former chief justice of the Supreme Court, Adam Strzembosz, on his last day in office on October 16, 1998. The controversy was triggered by two issues: the men who were appointed, and the fact that the appointments were made on the chief justice’s last day in office and without consultation. For several years afterwards, *Gazeta Wyborcza* ran a campaign to discredit lustration by publishing articles that were not only critical, but sought to undermine the integrity of Commissioner Nizieński. Nizieński was a retired judge known for his anti-communist opinions, who never became a member of the Communist Party, but whose career as a judge nevertheless spanned the entire hierarchy of positions in the Polish courts. As he stated in one interview, he perceived his work on the bench as service to the nation and not to the communist state. (Both the commissioner and the deputy commissioner have appeared extremely devoted to their offices and unafraid of controversy.)

One point of contention that was raised in discussions of the lustration law and procedure was the accountability of the commissioner and deputy commissioners. In the statute, article 17a clearly states that both are obliged to act within the law and the constitution, and make annual reports. While neither position appears particularly strong, as designed in the statute the commissioner’s role cannot be reduced to that of a public prosecutor. The commissioner is endowed with the same level of independence as a judge, and yet she or he represents the public interest in the lustration procedure. This peculiarity reflects the specificity of lustration, which is not a typical procedure as in criminal law. The institution represents a new type of legal institution in public law.<sup>23</sup>

A second problem was connected to the order of verification of lustration declarations. The commissioner was criticized for focusing first on judges and advocates, a move that was interpreted as taking revenge on the professional groups with which he was most familiar. His argument was that the highest

number of positive declarations occurred within these categories, which made the negative declarations call for strict verification. Commissioner Nizieński explained that screening one person who had made a positive declaration naturally led to other persons from the same profession and territorial region, who, it seemed, had also made false declarations.<sup>24</sup> On an alternative view, however, since the primary aim of lustration was the security of the state, and not decommunization, the verification order should have started with crucial positions within the structure of the state. In other words, the importance of the position from the point of view of the security of the state should have determined the order of the commissioner's verification of lustration declarations. Advocates and judges are not as important, in this sense, as ministers and undersecretaries of state. Criticism of the commissioner's activities, in this case, was therefore justified. The amendment that corrected article 17 states that verification should be carried out in the order of state positions enumerated in article 7, starting with the most important.<sup>25</sup>

The next objection was to the secrecy of the procedure, both during the initial verification conducted by the commissioner and later on before the Lustration Court. There is no easy way around this because classified material is used in the verification procedure and in the hearing before the Lustration Court. On the other hand, it is true that such secrecy goes against the principles of openness of justice. Commissioner Nizieński stated that while the accused usually were not interested in an open trial,<sup>26</sup> after requesting a closed hearing they often themselves made statements to the media, which fostered speculation about the entire procedure. This led to suggestions in the newspapers that the Lustration Court was a kangaroo court or some sort of inquisition having nothing in common with justice.

In a number of newspaper interviews and journal articles, commissioners have complained about the negative media coverage, which demonized the work of the first commissioner and focused only on sensational news.<sup>27</sup> Commissioner Nizieński was a public figure who did not avoid conflict and was guided by a strong belief in the mission of his office. No doubt his strong personality left its mark on the operation of the office. He was responsible for hiring, determined the organization of the support staff, and, more importantly, influenced public perception of the lustration process. On the other hand, his successor, Włodzierz Olszewski, keeps a low profile in the media, and it is difficult to find any reports on his activity, outside of formal announcements.

At the time of writing, 23,598 people have filled out lustration declarations,<sup>28</sup> which, according to the lustration law, are all subject to the commissioner's scrutiny, which obviously imposes a great workload on him and the

deputy commissioners. From 1999 to 2001, 150 persons declared that they had worked for or collaborated with state security institutions and their names were published in *Monitor Polski*. Among those were one secretary of state, five undersecretaries, and one MP. In 2002 not one positive lustration declaration was filed. By April 30, 2004,<sup>29</sup> the commissioner had filed 126 cases with the Lustration Court in relation to sixty-nine advocates; twenty parliamentarians; twelve judges; nine ministers, deputy ministers, or higher civil servants; seven public prosecutors; six journalists; and three *voivodes*. By April 30, 2004, the court had made decisions in relation to 103 persons: 79.8% of first instance verdicts and 80% of cases started by the commissioner were appealed. Forty-eight verdicts of the Lustration Court of the second instance were subject to cassation before the Supreme Court, of which eleven have been overturned and twenty-five have been upheld. In fifty-three of the 103 cases the court confirmed that the declaration was not true and in twenty cases it stated that the declaration was true. Fourteen cases were discontinued for various reasons.<sup>30</sup>

In the first year of his activity, the commissioner sent questions to the state security archives, where files were collected, regarding 2,296 people under verification; in 2000 he sent 4,168 requests for information; and in 2001, 4,174 for a total of 10,638 persons. By the end of 2001, the lustration procedure was finished for 6,689 individuals—28.35% of all lustration declarations lodged since 1997, when the law was adopted by Parliament.<sup>31</sup> Out of the 1,896 individuals whose cases were reviewed by the commissioner for public interest, only forty-five had their cases submitted to the court and only twenty-three were found to have told lustration lies.

According to the commissioner's report for 2001, by October 19, 2001, declarations by all people in key positions in the state had been scrutinized. The parliamentary elections in 2001 brought 245 new declarations from MPs and 50 from senators. As part of the verification process, the commissioner and his deputies interviewed forty-seven witnesses in 1999, fifty in 2000, and 112 in 2001. All witnesses were former officers of the secret police, military intelligence, or counterintelligence. Commissioners complained that witnesses were not cooperative and tried to hide the truth. In three cases the commissioner informed the procuracy of obstruction of justice.<sup>32</sup>

The commissioner decided not to bring 293 cases before the Lustration Court, despite the fact that the names of those involved were mentioned in the archives of the special services, because there was insufficient evidence to substantiate collaboration due to the destruction of documents. Furthermore, witnesses claimed that they did not remember whether these individuals collaborated with the former security institutions. Among these people,

advocates again made up the biggest group with 181, followed by thirty MPs, twenty-seven people from the media, ten procurators, and sixteen high-ranking civil servants.<sup>33</sup>

TABLE 1  
Lustration figures

23,598	Total lustration declarations (1999–present)
6,689	Individuals completed lustration procedure (1999–2001)
278	Positive lustration declarations (1999–2004)
126	Cases filed by Commissioner for the Public Interest with Lustration Court (April 2004)
209	Witnesses interviewed as part of lustration procedure (1999–2001)
103	Lustration Court verdicts (April 30, 2004)
53	Declarations confirmed not true by Lustration Court (May 2002)
20	Declarations confirmed true by Lustration Court (May 2002)
14	Cases discontinued by Lustration Court (May 2002)
48	Verdicts subject to cassation before Supreme Court (April 2004)
25	Verdicts subject to cassation before Supreme Court upheld (April 2004)
11	Verdicts subject to cassation before Supreme Court overturned (April 2004)

The commissioners' reports have contained a number of complaints, the first of which is about the law's impotence.<sup>34</sup> Commissioners suggested that unreliable and uncooperative witnesses should be punished according to article 233 of the criminal code, which contains provisions regarding false testimony. The second complaint relates to the need for objective media coverage of lustration activities, as mentioned above. Commissioners suggested that, to this end, the procedure before the Lustration Court should be open and public. The third complaint relates to procedural delays before the court due to absences of persons under review. The lustration law does not equip the court with any legal tool to require the presence of persons being investigated during the hearings, a situation that was abused. Often, individuals would produce medical certificates stating that due to illness they were not able to attend the hearing, while at the same time they were appearing on television to take part in parliamentary deliberations or voting. The fourth complaint is connected to access to archival resources of the former state security institutions. Since 2000 the Ministry of Internal Affairs has been transferring

archival resources to the Institute of National Remembrance. The transfer process has been very slow, and, even after the institute receives the archival materials, it lacks the funds to properly arrange and file them.

The lustration law does not operate in an institutional vacuum. The process is implemented within an institutional setting, which plays an important role and brings with it a number of problems. The first and biggest problem was the impossibility of creating a Lustration Court according to the provisions of the first version of the lustration statute prior to the subsequent amendments. According to the original provision, twenty-one judges for the special Lustration Court would be nominated by the judges' self-governing body, the National Judicial Council, from candidates nominated at meetings of all judges in appellate and *voivodeship* courts. Those nominations had to be made within thirty days of the entry into force of the lustration law. Judges were to be delegated by the minister of justice for four years to the Lustration Court, which was to be located at the Warsaw Appellate Court. However, not enough candidates were nominated within the prescribed time. As the lustration law's immediate aim, which was to establish an institutional structure for the lustration of MP and senatorial candidates before the parliamentary elections of September 21, 1997, was therefore not achieved, critics used this failure to claim that lustration was unnecessary.<sup>35</sup> This obstacle was overcome, however, by the June 1998 amendment that created the Lustration Court as a special division of the Warsaw Appellate Court.

One of the most controversial issues connected with the functioning of the lustration law was a decision of the minister of justice/procurator general to fire three procurators who had made positive lustration declarations admitting their collaboration with the secret services. The law itself does not include such a sanction in its provisions. What is penalized is providing a false declaration, not a positive declaration. Nevertheless, the minister of justice/procurator general's decision was based on the idea that the people in question had lost the necessary moral qualification to perform the functions connected with their offices. This was followed by an appeal to the presiding justices of the courts to remove judges who were compromised by collaboration with the communist regime's state security institutions. The appeal provoked a rather negative, if not angry, reaction from the judiciary and lawyers' professional organizations, such as the Association of Polish Lawyers.

Disciplinary sanctions applied by institutions to persons who have made positive lustration declarations are a side effect or, as some claim, an extension of the lustration statute.<sup>36</sup> It shows that lustration is sometimes confused with decommunization. Polish law should in some way regulate these types of

cases, either by accepting the application of disciplinary sanctions or strictly forbidding it. The exact scale of this phenomenon is unknown, but appears to be rather small. It could, however, become a larger problem with a change of the political context, for example, if the pro-lustration radical parties receive a bigger say in the public arena.

Cases of judges and procurators were regulated by a statute of December 8, 1998, on disciplinary responsibilities for breaching the independence of the judiciary; all such cases were only in relation to retired judges and procurators. Between 1998 and 2002 the minister for justice started seventy-three procedures against retired judges and seventy-seven against retired procurators.<sup>37</sup> On April 17, 1999, the National Advocates' Council adopted a motion stating that collaboration with the secret services between 1944 and 1990 amounted to acts against Polish society and constituted a crucial breach of the moral requirement for the profession. The motion also asked those who had collaborated to leave the profession. Unfortunately, until the lustration procedure comes to an end it is impossible to know how many people are involved. So far, the names of a small number of those who returned positive lustration declarations have been published in *Monitor Polski*. Former members of the profession removed from the list of advocates tried to appeal the decisions before the Constitutional Court, but without success.<sup>38</sup>

## THE LUSTRATION PROCESS IN PUBLIC OPINION

How has the general public perceived the Polish lustration law? After the 1992 dismissal of Olszewski's government because of Maciarczyk's list and its inclusion<sup>39</sup> of high-ranking officials such as Lech Wałęsa, lustration became a hot political issue. The next moment of high tension came in 1996, concerning the political use of secret service files, when former Prime Minister Józef Oleksy was accused of being a Soviet spy and was forced to resign from office.

Although polls cannot provide precise measurements of public opinion, they nevertheless can reveal trends. In opinion polls conducted by the Center for Public Opinion Research [*Ośrodek Badania Opinii Publicznej*] (OBOP) in December 1996, 72% of respondents were convinced that many high-ranking officials had previously been informants and collaborators with the secret police; 77% believed that such officials should be removed from office.<sup>40</sup> According to polls conducted by the OBOP in June 1994 and December 1996, 57% of the population supported lustration. In December 1997 that number rose to 76% and in November 1999 it dropped to 56%. Support for lustration

is strongly correlated with political party affiliation. The largest percentage of lustration opponents is within the SLD (former communist) electorate, while the largest percentage of supporters is within the post-Solidarity, right-wing electorate.

It is interesting to note the trend that the public's opinion of lustration became more negative after the lustration law became operational. In opinion polls conducted each year from 1994 to 2002, support for lustration dropped and negative evaluations increased. In 2002, a decidedly negative opinion was expressed by 31% of respondents and a decidedly positive one by only 33%. The opinion that the lustration law had a bad impact on political life in Poland was expressed by 51%, while only 30% believed that lustration improved political life in Poland.<sup>41</sup> Nevertheless, over the years support for lustration has remained relatively high and surprisingly steady. Over the years, on average more than 50% of the population has supported the lustration law in Poland.

#### **EVALUATION OF THE LUSTRATION LAW IN POLAND**

There are different methods of evaluating the lustration law. It seems to me that only one way, based on the realization of the aims of the lustration statute, is justifiable. In other words, the evaluation should be rooted specifically within the Polish context and not based on some abstract, universal criteria. It is commonplace for sociologists of law to argue that the operation or functioning of specific norms and legal institutions depends on the institutional and cultural context. That context in the Polish case, and probably in any other post-communist country, is rather fragile as far as democratic institutional infrastructure and legal culture are concerned. One of the aims of the lustration law was to help to build a democratic and legal culture in post-communist Poland by providing citizens with information about the prior involvement in the operation of the secret services of the communist regime of people aspiring to hold public offices; in this way, the idea was, citizens could make informed choices. The lustration law, by making public knowledge the names of those who confirm their collaboration, frees them from potential political blackmail. It is impossible to measure whether lustration, after only six years in operation, has been able to fulfill this aim. At best, an indirect approach to answering the question can be tried. I will discuss this in the next section on lustration and post-communism in Poland.

From a sociological point of view, the largest group obliged to make lustration declarations have been lawyers — approximately twenty thousand people. The rule of law requires a strong legal profession with strong moral character,

which will guarantee the professional autonomy of law. Yet, despite years of functioning, the lustration process has not had a significant impact upon lawyers. Nevertheless, it may help in the process of transforming the legal profession through at least partial *sanation* (cleansing), as demonstrated by the position, adopted by the self-governing body of the advocates, that advocates compromised by collaboration should make public their involvement, and by the disclosure of the identities of judges compromised by collaboration.

One of the critical factors in determining the effectiveness of lustration, particularly when the aim is to eliminate dangers to the new regime, is timing. The Polish lustration law entered into force very late in the transition because of political struggles. These struggles made lustration more politically charged, or connected with political processes. At the same time lustration lost its teeth while, paradoxically, public expectations grew higher.

One of the positive outcomes of the lustration law's late arrival is its "softness." In comparison to the harsh Czech approach, lustration in Poland is not focused on revenge or the elimination of certain groups of people from power. It is focused on the penalization of lies. All necessary elements of the rule of law, such as presumption of innocence, broad rights of the defendant, and proper court procedure, are observed. This makes the Polish lustration process as civilized as possible. It is true that this civility could be improved by distancing the process from political abuse, speeding up the procedure before the Lustration Court, and providing objective coverage in the media. Nevertheless, the very existence of the lustration law and the institutions it created eliminated wild lustration and provided wrongly accused persons with a legal tool for their defense outside of the normal procedure for defamation.

The lustration law sought to clean up the public sphere, which requires transparency. Procedures before the Lustration Court should in turn be more open to the public. The secrecy of the procedures has not contributed to the realization of the aims of the law. Despite the fact that classified material was used, the openness of the procedure could be improved.

The lustration law was too often changed as an outcome of political processes, which destabilized the lustration process. It is true that the first statute was not an example of "legislative art" and amendments were necessary, but some of the subsequent changes, made after the last election won by SLD, were introduced purely for political reasons. A good example of this is the manipulation of the definition of "collaboration," as described above.

The lustration laws in post-communist countries do not serve the same function as security clearances in liberal democracies. Lustration is one of the legal devices for dealing with the past, alongside other procedures such

as decommunization, restitution of property, and trials for perpetrators of crimes committed under the communist regime for political reasons. All these legal tools should be analyzed together, but such a task is beyond the scope of this chapter. In the final section, however, I will discuss the lustration process in Poland within the broader context of post-communist efforts to deal with the past.

## THE LUSTRATION LAW AND POST-COMMUNISM

What I have offered hitherto is an analysis that focuses on the legal and socio-legal dimensions of the Polish lustration law. Here I want to discuss the law from the point of view of social theory. The problem is that so far we do not have a satisfactory social theory of post-communism. That is why I will try to sketch the relationship between lustration and other strategies for dealing with the communist past in Poland after 1989.

All transitional justice projects presuppose some sort of social theory usually not very far removed from Durkheim's concept of law as an expression of mechanical solidarity, as values shared by members of a society. Law is an expression of the moral matrix of society; in effect, law defends the type of social relations that are most valuable for the society. A post-Durkheimian perspective adds the assumption that legal institutions could infuse society with some of the values necessary for democracy and the rule of law. This assumption treats post-communist societies as in a transitional phase from point A to point B, where point B is a fully developed liberal-democratic society with all the necessary institutions and values. Lustration, decommunization, and restitution of property are legal mechanisms for the realization of that aim.

I prefer to use the term *transformation*, rather than *transition*, to describe the social processes after the collapse of communism. This allows us to look at the specificity of the new institutions developed, trace the elements of the new social and institutional structure, and stress the role of those institutions in building something new. I will adopt this approach to these extraordinary processes in my analysis of the sociopolitical context of the Polish lustration law.

The initial problem is the past, especially the communist past, with which all post-communist countries are obliged to cope. All have developed institutions that allow them to do this. Those institutions are supposed to address local issues. Dealing with the past sounds like a universal problem, but behind it are always particularities—local settings, relations, and structures. The local

dimensions of policies dealing with the past were and are different, but it is possible to identify some similarities due to a common denominator—these are not policies to deal with just any past but with a specific past, namely, the legacies of communist regimes.

The case of the Polish lustration law is as specific as any other, but it is also puzzling. Some may find it puzzling that the country that led the dismantling of communism was the last to adopt a lustration law and that it adopted such a “soft” one. How do we explain that in the country in which there was an anti-communist organization (Solidarity) with ten million members—which was then suppressed by martial law imposed by General Wojciech Jaruzelski on December 13, 1981—the new political forces did not implement any decommunization measure? How do we explain the fact that a few years after the transfer of power, a post-communist party won a majority in an election? How do we explain that a former apparatchik and secretary of the Central Committee of the Communist Party won a presidential election against the legendary leader of Solidarity, Lech Wałęsa?

These are the most visible puzzles from political life; there are also questions regarding other dimensions, such as economic life. Where have the multimillionaires come from? How were they able to concentrate ownership of state property so quickly? What is their political genealogy? And there are questions regarding the moral dimension of social life. Why is public morality at such a low level in a society that not long ago generated a mass social movement such as Solidarity? How do we explain the erosion of the prestige of public authorities? Why did the majority of society not participate in the last democratic elections? Why is corruption so widespread?

These are important questions, but, one may ask, what do they have to do with lustration? Although it is impossible to connect lustration to everything that has gone wrong since 1989, lustration or its lack is very much connected to the project of building a new type of society and polity. In other words, I propose to look at lustration as a *constitutional* issue, as part of a broad spectrum of policies and legal strategies for “settling accounts with the past,” as part of the creation of the constitution of the new society.

Efforts to deal with the past are not unique to Central and Eastern Europe. It is true that the past haunts this part of the world, due to its complicated history, and most recently its communist history. As mentioned above, it is puzzling that while all post-communist societies sooner or later were forced to face their communist past, lustration and decommunization measures were the “softest,” in terms of sanctions, in the countries that first broke with communism: Poland and Hungary. One hypothesis is that because of the relatively

large proportion of both nations' populations engaged in the anti-communist opposition, in comparison to other countries such as Czechoslovakia, there was no need to provide additional legitimacy for the new political elites.

Lustration and decommunization in Poland became an issue when a real struggle began for the future social and institutional structure of the country. This shows that, contrary to the dominant perception, lustration and decommunization are not backward looking but forward looking. It also shows that lustration and decommunization were and are part of the political process and political struggle. The peculiar character of the post-communist "negotiated revolution," using the term coined by Laszlo Bruszt, when all elements of social life undergo radical change at the same time, represents a type of transformation in which dealing with the past cannot be reduced to the question of what to do about the "hangman." The very problem of dealing with the past in post-communist societies is not only about responding to gross violations of human rights through retributive justice, compensation and restitution of property, and truth telling. Lustration and decommunization became legal tools in the rearrangement of the constitutional setting of society and state. In the Polish case the lustration law became the main tool in the political struggle because other avenues, such as decommunization, were blocked. Lustration became a part of the pursuit of historical justice, but more importantly part of the struggle over social justice, over the criteria and rules of redistribution of the national product and national assets, when the losers in the economic transformation, who not long before comprised the main force in fighting against communism, discovered that the major beneficiaries of the transformation were former *nomenklatura* and members of security apparatuses.

Before 1989 there was no articulation of any ideas regarding decommunization or other ways of dealing with the functionaries of the communist regime. Generally there were two groups with positions on the matter:

- radicals, who believed that the collapse of communism would result from some sort of revolution and/or war and the problem would be solved by revolutionary justice; and
- evolutionists, who believed in the evolution of the communist system towards the incorporation of human rights and limited autonomy with preservation of the dominant position of the Communist Party. In this stream of political thought, there was no room even to entertain the idea of dealing with the past.

The peculiar type of exit from communism in Poland, first through round-table talks and then the partly free election on June 4, 1989, revealed that even

the communists were not conscious of the issue. They did not demand “sunset clauses” or general amnesty. They did not take charge of and destroy the files, as was the case in Chile where the archives of the special forces were destroyed in order to make it impossible to hold functionaries accountable before the courts in the future.

The so-called contract parliament, elected on June 4 and 18, 1989 (in two rounds of voting), established an Extraordinary Parliamentary Commission headed by the young deputy from the former anti-communist opposition, Jan Maria Rokita, to examine the activity of the Ministry of Internal Affairs.<sup>42</sup> The aim of Rokita’s commission was to investigate the deaths of almost one hundred people who died in unexplained circumstances but always in the context of the activity of secret services or communist militia during the 1980s. Nearly at the same time, another Extraordinary Parliamentary Commission was established to deal with the decision on October 30, 1988, of the last prime minister of the communist regime, Mieczysław Rakowski, to declare the bankruptcy of the Gdansk shipyard, which was the cradle of the Solidarity movement. It is possible to treat the work of this commission as a first step in settling accounts for the economic catastrophe of the communist regime in Poland.

After a celebrated article penned by Adam Michnik, entitled “*Wasz prezydent, nasz premier*” (Your president, our prime minister), a domino effect began. First came the creation of Tadeusz Mazowiecki’s government, but with two important portfolios (internal affairs and defense) reserved for President General Wojciech Jaruzelski’s people. Despite a relatively fast departure from agreements achieved at the round-table talks (visible in the very act of creating a government that did not include the communist party), progress in decommunization has been very slow.

Another attempt at decommunization was the government’s effort to determine the legal status of the property belonging to the Polish United Worker’s Party (Communist Party). Weeks after the establishment of the commission the party dismantled itself. The disappearance of one of the two parties to the agreement achieved at the round-table talks accelerated political change in the country. This does not mean, however, that Mazowiecki’s government, which accepted a “thick-line” policy separating the past from the present,<sup>43</sup> was active in the process of decommunization. The government was preoccupied with the economy, inflation, and foreign policy. At the same time, the opposition movement started to fragment. Decommunization was taken up by the Center Alliance [*Porozumienie Centrum*], organized by Jarosław Kaczyński. One of the more interesting decommunization ideas circulated at

this time of economic misery and high inflation in Poland was to impose a special levy on all members of the former Communist Party.

On March 20, 1990, the government established a committee to examine the archives of the Ministry for Internal Affairs. It was a reaction to information in the media that some files in the archives were being destroyed by the secret services. The establishment of the committee was not part of any holistic concept of preservation of the legacy of the security apparatus, however, but a response to the media's claim. The still-dominant part of the new ruling elite did not perceive the issue of dealing with the past.

In July 1990 a supplementary inquiry began regarding the brutal murder of Reverend Jerzy Popiełuszko by SB officers on October 19, 1984, near Toruń. Then, in September of the same year, the prosecutor's office of the armed forces began an inquiry into the massacre of workers in Gdańsk in December 1970. On November 9, 1990, the Parliament, by a small majority of 167 votes to 120, adopted a law on the assumption of the property of the former Communist Party by the state treasury. As a symbolic act, one week later the building that had housed the Central Committee of the Communist Party was turned into bank offices, and became the location of the Warsaw stock exchange.

Despite this accelerated political change, manifested by the dismissal on July 6, 1990, of two close associates of President Jaruzelski — General Florian Siwicki as minister of defense and General Czesław Kiszczak as minister of internal affairs — and the subsequent resignation of General Jaruzelski from the office of the president, decommunization policies and legislative activities progressed very slowly. This was not because of the government alone; public opinion was deeply divided over the issue. According to a public opinion survey conducted in November 1990, 42% of respondents supported a ban on former communists holding public office, while 45.5% were against such policies. In September 1991, 52% of respondents were against depriving the former communists of the right to hold public office. It appears that at the beginning of the period of economic austerity, a significant part of Polish society supported the presence of communists in the new democratic polity.

An important measure of historical retributive justice came in the form of a statute of April 4, 1991, which established "Stalinist crimes" as crimes committed between 1939 and 1956 against ethnic Poles or against Polish citizens of other ethnic origin. Stalinist crimes were not subject to the statute of limitations. The same statute also established the main Commission for Inquiry into Crimes against the Polish Nation, based on the former Commission for Inquiry into Nazi Crimes, which stimulated new inquiries. Between 1991 and 1995 the commission initiated 950 new inquiries and completed 620. Despite

the large number of inquiries, however, the courts received a very small number of indictments. Prosecution was often abandoned for lack of satisfactory documents and the impossibility of identifying perpetrators. If the trials actually started, they were prolonged, to the frustration of former victims. For instance, the trial of a high-ranking official in the Ministry of Public Security between 1945 and 1954, Colonel Adam Humer, and his colleagues accused of torture, only ended with a verdict at first instance after nearly three years (September 1993 to March 1996). So far approximately twenty verdicts have been reached.

A statute of February 23, 1991, focused on victims and annulled verdicts passed between 1944 and 1956 for activity aimed at the independence of the Polish state. This statute contained provisions for compensation for victims of communist crimes. On August 25, 1998, another statute denied pension privileges to judges and prosecutors who, between 1944 and 1956, were functionaries of the apparatus of repression, that is, worked in the military administration of justice, secret court divisions, or so-called ad hoc courts.

It has been, and to some extent remains, nearly impossible to apply criminal justice in relation to crimes committed by communist state functionaries after 1956, which do not fall into the category of Stalinist crimes. Trials in such cases became possible with the adoption of the legal provision that the statute of limitations for crimes committed by public functionaries prior to December 31, 1989, started on January 1, 1990. An additional statute of May 31, 1996, forbidding the application of amnesties granted by the communist People's Republic of Poland for functionaries who committed crimes, eliminated any doubts about the legal status of those crimes.

From the point of view of public opinion, however, these trials have been very long and extremely slow. For instance, in the case of the members of the Motorized Detachment of the Civic Militia [*Zmotoryzowane Odwoły Milicji Obywatelskiej*] (ZOMO) platoon, who took part in pacification of the Wujek coal mine in which striking miners were killed, an indictment was filed with the court in December 1992, fourteen months after the inquiry was closed. In November 1997, six years after the beginning of the trial, the court found the former functionaries not guilty. But this was not the end of the procedure; there were appeals and the Supreme Court sent the matter back to the lower court. The trials are still continuing.<sup>44</sup> A sort of breakthrough occurred when the former minister of internal affairs, General Czesław Kiszczak, was found responsible on March 17, 2004, for the deaths of the miners. It was the first time that a high functionary of the communist state was found guilty and sentenced by the court.

Similarly, the inquiry into the case of the massacres in December 1970 in Gdańsk began in October 1990, but an indictment was not filed with the court until April 1995, and the trials started three years later due to the absence of the accused. It is still ongoing.

A special case concerns the issue of the responsibility of General Wojciech Jaruzelski for the implementation of martial law on December 13, 1981. Despite the fact that Parliament declared the implementation of martial law illegal, the procedure against General Jaruzelski before the parliamentary Committee for Constitutional Responsibility was discontinued on February 13, 1996, after four years of procedure. In April 2006 the prosecutor's office presented charges against General Jaruzelski in connection with this matter.

At the same time, the self-purification of state institutions was very slow and minimal. With the reorganization of the Ministry of Internal Affairs and dismantling of the SB, fourteen thousand out of twenty-four thousand functionaries decided to undergo the verification procedure [*weryfikacja*], or vetting procedure, required for readmission to the services<sup>45</sup> (ten thousand decided not to apply). Ten thousand applicants qualified for further employment, and about four thousand became functionaries in the new State Security Office [*Urząd Ochrony Państwa*] (UOP). The procedure was carried out by qualification commissions, which were mandated to disqualify applicants who, as functionaries of former intelligence or counterintelligence services in the previous regime, had violated the law or the human rights or dignity of other persons, or had used their position for private gain.

The qualification commissions operated at the *voivodeship* level and at the central state level as appeals commissions. They were comprised of MPs, senators, lawyers and representatives from police headquarters, members of the Solidarity trade union, and other trustworthy citizens. Criticism of the verification procedure came mainly from the former Communist Party in the Sejm. The commissioner for citizens' rights (ombudsman) at the time, Ewa Łętowska, also criticized the procedure for violating the human rights of the former functionaries.<sup>46</sup> After the completion of the verification procedure, two-thirds of the operational staff of the newly established UOP came from the pre-1989 Ministry of Internal Affairs. Many of the disqualified former secret services operatives found employment in regular police forces and private security agencies.

Regular police forces and military intelligence were not subjected to the verification procedure. Military intelligence was reorganized and reduced in size, but the entire process was not subject to any external control.

Verification of public prosecutors was based on the evaluation of their declarations of professional qualifications and activities. If the Ministry of Justice found the declaration to be false, the prosecutor was not reappointed. In 1990, 10% of public prosecutors, that is 341 people, lost their jobs as a result of national verification. In the office of the general prosecutor, 33% of the staff lost their jobs.<sup>47</sup> The process itself was quick and effective, but was criticized by the post-communist party for breaching the rule of law. Following complaints made to the commissioner for citizens' rights concerning the lack of an appeals mechanism, the Ministry of Justice set up a commission to review appeals; it overturned decisions in forty-eight cases.

There is also the issue of access to secret police files. In 1992 Germany became the first former communist country to open up secret police files to citizens. Other post-communist countries followed and passed similar legislation, such as Hungary in 1994 and Bulgaria in 1998. This was not possible everywhere, however, from an economic and organizational point of view. In Poland the issue was discussed only in 1997 in connection with a presidential lustration law project in which it was suggested that a civic archive be established within the framework of the state archives. In the wake of the September 1997 election, this idea was absorbed into the Law on the Institute of National Remembrance [*Ustawa o Instytucie Pamięci Narodowej*], which was introduced in July 2000. The law regulates access of interested persons to information collected about them by the secret services between 1944 and 1989. In an opinion poll conducted in December 1997, 73% of respondents supported the view that each citizen should have access to his/her file, and 11% supported the opposite opinion. Many interested citizens will not find a file on themselves because the archives of the Office for the Protection of the State and then the Ministry of Internal Affairs and Administration preserved only about three million files on citizens. The Law on the Institute for National Remembrance granted the prosecutor of the institute the same procedural rights as public prosecutors. The institute started work on the communist period in Poland and has begun to play an important role in the lustration process due to the fact that all files are in its archives.

In this broad context of decommunization, lustration plays a peculiar and crucial role. It can be said that transformation itself is decommunization. This is true, but with the reservation that the post-communist structure is still in the process of solidifying itself, and the networks of communist connections influence public life mainly through their impact on the design and operation of the new institutions. In this way, the interests of the former *nomenklatura*

networks become embedded in the new political setting. This is why in the Polish case lustration was and is a battlefield. Post-communist forces supported it, but presented it as a normal clearance procedure as would exist in any democratic country. Anti-communists saw it as a limited tool for undermining a post-communist structure still controlled by the former *nomenklatura* and secret services.

Since the parliamentary and presidential elections in November 2004, there has been talk about broadening the scope of lustration to include other professional groups, such as academics, as well as simplifying the procedure. One development is a new process of scrutiny within the Catholic Church in Poland—based on a *sui generis* lustration procedure. With the victory of pro-lustration political parties and declarations by the new government that it wants to change the law in order to broaden the process, it looks as if the lustration odyssey is not finished yet, sixteen years after the beginning of the transformation.

## NOTES

- 1 See the final section of this chapter.
- 2 Wojciech Sadurski reconstructed the meaning of both categories in political discourse in Central and Eastern European post-communist countries. He wrote “‘lustration’ applies to the screening of persons seeking to occupy (or actually occupying) certain public positions for evidence of involvement with the communist regime (mainly with the secret security apparatus), while ‘decommunisation’ refers to the exclusion of certain categories of ex-Communist officials from the right to run for, and occupy, certain public positions in the new system. However, in the public debate on the moral and legal rationales for and against the policies covered by these concepts, the two have been often lumped together.” Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), 245. For further analysis of the decommunization issue in Poland, see Bronisław Wildstein, *Dekomunizacja której nie było* (Kraków: Ośrodek Myśli Politycznej i Księgarnia Akademicka, 2000).
- 3 The description of a political party as “post-communist” means that it existed in and was part of the communist political system. A general typology within the Polish party system is a division between post-communist parties and post-Solidarity parties. The two main post-communist parties were the Democratic Left Alliance [*Sojusz Lewicy Demokratycznej*] and the Polish Country Party [*Polskie Stronnictwo Ludowe*].
- 4 For a detailed history of the debate about the lustration issue in Poland, see the recently published book by Piotr Grzelak, *Wojna o lustracje* (War around lustration) (Warszawa: Trio, 2005). For an overview of the main points of not only lustration but “dealing with the past” in Poland, see Noel Calhoun, *Dilemmas of Justice in Eastern Europe’s Democratic Transition* (New York: Palgrave, 2004), 92–131; on lustration, see 104–6 and 122–20.
- 5 For an example of the role of secret services in the communist society, see Ewa Matkowska, *System. Obywatel NRD pod nadzorem tajnych służb* (Kraków: Arcana, 2003).
- 6 Józef Oleksy, when he was prime minister, was accused by Mielczanowski, at the time the minister of internal affairs, of being an agent for the Soviet Union’s intelligence.
- 7 For more on the history of that department, with a staff of nineteen people led by twenty-six-year-old Piotr Woyciechowski, see Michał Grocki, *Konfidenci są wśród nas...* (Warszawa: Editions Spotkania, 1993).
- 8 For a history of this drama in context, see Antoni Dudek, *Pierwsze lata III RP 1989–2001* (Kraków: Wydawnictwo Arcana, 2002), 257–69.
- 9 After 1989 unified oppositional forces fragmented into many political parties and movements. Parties that arose from the opposition and Solidarity are usually referred to as being post-Solidarity. This does not mean that post-Solidarity parties share the same ideology. They share only the same genealogy. Two liberal post-Solidarity

parties were the Democratic Union [*Unia Demokratyczna*], under the leadership of Tadeusz Mazowiecki and with distinguished members such as Jacek Kuroń, Adam Michnik, and Bronisław Geremek; and, liberal in the economic sense, the Liberal-Democratic Congress [*Kongres Liberalno-Demokratyczny*]. The differences were in policies but were mainly generational. The Liberal-Democratic Congress was founded by a different generation of anti-communist opposition.

- 10 For a fuller presentation of this position and an overview of the arguments, see Andrzej Zybortowicz, *W uścisku tajnych służb. Upadek komunizmu i układ postnomenklaturowy* (Warszawa: Wydawnictwo Antyk, 1993); see also Maria Łoś and Andrzej Zybortowicz, *Privatising the Police-State: the Case of Poland* (London, New York: Palgrave, 2000).
- 11 Decision U.6/92 of June 19, 1992. For a description of context and comments, see Sadurski, *Rights Before Courts*, 244.
- 12 Jan Olszewski was a lawyer and prominent member of the opposition movement. He became prime minister after the 1991 election. His government was composed of right-of-center parties, used strong anti-communist rhetoric, and promoted decommunization. Olszewski's government was from the very beginning in conflict with President Lech Wałęsa. Wałęsa dismissed Olszewski's government after the release of the so-called Maciarewicz list, on which Wałęsa's name was mentioned.
- 13 For an analysis of techniques used in the media to compromise lustration, see Radosław Sojak, "Demaskowani i wykluczeni. Dyskurs antylustracyjny w Polsce w świetle socjologii wiedzy," *Terazniejszość Człowiek Edukacja*, no. 2 (1998): 29–59.
- 14 See Annna Potocka-Hoser, "Spor o lustracje — komunikacja bez porozumienia," *Kultura i Społeczeństwo*, no. 2 (1996): 163–182, 178.
- 15 For an overview of the main features of the four drafts, see the table on pages 199 and 200 in Ewa Bieniek, "Lustracja w krajach Europy Środkowo-Wschodniej," in *Zagadnienia konstytucjonalizmu krajów Europy Środkowo-Wschodniej*, ed. Tadeusz Moldawa (Warszawa: Elipsa, 2003).
- 16 Before his successful presidential election, Kwaśniewski was a leader of the post-communist party and before 1989 he was one of the secretaries of the Central Committee of the Polish Communist Party [*Polska Zjednoczona Partia Robotnicza*] (PZPR).
- 17 Decision of the Constitutional Tribunal of October 21, 1998 [*Wyrok Trybunału Konstytucyjnego z dnia 21 października 1998 r.*] and Decision of the Constitutional Tribunal of November 10, 1998 [*Wyrok Trybunału Konstytucyjnego z dnia 10 listopada 1998 r.*], *Przegląd Sejmowy*, nr 6 (1988), 172.
- 18 The minority opinion criticized the amendment and wanted to invalidate the clause on substantive not procedural grounds. For instance, the president of the Constitutional Tribunal, Marek Safjan, argued in his dissenting opinion that the exemption of those who did not endanger other people's rights and freedoms would introduce highly

- vague and subjective criteria into the definition of collaboration that would lead to inequality of treatment of the accused in the lustration procedure.
- 19 Cassation is a form of appeal. In the Polish lustration law there is a provision for normal appeal to the higher Lustration Court and then in the form of cassation to the Supreme Court.
  - 20 See comments in *Ius et Lex* 1, no. 2 (2003): 489–520.
  - 21 *Wojewoda* in Polish is a state administrator of the administrative unit of the state, *województwo* (province).
  - 22 Decision K.39/07, *Orzecznictwo Trybunału Konstytucyjnego* at 518–19.
  - 23 For an interpretation of the concept of public law, see Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004).
  - 24 Bogusław Nizieński, commissioner for the public interest, interview by author, conducted in his office, Warsaw, Poland, November 20, 2002.
  - 25 For the order of positions see article 7 of the lustration law at <http://www.rzeczniplik.gov.pl/pprawna.htm>.
  - 26 Krzysztof Kauba and Bogusław Nizieński, “Lustracja,” in *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza*, ed. Antoni Dębiński, Alicja Grześkowiak and Krzysztof Wiak (Lublin: Wydawnictwo KUL, 2002), 347.
  - 27 *Ibid.*
  - 28 Actually 25,453 lustration declarations were filed but 1,855 came from retired procurators and judges who were not obliged to do so.
  - 29 The latest figures available are from May 2004; see Bogusław Nizieński, “Polski model lustracji” (paper delivered at the conference “Cienie państwa policyjnego, wokół teczek bezpieki” at Nicolaus Copernicus University, Toruń, Poland, May 4, 2004) (on file with author).
  - 30 Statement of the Commissioner for Public Interest, Session 21 of the Sejm of the Polish Republic, May 10, 2002 [*Wystąpienie Rzecznika Interesu Publicznego Bogusława Nizieńskiego na 21 posiedzeniu Sejmu Rzeczypospolitej Polskiej w dniu 10 maja 2002*] (on file with author).
  - 31 All this information is in the report delivered by the commissioner to Parliament. No more recent data had been published by the commissioner’s office at the time of writing.
  - 32 See Kauba and Nizieński, “Lustracja,” 348.
  - 33 All data from “Excerpts from the information about activities of the Commissioner for Public Interest in 2001, sent on February 19, 2002 to the President of Polish Republic, Sejm, Senate, Prime Minister, and Chief Justice of the Supreme Court” [*Wyciąg z Informacji o działalności rzecznika Interesu Publicznego w 2001 r. Przesłanej w dniu 19 lutego 2002 do Prezydenta RP, Sejmu, Senatu, Prezesa Rady Ministrów oraz do I Prezesa Sądu Najwyższego*] (on file with author). The largest number of cases was at the beginning of the lustration procedure according to the provisions in the lustration law. After that only newcomers

- to public life, limited in number, were obliged to make a lustration declaration.
- 34 Kauba and Niziński, “Lustracja,” 345–49.
- 35 See article written during the stalemate by Leszek M. Hudala, “Ustawa Lustracyjna — i co dalej?,” *Studia Iuridica* 35 (1998): 171–91.
- 36 See Wojciech Sadurski, “Ustawa lustracyjna uzupełniona,” *Rzeczpospolita*, March 5, 1999.
- 37 For problems with dealing with past in the Polish system of the administration of justice, see Maria Stanowska, “Próby rozliczenia z przeszłością w wymiarze sprawiedliwości,” in *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza*, ed. Antoni Dębiński, Alicja Grześkowiak and Krzysztof Wiak (Lublin: Wydawnictwo KUL, 2002), 301–37.
- 38 See Constitutional Tribunal ruling of May 20, 2002 (SK28/01).
- 39 See the history of lustration above.
- 40 *Gazeta Wyborcza*, February 3, 1997.
- 41 See summary information of the research under Komunikaty, Public Opinion Research Center (CBOS).
- 42 See Jan Rokita, *Raport Rokity. Sprawozdanie Sejmowej Komisji Nadzwyczajnej do Zbadania Działalności MSW* (Kraków: Arkana, 2005).
- 43 Mazowiecki, the first non-communist prime minister in the former communist world, in his first speech to Parliament, used the expression *gruba kreska* (thick line) to separate the communist past from the post-communist present and future. The expression became synonymous with a policy of abandoning the attempt to make the former communist ruling elite accountable for the excesses of the communist regime.
- 44 “Historia Wujka i procesu,” *Gazeta Wyborcza*, March 17, 2004.
- 45 Maria Łoś, “Lustration and Truth Claims: Unfinished Revolution in Central Europe,” *Law and Social Inquiry* 20, no. 1 (Winter 1995): 122–23.
- 46 For information see “Vetting of the SB cadres,” in Łoś and Zybortowicz, *Privatising the Police-State*, 127–28.
- 47 Stanisław Podemski, “Lustracja zlustrowana,” *Polityka*, September 13, 1997, 17.

## Lustration and Lapse of Time: 'Dealing with the Past' in the Czech Republic

David Kosář\*

Czech Lustration Acts: basic features – Among the most far-reaching in the post-communist countries in Europe – Challenges for the rule of law – 2001: Czech Constitutional Court upholds their validity – Case-law of the European Court of Human Rights – 'Transition-to-democracy' circumstances that justified their adoption have ceased to exist

One of the most important challenges for the rule of law in the Czech Republic in the period of transition has been the so-called lustration. The Czech lustration consisted of two separate laws, the so-called 'Large Lustration Act'<sup>1</sup> and 'Small Lustration Act'.<sup>2</sup> Throughout the paper I will use the term 'Czech Lustration Acts' to refer to both of these Acts as they operate on the same principles, but the focus of this paper is primarily on the 'Large Lustration Act'.

Although the Czech Lustration Acts were initially adopted for five years, they are still valid and as such subject to recurring political controversies even two decades after the Velvet Revolution. In 2007, the former Prime Minister of the

\* Research and Documentation Department of the Supreme Administrative Court of the Czech Republic. E-mail: david.kosar@nssoud.cz. I am grateful to Adam Czarnota, Mark Gillis, Zdeněk Kühn, Pavel Molek, Vojtěch Šimíček and Karel Šimka for extremely helpful comments and discussions. I also thank Tom Eijssbouts, Jan-Herman Reestman and two anonymous reviewers for additional comments that significantly improved the original manuscript. An earlier version of this paper was published as the Eric Stein Working Paper No. 3/2008. All opinions expressed in this paper are personal to the author (and not to the institution) and any mistake, of course, remains his own.

<sup>1</sup> Act No. 451/1991 Coll., on standards required for holding specific positions in state administration of the Czech and Slovak Federal Republic, Czech Republic and Slovak Republic [*Zákon č. 451/1991 Sb., kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní Republiky, České republiky a Slovenské republiky*] of 4 Oct. 1991.

<sup>2</sup> Act No. 279/1992, on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps of the Czech Republic [*Zákon č. 279/1992 Sb., o některých dalších předpokladech pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Vězeňské služby České republiky*] of 28 April 1992.

Czech Republic,<sup>3</sup> a top manager in the Czech Television (state television)<sup>4</sup> and a famous singer<sup>5</sup> were accused of collaborating with the communist State Security Police or of being a former member of the Peoples' Militia. In 2008, the incomplete files of the State Security Police and the speculations based thereon played a seminal role in the heated presidential duel between the incumbent Václav Klaus and his rival Jan Švejnar. Each camp attempted to denigrate its opponent by misusing these files and the eventual victory of Václav Klaus was further tainted by the accusation that the MP from the opposition party who cast a decisive vote for Klaus was blackmailed by the threat of public revelation of his collaboration with the State Security Police.<sup>6</sup> These examples not only show the pain of 'dealing with the past' in a post-communist regime, but also reveal clear deficiencies of the Czech Lustration Acts themselves.

The Czech<sup>7</sup> Lustration Acts are widely acknowledged to be 'thorough and comprehensive'<sup>8</sup>, 'one of the strongest'<sup>9</sup> and even 'the most sweeping'<sup>10</sup> among the lustrations acts of the post-communist countries in Central and Eastern Europe. As a result, they were met with fierce criticism, not only from foreign<sup>11</sup> and Czech<sup>12</sup> scholars, but also from dissidents themselves.<sup>13</sup> However, it is not my intention to

<sup>3</sup> See J. Kmenta, J. Vaca, 'Tošovský spolupracoval s StB' [Tošovský collaborated with State Security Police], *MF Dnes*, 12 Feb. 2007, p. 4.

<sup>4</sup> See J. Kubita, 'Rada ČT podržela Janečka i bývalého milicionáře' [the Council of Czech TV supported Janeček as well as a former member of the militia], *Hospodářské noviny*, 22 Feb. 2007, p. 1 and 3.

<sup>5</sup> See R. Malecký, 'Nohavica a StB: nová fakta' [Nohavica and State Security Police: new facts], *Lidové noviny*, 10 Feb. 2007, p. 7.

<sup>6</sup> A. Kottová, J. Jareš, 'Spolupracoval Snitilý s StB?' [Did Snitilý collaborate with the StB?], *Týden*, 12 Feb. 2008, available at <[http://www.tyden.cz/rubriky/domaci/boj-o-hrad/spolupracoval-snitily-s-stb\\_43711.html](http://www.tyden.cz/rubriky/domaci/boj-o-hrad/spolupracoval-snitily-s-stb_43711.html)>, visited 17 Aug. 2008.

<sup>7</sup> I do not refer to the lustration law as 'Czechoslovak' since it became a dead letter in Slovakia after the split of Czechoslovakia. More precisely, the lustration laws lapsed by *desuetude* in Slovakia due to the fact that no Ministry in Slovakia has been given authority to issue lustration certificates.

<sup>8</sup> G. Skapska, 'Moral Definitions of Constitutionalism in East Central Europe: Facing Past Human Rights Violations', 18 *International Sociology* (2003) p. 199 at p. 202.

<sup>9</sup> D. Robertson, 'A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity', in W. Sadurski, et al. (eds.), *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* (Dordrecht, Springer 2006) p. 73 at p. 87.

<sup>10</sup> H. Schwartz, 'Lustration in Eastern Europe', 1 *Parker School Journal of East European Law* (1994) p. 141 at p. 142.

<sup>11</sup> See id.; see also T. Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (New York, Vintage Books 1995).

<sup>12</sup> See Z. Jičínský, V. Mikule, 'Některé ústavněprávní otázky tzv. Lustračního zákona' [Certain Constitutional Questions Related to the So-called Lustration Law], 131 *Právník* (1992) p. 227.

<sup>13</sup> See, e.g., the stance of Jiřina Šiklová and Václav Havel in J. Šiklová, 'Lustration or the Czech Way of Screening', in M. Krygier and A.W. Czarnota (eds.), *The Rule of Law after Communism: Problems*

question the legitimacy of the introduction of the Lustration Acts in the early 1990's. I presume that (1) the Czechoslovak Parliament *immediately after the Velvet Revolution* enjoyed legitimacy to adopt the selective lustration laws;<sup>14</sup> (2) the most excessive aspects of these laws were remedied by the Constitutional Court of the Czech and Slovak Federal Republic (hereafter, Federal Court)<sup>15</sup> and the Czech Constitutional Court;<sup>16</sup> and that (3) the departure from the rule-of-law principles in 1995 and 2000 when the Czech Parliament extended the validity of both lustration laws<sup>17</sup> was still justified by the unique circumstances of the transition to democracy in the Czech Republic.

But this presumption does not prevent us from asking whether the Czech Lustration Acts are constitutional *today*. This question becomes even more pertinent due to recent case-law of the European Court of Human Rights (hereafter, ECtHR). The core of this paper thus focuses on the phenomenon of 'lapse of time' and screens the Czech Lustration Acts against the contemporary jurisprudence of the ECtHR. Although according to the ECtHR's jurisprudence as it stands now the Czech Lustration Acts do not necessarily violate the European Convention on Human Rights (hereafter, ECHR or Convention), I argue that they violate the Czech Charter of Fundamental Rights and Basic Freedoms (hereafter, Charter),<sup>18</sup> since the 'transition-to-democracy' circumstances that justified their adoption have ceased to exist. Therefore, they should either be repealed by the Parliament or annulled by the Constitutional Court of the Czech Republic.

In the following, the basic features of the Czech Lustration Acts are outlined, after which the recent case-law of the ECtHR is analysed. Subsequently, the Czech Lustration Acts are scrutinised in the light of the ECtHR's jurisprudence. Finally the conformity of this law with the Charter is reviewed.

*and Prospects in East-Central Europe* (Aldershot, Ashgate 1999) p. 248-258. Note also that then-President Václav Havel vetoed the extension of the time limit in the lustration laws both in 1995 and 2000 (*see infra*). Another famous Czech dissident, Petr Uhl, was even the main representative of the petitioners before the Constitutional Court of the Czechoslovak Federal Republic in the *Lustration I* case (*see infra*).

<sup>14</sup> See M. Gillis, 'Lustration and Decommunisation', in J. Příbáň and J. Young (eds.), *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot, Ashgate 1999) p. 59-66.

<sup>15</sup> Decision of the Federal Court No. Pl. 03/92 of 26 Nov. 1992 (*Lustration I*), available in English at <[http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)>, visited 17 Aug. 2008. Note that the Federal Court was established in 1991, started to work in 1992 and had come to an end due to the dissolution of the Czech and Slovak Federal Republic on 31 Dec. 1992.

<sup>16</sup> Decision of the Czech Constitutional Court No. Pl. 09/01 of 5 Dec. 2001 (*Lustration II*), available in English at <[http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)>, visited 17 Aug. 2008.

<sup>17</sup> *See infra*.

<sup>18</sup> Act No. 2/1993 Coll. of 16 Dec. 1992.

## BASIC FEATURES OF THE CZECH LUSTRATION ACTS

While the international scholarly literature devotes attention almost exclusively to the Large Lustration Act, the Czech Law knows two Lustration Acts.<sup>19</sup> Lack of awareness of the Small Lustration Act can be explained by the fact that only the Large Lustration Act was challenged before the Federal Court.<sup>20</sup> For this reason, this paper also focuses primarily on the Large Lustration Act. It is important to note, however, that both Lustration Acts should be read in conjunction. In fact, the second challenge to lustration, the first before the Czech Constitutional Court, was aimed at both Acts and was partly successful in challenging the Small Lustration Act.<sup>21</sup>

### *'Protected' and 'suspect' positions in the Large Lustration Act*

The Large Lustration Act includes two lists, the so-called 'protected positions' on the one hand and the 'suspect positions' on the other.<sup>22</sup> The first label refers to the public offices<sup>23</sup> for which a negative lustration certificate is required. Thus, persons falling into one of the categories in the list of 'suspect positions' are barred from holding these positions. The second label covers the offices or activities held during the communist regime that disqualify its holder from working in capacities included in the 'protected positions'. In other words, the 'suspect positions' list stipulates 'who is disqualified' whereas the 'protected positions' list specifies 'which positions he is disqualified from'.

The 'protected positions' include, *inter alia*, all those filled by election, nomination, or appointment in bodies of state administration,<sup>24</sup> the army, security service, and police force, the staff working in the offices of the President, Government, Parliament, courts, state radio and television, and in the state-owned companies.<sup>25</sup> However, in contrast to Poland, the Large Lustration Act does not apply to positions for which individuals are elected by democratic vote. Therefore, MPs, senators and elected municipal authorities do not fall within the scope of the 'protected

<sup>19</sup> See *supra* nn. 1 and 2.

<sup>20</sup> Pl. 03/92 *Lustration I*. In fact, the Small Lustration Act did not exist at that time.

<sup>21</sup> Pl. 09/01 *Lustration II*.

<sup>22</sup> Gillis, *supra* n. 14, at p. 56.

<sup>23</sup> The term 'public offices' is understood broadly here and encompasses all forms of public employment including high-ranking positions in the state-owned companies, universities and state media.

<sup>24</sup> The term 'state administration' in the Czech Republic refers only to civil servants and does not cover democratically elected functions (*see infra*).

<sup>25</sup> Art. 1(1) of the Large Lustration Act.

positions'.<sup>26</sup> Put differently, 'democratic legitimacy took precedence over lustration procedures.'<sup>27</sup>

The 'suspect positions'<sup>28</sup> include, *inter alia*, high ranking positions in the Communist Party, members of the 'Peoples' Militia',<sup>29</sup> various offices related to the State Security Police<sup>30</sup> and informers of State Security Police.<sup>31</sup> Conversely, the *ordinary members* of the Communist Party (in contrast to its *officials*) are outside the scope of the Act.<sup>32</sup> The original text of the Large Lustration Act included also a highly controversial group of 'candidates for collaboration',<sup>33</sup> but inclusion of this group was – rightly – declared unconstitutional by the Federal Court.<sup>34</sup> However, this correction has not saved the Large Lustration Act from being labelled as 'striking' for allegedly giving priority to dealing with *informers and collaborators* instead of prosecuting and punishing perpetrators.<sup>35</sup>

<sup>26</sup> See J. Příbáň, 'Constitutional Justice and Retroactivity of Laws in Postcommunist Central Europe', in J. Příbáň, et al. (eds.), *Systems of Justice in Transition: Central European Experiences since 1989* (Aldershot, Ashgate 2003), p. 29 at p. 42, and the sources cited therein.

<sup>27</sup> *Id.*

<sup>28</sup> Art. 2(1) of the Large Lustration Act.

<sup>29</sup> People's Militias (in Czech '*Lidové milice*', in Slovak '*Ludové milície*') was a paramilitary organisation of the Communist Party of Czechoslovakia during 1948-1989.

<sup>30</sup> The State Security Police was organisation analogous to the KGB in the USSR, i.e., a secret police force which was controlled by the Communist Party of Czechoslovakia.

<sup>31</sup> The category of the informers was divided into three subcategories: category A of 'agents, informers, and owners of conspiratorial flats'; category B of 'trustees', who, though not classified by any of the activities listed in category A, were conscious collaborators; and category C, 'candidates for collaboration' (*see infra*). Categories A and B are defined in Art. 2(1)(b) of the Large Lustration Act, whereas category C was stipulated in Art. 2(1)(c) of this Act.

<sup>32</sup> See Příbáň 2003, *supra* n. 26, at p. 42, and the sources cited therein.

<sup>33</sup> Art. 2(1)(c) of the Large Lustration Act (before the *Lustration I* decision). 'Candidates for collaboration' were persons who had been contacted and interrogated by the State Security Police and listed as potential confidants but who were not necessarily active collaborators (as they were listed even though they declined to collaborate).

<sup>34</sup> Pl. 03/92 *Lustration I*.

<sup>35</sup> A. Du Toit, 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition', in D. Thompson and R.I. Rotberg (eds.), *Truth v. Justice: The Morality of Truth Commissions* (Princeton, Princeton University Press 2000), p. 127 [emphasis in original]. Du Toit is right since the Czech Lustration Acts have primarily affected those whose collaboration was disputable, whereas the worst perpetrators silently left their public offices and moved to more lucrative positions in emerging business areas, where they could sell their good contacts (Šiklová, *supra* n. 13, at p. 250). Instead of punishing perpetrators the positive lustration certificates have ruined the lives of hundreds of 'innocent' persons (innocent in a sense that they were not any more complicit with the Communist regime than the rest of the population); *see* J. Kavan, 'The Development of Rights of Access to the Media: the Role of Media in Lustration', in A. Sajó and M. Price (eds.), *Rights of Access to the Media* (The Hague, Kluwer Law International 1996), p. 259 at p. 277-278.

*How does the Large Lustration Act operate?*

The practical application of the Large Lustration Act is three-fold: (1) the candidates for 'protected positions' are screened; (2) positively lustrated candidates are barred from holding 'protected positions'; and (3) positively lustrated individuals who already hold a 'protected position' are removed from them.<sup>36</sup> The lustration certificates are issued by the Ministry of the Interior and these certificates, unlike those provided by the Gauck Office in Germany, have the effect of administrative decisions with direct consequences for the person being screened.<sup>37</sup> Furthermore, there are no exoneration grounds available and the few exceptions<sup>38</sup> the Large Lustration Act originally contained were annulled by the Federal Court in 1992 for a violation of the principle of equality enshrined in Article 1 of the Charter.<sup>39</sup> Therefore, 'those who fall into the "suspect positions" ... are *automatically* excluded or removed from the "protected position".'<sup>40</sup> As a result, the Czech Lustration Acts lack any form of individualisation.

Another important feature of the Czech Lustration Acts was their temporality. At the time of enactment, the Czech Lustration Acts were considered to be 'a provisional and only temporary legal method for protecting the new democratic regime.'<sup>41</sup> The Act was adopted in October 1991 initially for five years. In 1995<sup>42</sup> Parliament extended its validity for a further five years and in 2000 it repealed the time limitation altogether.<sup>43</sup> It is also worthy of mention that President Václav Havel vetoed the extension of the time limit both in 1995 and 2000 and returned the amendment to Parliament, arguing that 'the Act was only relevant for the "revolutionary phase", and that it was time to introduce normal rule-of-law conditions, which could permit no trace of collective guilt.'<sup>44</sup> However, Parliament in both cases disagreed with Havel and overrode his veto. More recently, when the Prime

<sup>36</sup> J. Meierhenrich, 'The Ethics of Lustration,' 20 *Ethics and International Affairs* (2006) p. 99 at p. 99.

<sup>37</sup> Příbání 2003, *supra* n. 26, at p. 45.

<sup>38</sup> Arts. 2(3) and 3(2) of the Large Lustration Act (before the *Lustration I* decision) gave discretion to the Minister of Defence and Minister of the Interior to pardon members of the State Security Police for reasons of national security and 'opt them out' from the 'suspect positions'.

<sup>39</sup> Art. 1 of the Charter reads as follows: 'All people are free, have equal dignity, and enjoy equality of rights....' [author's translation]

<sup>40</sup> Gillis, *supra* n. 14, at p. 57.

<sup>41</sup> Příbání 2003, *supra* n. 26, at p. 42.

<sup>42</sup> Act No. 254/1995 Coll., which amends the Large Lustration Act, of 27 Sept. 1995; and Act No. 256/1995 Coll., which amends the Small Lustration Act, of 27 Sept. 1995.

<sup>43</sup> Czech Republic, Act No. 422/2000 Coll., which amends the Large Lustration Act, of 25 Oct. 2000; and Czech Republic, Act No. 424/2000 Coll., which amends the Small Lustration Act, of 25 Oct. 2000.

<sup>44</sup> Šiklová, *supra* n. 13, at p. 252.

Minister (of the Czech Social Democrats) suggested the annulment of the Lustration Acts in 2005 he was met with staunch criticism from his colleagues and the media, who accused him of preparing the ground for a Government coalition with the Communist Party.

### *The Small Lustration Act*

As to the Small Lustration Act, its structure, operation and (initial) temporal nature mirror the Large Lustration Act. It differs only in two major aspects. First, the ‘protected positions’ are specific to the *rationae materiae* of the Small Lustration Act and include high-ranking positions within the Police of the Czech Republic and several positions at the Ministry of the Interior. Secondly, the ‘suspect positions’ differ slightly from those in the Large Lustration Act, in particular for (potential) holders of a position within the ‘Correctional Corps’ of the Czech Republic.<sup>45</sup>

### *Constitutional lustration adjudication in the Czech Republic*

Both the Large Lustration Act in its original wording, and the amendments repealing the time limit of the Czech Lustration Acts were challenged before the Federal Court and the Czech Constitutional Court respectively. As a result, both constitutional courts were obliged to address the ‘lapse of time’ phenomenon.

In the first decision, the so called *Lustration I* case,<sup>46</sup> the Federal Court stressed two crucial factors for the outcome of the case. First, it spelled out its perception of the material *Rechtsstaat*, which is generally considered a core of the decision:<sup>47</sup>

In contrast to the totalitarian system, which was founded on the basis of the goals of the moment and was never bound by legal principles, much less principles of constitutional law, a democratic state proceeds from quite different values and criteria.

(...)

Each state, or rather those which were compelled over a period of forty years to endure the violation of fundamental rights and basic freedoms by a totalitarian regime, has the right to [en]throned democratic leadership and to apply such legal

<sup>45</sup> Art. 5 of the Small Lustration Act. The ‘Correctional Corps’ in Communist Czechoslovakia consisted of prison guards who acted as an extended arm of the Communist Party of Czechoslovakia and often brutally interrogated the opponents of the Communist regime.

<sup>46</sup> Pl. 03/92 *Lustration I*.

<sup>47</sup> Cf. Z. Kühn, ‘České lustrační rozhodnutí – role srovnávacího práva a nedostatky v soudcovské argumentaci’ [The Czech Lustration Decision – the Role of Comparative Law and the Deficiency of Judicial Argumentation], in O. Novotný (ed.), *Pocta Vladimíru Mikule k 65. Narozeninám* (Praha, ASPI Publishing 2002) p. 361 at p. 369.

measures as are apt to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

(...)

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist [of] certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as concerns values, may not adopt [...] criteria of formal-legal and material-legal continuity which is based on a differing value system, not even under the circumstances that the formal normative continuity of the legal order makes it possible. Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.<sup>48</sup>

Next to the material *Rechtsstaat* reasoning, the Federal Court relied heavily on the temporary nature of the Large Lustration Act and noticed that it 'shall apply only during a *relatively short time period* by the end of which it is foreseen that the process of democratisation will have been accomplished (by 31 December 1996).'<sup>49</sup> This two-fold reasoning left many questions unresolved. Most importantly, until the *Lustration II* case<sup>50</sup> it was not clear whether these two conditions operate separately or cumulatively, and whether the process of democratization is limited by a specific deadline or tied to the accomplishment of a specific aim.

In fact, the petitioners who in 2000 challenged the repeal of the time limitation of both Lustration Acts in the *Lustration II* case raised this issue and argued that as the time limitation of the Lustration Acts was repealed, the Acts failed to meet the conditions of constitutionality.<sup>51</sup> In other words, they asserted that the 'material *Rechtsstaat*' condition and the 'temporary nature' condition must be fulfilled cumulatively. The Czech Constitutional Court rejected this argument.<sup>52</sup> While it acknowledged the importance of the time factor, it also held that the 'short-time-period' argument in *Lustration I* was not the only justification for upholding the

<sup>48</sup> Unofficial translation of the Federal Court, available at <[http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)>, visited 17 Aug. 2008

<sup>49</sup> Id. [emphasis added].

<sup>50</sup> Pl. 09/01 *Lustration II*.

<sup>51</sup> The petitioners relied on Art. 1 of the Constitution (principle of rule of law), Arts. 1 (principle of equality), 4 § 2 and § 4 (protection of the core of the fundamental rights) and Art. 21 § 4 (right to access under equal conditions to elected and other public offices) of the Charter, Art. 4 of the International Covenant on Economic, Social and Cultural Rights and the International Labour Organization's Convention on Discrimination (Employment and Profession) of 1958 (No. 111).

<sup>52</sup> This paper leaves aside a lengthy elaboration on the relationship between the Federal Court and the Czech Constitutional Court with regards to the concept of *res iudicata*.

constitutionality of the Large Lustration Act in 1992. In other words, the Court decided that the ‘material *Rechtsstaat*’ argument and the ‘temporary nature’ argument apply separately and departure from the short time nature of the Lustration Acts does not in itself make these acts unconstitutional.

This was not the end of the story. The Czech Constitutional Court still had to decide whether the conditions for constitutionality of the Lustration Acts indeed existed eleven years after the Velvet Revolution. It approached this issue diligently, but it was clear from its reasoning that it was highly reluctant to ‘overrule’ the conclusions of the Federal Court in *Lustration I*. More specifically, it invoked the concept of a ‘democracy capable of defending itself’<sup>53</sup> and left the decision to the legislature as to whether the Lustration Acts were still necessary.<sup>54</sup> One commentator found this part of the Court’s reasoning so deferential that he referred to it as ‘a form of “political question doctrine”’.<sup>55</sup> But this is exaggerated. Even though the Court seemed to have shied away from annulling the Czech Lustration Acts for ‘a lack of judicially discoverable and manageable standards’,<sup>56</sup> given other factors<sup>57</sup> it is more appropriate to say that the Czech Constitutional Court exer-

<sup>53</sup> This concept of German origin (referred to as *wehrhafte* or *streitbare Demokratie*) empowers the democratic State to take measures to prevent the (re)occurrence of the totalitarian regime and to curtail the rights of those who advocate for such regime. In the lustration context, it means that the State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. See *supra* excerpt from the *Lustration I* decision; cf. D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> edn. (Durham, Duke University Press 1997), at p. 37-38 and 217-237; A. Sajó (ed.), *Militant Democracy* (Utrecht, Eleven International Publishing 2004); and ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt v. Germany*, §§ 54-59; ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia* [GC], § 100; and ECtHR 13 Feb. 2003, Cases Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], § 99.

<sup>54</sup> The relevant part of the reasoning of the Czech Constitutional Court reads as follows: ‘The petition ... brings many data which convincingly document that the development of democratic changes after 1992 is stormy and that ... the “democratic process culminated.” Nonetheless, the ... 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 ... Court is not able to review the claim of “culmination” or, on the contrary “non-culmination” of the democratic process by the means which it has at its disposal ... However, it can ... 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.’ (Pl. 09/01 *Lustration II*, unofficial translation, available at <[http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)>, visited 17 Aug. 2008)

<sup>55</sup> Robertson, *supra* n. 9, at p. 89.

<sup>56</sup> *Baker v. Carr*, 369 US 186, at 217 (1962).

<sup>57</sup> Since there is no such concept as the ‘political question doctrine’ in Czech constitutional law, since the Charter contains a justiciable right to access under equal conditions to public offices (Art. 21 § 4) and since the Court struggled to provide further rationale for its position and left room for future challenges.

cised a significant self-restraint and gave a broad discretion to the legislator.<sup>58</sup> It simply lacked enough evidence (both empirical and juridical) to generate the constitutional legitimacy necessary to counter predominant political views *at the time when the Lustration II decision was taken*.<sup>59</sup> As David Robertson rightly observed, the 'world was judged not to have changed enough' to rebut other arguments in support of lustration endorsed by the Federal Court in 1992.<sup>60</sup>

Finally, the Czech Constitutional Court also engaged in a comparative analysis of the other lustration acts in the CEE region, which was met with scathing criticism for its selectivity, shallowness<sup>61</sup> and manipulation of the facts.<sup>62</sup> More interesting for the purpose of this paper is that the Court also noted that since 'no international court has *yet* issued a decision in the question of the compliance of lustration acts with international agreements, the [Czech Constitutional Court will] ... use other ... indicators.'<sup>63</sup> Therefore, we can reasonably infer that the Czech Constitutional Court is prepared to reconsider the *Lustration I* and *II* rulings in the light of non-conformity judgments of international courts. Here the jurisprudence of the ECtHR comes into play.

Before this paper proceeds to the analysis of the jurisprudence of the ECtHR on lustration and decommunisation, it will briefly outline the main grounds of criticism of the Czech Lustration Acts and their unique features. This outline is meant to put the Czech lustration law into a broader perspective within the CEE region and prepare the ground for distinguishing the Czech Acts from the other lustration acts that have already been challenged before the ECtHR.<sup>64</sup>

<sup>58</sup> For a German position *vis-à-vis* the 'political question doctrine' which is roughly similar to the Czech one, cf. D. Kommers, *supra* n. 53, at p. 153-164; or T.M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, Princeton University Press 1992), at p. 107-125. On how the self-restraint and deference may operate within the test of proportionality, cf. J. Rivers, 'Proportionality and Variable Intensity of Review', 65 *Cambridge Law Journal* (2006), p. 174 at p. 195-207.

<sup>59</sup> Cf. R. Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political', XIII *Juridica International* (2007) p. 47 at p. 53.

<sup>60</sup> Robertson, *supra* n. 9, at p. 89.

<sup>61</sup> The Czech Constitutional Court cited in support of its conclusion among others *Adler v. Board of Education*, 342 US 485 (1952), a rather outdated case, and, what is more, a precedent which was overruled only 15 years later by *Keyishian v. Board Of Regents*, 385 US 589 (1967). See Kühn, *supra* n. 47, at p. 376.

<sup>62</sup> Kühn, *supra* n. 47, at p. 376.

<sup>63</sup> *Lustration II*, § IX [emphasis added].

<sup>64</sup> For this reason. I will not contrast the Czech Lustration Acts with those lustration laws (such as the Hungarian Lustration Act of 1994) that have not been challenged before the ECtHR so far.

*Specificities of the Czech Lustration Acts and main grounds of its criticism*

As mentioned earlier, the Czech Lustration Acts have been met with sharp criticism since the very beginning of their existence. It is helpful to summarise briefly the grounds of this criticism. Since 1991, the following deficiencies of the Czech Lustration Acts have been raised: (1) it is overinclusive and at the same time underinclusive, as will be explained later on;<sup>65</sup> (2) it legalises collective guilt;<sup>66</sup> (3) it applies the presumption of guilt instead of innocence;<sup>67</sup> (4) it does not take into account individual circumstances of a particular case;<sup>68</sup> (5) it violates the principle of equality before the law;<sup>69</sup> (6) the State Security Police files are inaccurate and incomplete,<sup>70</sup> which ‘often benefits individuals who may have dubious pasts but keep good contacts with communist secret police officers who now willingly testify in their favour before the courts;<sup>71</sup> and (7) lustration has been abused for political motives and has led to witch hunts.<sup>72</sup>

These deficiencies also pinpoint the main characteristics of the Czech Lustration Acts that distinguishes them from their counterparts in Central and Eastern Europe.<sup>73</sup> First, in contrast to most of the lustration acts in the region, the Czech Lustration Acts after the 2000 amendments do not contain a time limit. Secondly, unlike in Poland<sup>74</sup> or Lithuania,<sup>75</sup> they foreclose the positively<sup>76</sup> lustrated persons from holding the ‘protected positions’ *indefinitely*.

<sup>65</sup> Šiklová, *supra* n. 13, at p. 254-55; Du Toit, *supra* n. 35, at p. 127.

<sup>66</sup> Schwartz, *supra* n. 10, at p. 142.

<sup>67</sup> Václav Havel (quoted in: Šiklová, *supra* n. 13, at p. 249). See Kühn, *supra* n. 47, at p. 367.

<sup>68</sup> Kühn, *supra* n. 47, at p. 376; arguing *a contrario* ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt v. Germany*, § 55.

<sup>69</sup> See F. Šamalík, ‘Lustrace “lustračního zákona” [The Lustration of ‘the Lustration Law’], *Časopis pro právní vědu a praxi*, No. 3 (1994), p. 21.

<sup>70</sup> Skapska, *supra* n. 8, at p. 210.

<sup>71</sup> J. Příbáň, ‘Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law’, in A. Mayer-Rieckh and P. de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York, SSRN 2007) p. 309 at p. 336-337 (available also online at <<http://www.ssrc.org/blogs/books/2007/05/08/justice-as-prevention/>>, visited 17 Aug. 2008).

<sup>72</sup> See Rosenberg, *supra* n. 11; and Uitz, *supra* n. 59, at p. 53.

<sup>73</sup> There is a growing body of literature that rightly observes that a particular type of lustration selected in each post-communist country reflects its mode of transition and contrast ‘round-table-talks scenario’ in Hungary and Poland with the ‘revolutionary scenario’ in the Czech Republic and East Germany; see, e.g., S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, University of Oklahoma Press 1991) p. 228; or more recently A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71. However, this issue is beyond the scope of this paper.

<sup>74</sup> Where the persons can be barred from holding certain positions ‘only’ for 10 years. See Law on disclosing work for or service in the State’s security services or collaboration with them between 1944 and 1990 by persons exercising public functions [Ustawa z 11 kwietnia 1997 o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne] of 11 April 1997 (hereafter, 1997 Polish Lustration Act), sec. 30. Note that the 1997 Polish Lustration Act lost its binding force on 15 March 2007.

Thirdly, they do not contain any exoneration grounds for those who were intimidated and forced to collaborate or those who were enlisted only for a very short period of time. Similarly, and again unlike in Poland,<sup>77</sup> the Czech Lustration Acts bar the positively lustrated persons from holding the 'protected positions' *even if* they explicitly acknowledged that they held one of the other 'suspect positions' during the communist regime (e.g., their collaboration with State Security Police).

Fourthly, it is applicable both to the candidates for 'protected position' and those who are already holding this position. And, finally, the Czech Lustration Acts are generally considered to be very broad as to the 'suspect' and 'protected' positions, and they lack effective remedies against the accusation of being a collaborator with the former regime.<sup>78</sup> These specifics of the Czech Lustration Acts led foreign commentators to the labelling mentioned in the introduction.

On the other hand, it is necessary to overcome myths about the 'sweepingness' of the Czech Lustration Acts. While it can still be reasonably argued that the Czech Lustration Acts are *overall* 'the most sweeping', they are definitely not 'the most sweeping' in *all aspects*. For instance, the crucial distinction from the 1997 Polish Lustration Act lies in the fact that the Czech Lustration Acts do *not* apply at all to positions for which individuals are democratically elected. As I will argue below, there is a world of difference between the right to stand in the elections and the right to access to positions in the public service. Similarly, 'protected positions' in the Lithuanian KGB Act and 1997 Polish Lustration Act were much broader, since they included certain private sector jobs, which were, moreover, often framed in an ambiguous manner.<sup>79</sup>

<sup>75</sup> Law on the Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Permanent Employees of the Organisation [*Istatymas dėl SSRS valstybės saugumo komiteto (NKVD, NKGB, MGB, KGB) vertinimo šios organizacijos kadroinių darbuotojų dabartinės veiklos*] of 16 July 1998 (hereafter, Lithuanian KGB Act), sec. 2.

<sup>76</sup> According to the Czech lustration terminology, 'positively lustrated person' (and, analogously, 'positive lustration certificate') refers to a person who *falls* within the 'suspect positions'. This may create certain confusion when reading ECtHR's cases since the ECtHR sometimes uses the term 'negative security clearance' to refer to the same group. See, e.g., ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek v. Slovakia*, §§ 11, 79, 83, 88, 91, 100-101, 110 and 117.

<sup>77</sup> The 1997 Polish Lustration Act obliged persons exercising public functions in Poland to disclose whether they had worked for or collaborated with the State's security services between 1944 and 1990. If a person discloses their collaboration, they are no longer barred from holding a 'protected position.'

<sup>78</sup> See, e.g., Kühn, *supra* n. 47, at p. 378.

<sup>79</sup> With regards to Lithuania, see Lithuanian KGB Act, sec. 2; and analysis of *Sidabras and Džijantas v. Lithuania infra*. As to Poland, see 1997 Polish Lustration Act (as amended in 1998), sec. 7 (1) item 10 (a); and analysis of *Bobek v. Poland infra*.

Furthermore, in contrast to Lithuania, the Czech Lustration Acts were adopted immediately after the Velvet Revolution, which buttresses its legitimacy. And finally, from the practical point of view, although the Czech Lustration Acts are one of the most long-lasting lustration statutes, they have never been directly challenged before the ECtHR by a Czech national.<sup>80</sup> This finding is surprising since, for instance in comparison with Poland, the Czech Lustration Acts seem to interfere more with the human rights of those who were ‘positively lustrated’.

## RECENT JURISPRUDENCE OF THE ECtHR

Although the European Commission of Human Rights spelled out the argument of ‘transition-to-democracy’ as early as 1989,<sup>81</sup> the ECtHR has applied this argument rather seldom.<sup>82</sup> This does not, of course, mean that the cases with an element of ‘dealing with the past’ do not come before the ECtHR. On the contrary, there has been a significant case-load coming predominantly from the post-communist countries on a variety of ‘transitional justice’ issues, such as restitution,<sup>83</sup> rent (de)regulation,<sup>84</sup> conversion of money after German reunification,<sup>85</sup> or citizenship issues.<sup>86</sup>

But this was not the case with lustration. Only in 2004 did the ECtHR give its first lustration judgment on the merits, in a case against Lithuania.<sup>87</sup> Since 2004

<sup>80</sup> Note that there was a challenge on the basis of the Large Lustration Act from Slovakia; see discussion on *Turek v. Slovakia* *infra* and European Commission of Human Rights, 28 June 1995, Case No. 24157/94, *Matejka v. Slovakia* (dec.).

<sup>81</sup> European Commission of Human Rights, 7 Nov. 1989, Case No. 11798/85, *Castells v. Spain* (dec.). See also reflection of this argument in the Joint dissenting opinion of judges Frowein and Hall (§ 2) and Dissenting opinion of judge Martínez (§§ 15-16) in the merits stage (European Commission of Human Rights, 8 Jan. 1991, Case No. 11798/85, *Castells v. Spain*).

<sup>82</sup> Apart from lustration cases discussed *infra*, see, e.g., ECtHR 26 Oct. 2000, Case No. 30985/96, *Hasan and Chaub v. Bulgaria* [GC]; ECtHR 13 Feb. 2003, Cases Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refab Partisi (the Welfare Party) and Others v. Turkey* [GC]; ECtHR 22 March 2001, Cases Nos. 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany* [GC]; ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek v. Slovakia*; ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia* [GC]; ECtHR 15 March 2007, Cases Nos. 43278/98 and others, *Velikovi and Others v. Bulgaria*; or ECtHR 8 July 2008, Case No. 33629/06, *Vajnai v. Hungary*.

<sup>83</sup> See, e.g., ECtHR 2 March 2005, Cases Nos. 71916/01, 71917/01 and 10260/02, *Maltzan and Others v. Germany* (dec.) [GC]; ECtHR 13 Dec. 2000, Case No. 33071/96, *Malbous v. the Czech Republic* (dec.) [GC]; or ECtHR 13 Dec. 2005, Case No. 17120/04, *Bergauer and Others v. the Czech Republic* (dec.).

<sup>84</sup> ECtHR 19 June 2006, Case No. 35014/97, *Hutten-Czapaska v. Poland* [GC].

<sup>85</sup> ECtHR 15 Nov. 2001, Cases Nos. 53991/00 and 54999/00, *Honecker and Others v. Germany* (dec.).

<sup>86</sup> ECtHR 9 Oct. 2003, Case No. 48321/99, *Slivenko v. Latvia* [GC].

<sup>87</sup> ECtHR 27 July 2004, Cases Nos. 55480/00 and 59330/00, *Sidabras and Džiantas v. Lithuania*.

one more Lithuanian,<sup>88</sup> one Slovak,<sup>89</sup> one Latvian,<sup>90</sup> and two Polish<sup>91</sup> cases have been decided on the merits. It is somewhat paradoxical that the ECtHR only started to deal with lustration almost two decades after the change of regimes in Central and Eastern Europe took place.

*Cases from the Baltic States*

As said before, the first lustration case came from Lithuania.<sup>92</sup> Mr. Sidabras and Mr. Džiautas both worked for the Lithuanian branch of the KGB during the Communist regime. After Lithuania declared its independence in 1990, Mr. Sidabras worked as a tax inspector and Mr. Džiautas as a prosecutor. In January 1999, the Lithuanian KGB Act came into force. As a result of this Act, both applicants were dismissed from their posts and banned from applying for public-sector and various private-sector posts from 1999 until 2009. In short, the ECtHR held that the ban on the applicants' engaging in professional activities in various private-sector spheres such as banks, communication companies, jobs requiring the carrying of a weapon or practising as a lawyer until 2009 had affected their private life as protected by Article 8 ECHR.

However, the ECtHR did not find a violation of the applicants' right to private life taken alone. Instead, it found a violation of Article 8 ECHR, taken in conjunction with Article 14 (prohibition of discrimination). It did so in particular on three grounds:<sup>93</sup> (1) the applicants' employment prospects were restricted *not only* in the public sector, *but also* in various spheres of the private sector;<sup>94</sup> (2) the wording of 'protected positions' was vague;<sup>95</sup> and (3) the adoption of the Lithuanian KGB Act was belated.<sup>96</sup> As to the third ground, the ECtHR observed that 'the KGB Act came into force ... almost a decade after Lithuania had declared its independence ... [as a result of] which the restrictions on the applicants' profes-

<sup>88</sup> ECtHR 7 April 2005, Cases Nos. 70665/01 and 74345/01, *Rainys and Gasparavičius v. Lithuania*.

<sup>89</sup> ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek v. Slovakia*.

<sup>90</sup> ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia* [GC].

<sup>91</sup> ECtHR 24 April 2007, Case No. 38184/03, *Matyjek v. Poland*; and ECtHR 17 July 2007, Case No. 68761/01, *Bobek v. Poland*.

<sup>92</sup> ECtHR, *Sidabras and Džiautas v. Lithuania*, Cases Nos. 55480/00 and 59330/00, ECHR 2004-VIII.

<sup>93</sup> This paper to a large extent leaves aside ECtHR's highly questionable Art. 14 analysis. The ECtHR somehow forgot the 'similar situation' stage in the Art. 14 test. See partly dissenting opinions of Judge Loucaides.

<sup>94</sup> The ECtHR reiterated that 'the requirement of an employee's loyalty to the State was an inherent condition of employment with State authorities ... [but] there is not inevitably such a requirement for employment with private companies' (§ 57).

<sup>95</sup> *Sidabras and Džiautas*, § 59.

<sup>96</sup> *Ibid.*, § 60.

sional activities were imposed on them thirteen years [*Sidabras*] and nine years respectively [*Džiautas*] after their departure from the KGB.<sup>97</sup> It is not entirely clear whether it was only the cumulative effect of these three deficiencies that affected the outcome of this case, or whether one or two deficiencies might have sufficed.

In the second Lithuanian case, *Rainys and Gasparavičius v. Lithuania*,<sup>98</sup> the ECtHR relied heavily on its reasoning in *Sidabras and Džiautas*<sup>99</sup> and again stressed ‘the very belated nature of the [KGB] Act.’<sup>100</sup> However, it also distinguished *Rainys and Gasparavičius* from *Sidabras and Džiautas* on the ground that the applicants, *Rainys and Gasparavičius*, were actually dismissed from existing employment in the private sector,<sup>101</sup> whereas applicants in *Sidabras and Džiautas* were dismissed from public service and thus subjected only to the ‘hypothetical inability to apply for various private-sector jobs until 2009.’<sup>102</sup> In other words, the ECtHR found the applicants’ complaints in *Rainys and Gasparavičius* even more substantiated and implicitly considered *dismissal* from certain private-sector jobs as a harsher encroachment upon the right to private life than the mere prevention from *access* to employment in that sector. The ECtHR thus again found violation of Article 14 taken in conjunction with Article 8.

The third case, a Grand Chamber judgment in *Ždanoka v. Latvia*<sup>103</sup> was not an Article 8 case. It involved the right to free elections (Article 3 of Protocol No. 1). The facts might be briefly summarised as follows. Pursuant to Latvia’s Parliamentary Elections Act,<sup>104</sup> Mrs. Ždanoka was excluded from standing as a candidate for the 1998 parliamentary elections due to her activities in the Communist Party of Latvia (CPL) in 1991 after an unsuccessful coup d’état orchestrated by the CPL.<sup>105</sup> As to the merits, the ECtHR provided a thorough analysis of the right to free elections and historical and political circumstances of Latvia’s restoration of independence, and finally concluded that Article 3 of Protocol No. 1 was not violated.<sup>106</sup> The ECtHR generally reaffirmed the legitimacy of the concept of a

<sup>97</sup> Id.

<sup>98</sup> ECtHR, *Rainys and Gasparavičius v. Lithuania*, Cases Nos. 70665/01 and 74345/01, 7 April 2005.

<sup>99</sup> Ibid., § 34-35.

<sup>100</sup> Ibid., § 36.

<sup>101</sup> Mr. Rainys was employed as a lawyer in a private telecommunications company and Mr. Gasparavičius was a practising barrister.

<sup>102</sup> *Rainys and Gasparavičius*, § 34.

<sup>103</sup> ECtHR 16 March 2006, Case No. 58278/00, *Ždanoka v. Latvia* [GC].

<sup>104</sup> Latvia, Parliamentary Elections Act [*Saeimas vēlēšanu likums*] of 25 May 1995, sec. 5(6).

<sup>105</sup> For a complicated factual background of this case which cannot be addressed here, see §§ 12-51 of the judgment.

<sup>106</sup> I will leave aside the issue that the ECtHR’s ruling in *Ždanoka* seems to be inconsistent with its previous case-law since intrusion on to democratic elections is from a democratic point of view far more serious than dismissing a tax inspector or a corporate lawyer. The alternative view (but not

'democracy capable of defending itself',<sup>107</sup> but articulated one important principle that is relevant for the Czech Lustration Acts:

[T]he Latvian Parliament must keep the statutory restriction under *constant review*, with a view to bringing it to *an early end*. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration.... Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court.<sup>108</sup>

As to the 'belated timing' element, the ECtHR distinguished *Ždanoka* from the Lithuanian lustration cases mentioned above on the ground that the Lithuanian KGB Act imposed 'much more far-reaching restriction of personal rights barring ... access to various spheres of employment in the private sector'<sup>109</sup> and that the Lithuanian lustrations 'were introduced almost a decade after the re-establishment of Lithuanian independence.'<sup>110</sup> The four-year delay in adopting the Latvian Parliamentary Elections Act was found acceptable as 'a newly-established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements'<sup>111</sup> which was in this case buttressed by the presence of the Russian troops in Latvia until 1994.

Finally, the ECtHR in *Ždanoka* elucidated 'the-need-for-individualisation' requirement. While it observed that this requirement 'is not a pre-condition of the measure's compatibility with the Convention',<sup>112</sup> it stressed that '[t]he need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it is required by the Convention, depend on the circumstances of each particular case, namely the

elucidated by the ECtHR) is that it is the very significance of the position which justifies applying lustration to Mrs. Ždanoka. It thus seems that it was special historico-political circumstances (*see* §§ 115(c) and 121) of the restoration of Latvia's independence which was decisive for the outcome of the case.

<sup>107</sup> *See Ždanoka* [GC], § 100.

<sup>108</sup> *Ibid.*, § 135 [emphasis added, citation omitted]. Note that the ECtHR in *Ždanoka* seems to have adopted a well-known strategy of many constitutional courts in Europe, i.e., to hold in favour of the Government but to warn it that it will decide the other way unless the Government acts to amend or repeal the law (for similar German practice cf. D. Kommers, *supra* n. 53, at p. 53).

<sup>109</sup> *Ibid.*, § 131. However, this should operate rather against Latvia's Parliamentary Elections Act (*see supra* n. 106).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The ECtHR cited the *Rekvenyi* case (ECtHR 20 May 1999, Case No. 25390/94, *Rekvenyi v. Hungary* [GC]) in support of its conclusion.

<sup>112</sup> *Ibid.*, § 114.

nature, type, duration and consequences of the impugned statutory restriction.<sup>113</sup> Most importantly, it distinguished the right to private life from (the ‘passive’ aspect of) the right to free elections since ‘[f]or a restrictive measure to comply with Article 3 of Protocol No. 1, a *lesser* degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8-11 of the Convention’.<sup>114</sup> Thus, Article 8 not only requires more intensive review of its alleged infringement<sup>115</sup> but also a higher degree of individualisation than Article 3 of Protocol No. 1.

### *Slovak and Polish cases*

The fourth case, *Turek v. Slovakia*,<sup>116</sup> did not directly tackle the issue of conformity of the Lustration Act with the ECHR, but dealt primarily with the length of proceedings and equality of arms.<sup>117</sup> More specifically, the applicant challenged solely the inclusion of his name on the list of State Security Police collaborators and argued that he was denied access to his file since it was categorised as a national secret. The ECtHR again confirmed that a positive lustration certificate may affect the private life of the person concerned, but in this case ‘only’ found a violation of Article 8 concerning the lack of a procedure by which the applicant could seek protection for his right to respect for his private life.

Half a year later, in the *Matyjek* case,<sup>118</sup> the first judgment in a case concerning the 1997 Polish Lustration Act, the ECtHR upheld its admissibility decision<sup>119</sup> and acknowledged that lustration triggers the criminal law head of Article 6. Mr. Matyjek, who had been a member of the Polish Parliament (*Sejm*), had declared that he had not collaborated with the communist-era secret services,<sup>120</sup> but the Polish courts found him a deliberate and secret collaborator with the secret services and that he had therefore lied in his lustration declaration. As a result, Mr. Matyjek was deprived of his mandate as a member of parliament and was banned from being a candidate in elections or from holding any other public office for the next 10 years.<sup>121</sup> The ECtHR held that the lustration proceedings against the ap-

<sup>113</sup> Ibid., § 115(d).

<sup>114</sup> Id. [emphasis added].

<sup>115</sup> *A contrario* ibid., § 115(c).

<sup>116</sup> ECtHR 14 Feb. 2006, Case No. 57986/00, *Turek v. Slovakia*.

<sup>117</sup> One could even ask if this should really qualify as a lustration case, seeing Slovakia does not actually apply their own lustration law, thus nobody there is excluded from office.

<sup>118</sup> ECtHR 24 April 2007, Case No. 38184/03, *Matyjek v. Poland*.

<sup>119</sup> ECtHR 30 May 2006, Case No. 38184/03, *Matyjek v. Poland* (dec.), §§ 48-59.

<sup>120</sup> For consequences of such a declaration, see *supra* n. 74.

<sup>121</sup> Having been found to be a ‘lustration liar’ entails dismissal from public function exercised by the person concerned and prevents her from applying for the protected provisions for a period of

plicant, taken as a whole, violated Article 6(1) taken together with Article 6(3) ECHR.<sup>122</sup>

The *Matyjek* case to a large extent resembles the *Turek* case, since it also focuses on the access to the classified materials and equality of arms<sup>123</sup> and because the ECtHR again avoided taking a clear stance on the Lustration Acts as such. Nevertheless, there are two *dicta* which are worthy of mention. On the one hand, the ECtHR recognised that 'at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions',<sup>124</sup> but at the same time it stressed that 'if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy *all procedural guarantees* under the Convention in respect of any proceedings relating to the application of such measures.'<sup>125</sup>

The most recent case, *Bobek v. Poland*,<sup>126</sup> is to a large extent a follow-up to *Matyjek*. Ms. Bobek was an advocate, who made a declaration under the provisions of the 1997 Polish Lustration Act that she had never secretly collaborated with the communist secret service, and subsequently was found to be a 'lustration liar'. She alleged a violation of her right to fair trial since she had not had access to the file to an extent sufficient to ensure the fairness of the proceedings and since the motivation of the judgments had never been served on her or made accessible to the public.

The ECtHR relied heavily on the judgments in *Matyjek*, *Turek*, *Sidabras* and *Rainys and Gasparavičius*. It reiterated that 'the 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 particular in the light of the *long period which had elapsed* since the fall of the communist regime'<sup>127</sup> and that 'if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all the procedural guarantees of the Convention'.<sup>128</sup> It added that some state documents might be kept confidential, but given the *considerable time which has elapsed* since the documents were created, this must be only exceptional.<sup>129</sup> As a result, the ECtHR had no reason to depart

10 years. For further details, see *supra* nn. 74 and 77, and A. Czarnota, 'The Politics of the Lustration Law in Poland: 1989-2006', in A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71, p. 222.

<sup>122</sup> Interestingly, Mr. Matyjek did not invoke the right to free elections before the ECtHR.

<sup>123</sup> Albeit in contrast to *Turek*, the ECtHR did so on the Art. 6, and not on the Art. 8, ground.

<sup>124</sup> *Matyjek*, § 62 [emphasis added]. Interestingly, the ECtHR did not address the 'belated timing' argument, although the 1997 Polish Lustration Act was adopted only two years prior to the Lithuanian KGB Act.

<sup>125</sup> Id. (quoting *Turek*, § 115) [emphasis added].

<sup>126</sup> ECtHR 17 July 2007, Case No. 68761/01, *Bobek v. Poland*.

<sup>127</sup> *Bobek*, § 63 (quoting *Rainys and Gasparavičius*, § 36) [emphasis added].

<sup>128</sup> Ibid., § 69 (quoting *Turek*, § 115; and *Matyjek*, § 62).

<sup>129</sup> Id.

from *Matyjek* and again found a violation of Article 6(1) taken in conjunction with Article 6(3) ECHR.

*Summary of ECtHR's principles applicable to lustration cases*

In sum, the ECtHR jurisprudence stipulates seven principles that are applicable for any lustration act. First, a positive lustration certificate may amount to a violation of one's private life, especially when a person does not have access to classified materials relevant to his lustration file. Second, a lustration act must distinguish between the public and private sectors. It is not entirely clear whether exclusion from positions in the private sector is prohibited at all,<sup>130</sup> but applicability of the lustration act to private jobs is surely an aggravating factor.<sup>131</sup> Third, the 'belated timing' is relevant to the overall assessment of the proportionality of the lustration acts<sup>132</sup> even though this element does not seem to be in itself conclusive.<sup>133</sup> Fourth, there is a distinction between access to the 'protected positions' and dismissal from 'protected positions'. Pursuant to consistent case-law of the ECtHR, the states must provide weightier reasons in case of dismissal. However, the ECtHR has not explicitly broadened this principle (at least not in the lustration context) to any of the posts within the public service and thus it is not clear whether it applies equally to the positions in the public and the private sector.<sup>134</sup> Fifth, since the *Matyjek* case, the ECtHR made clear that lustration acts may trigger the criminal part of Article 6 (right to fair trial). Sixth, a person affected by lustration must enjoy all procedural guarantees in the subsequent proceedings, including a sufficient degree of individualisation. Finally, although the transition-to-democracy rationale of the acts under challenge generally allows for a wider margin of appreciation, lustration acts are inherently temporary measures and must be under constant review. This principle creates a significant problem for lustration acts that have been adopted for an indefinite period of time or the time limits of which were repealed.

<sup>130</sup> This is a position of the Polish Constitutional Court. See Judgment of the Polish Constitutional Court of 11 May 2007, No. K 2/07; and also M. Safjan, 'Transitional Justice: The Polish Example, the Case of Lustration', 1 *European Journal of Legal Studies* (2007), No. 2, p. 18.

<sup>131</sup> In fact, the factor that lustration laws apply to important public functions is what justifies the intrusion represented by lustration.

<sup>132</sup> Slovak politicians do not seem to be aware of this factor when proposing the reintroduction of lustration in Slovakia; see I. Petránský (Interview), 'Proti zavedení lustraci bych nebyl' [I wouldn't say no to the introduction of lustration], *Hospodářské noviny*, 7 Feb. 2007, p. 9.

<sup>133</sup> This principle might be stricter as more time lapses from the moment of transition to democracy.

<sup>134</sup> This paper does not suggest that the Convention contains the right of access to the civil service (see *infra*).

### (HOW LONG) CAN THE CZECH LUSTRATION ACTS SURVIVE THE SCRUTINY OF THE ECtHR?

Let us now examine the Czech Lustration Acts in light of the seven principles of the ECtHR jurisprudence. The second and third principles can be easily rebutted. Unlike in Lithuania, the scope of 'protected positions' envisaged by the Czech Lustration Acts is limited to public service positions and specific arms-related trade licences. Moreover, they were adopted immediately after the Velvet Revolution and therefore were not belated, unlike in Lithuania, and arguably also unlike the 1997 Polish Lustration Act.<sup>135</sup> It should be also remembered that the ECtHR made it clear that 'belated timing' does not seem in itself decisive.<sup>136</sup>

The remaining principles represent a bigger challenge to the Czech Lustration Acts. But as I will show, it is still possible to distinguish the Lustration Acts from their foreign counterparts. To this end, I will address these five principles one by one. As to the first principle, the Czech Lustration Acts allow for full access to State Security Police files before the court (*a contrario Turek*). Moreover, in *Sidabras* the ECtHR refused to consider whether there had been a violation of Article 8 taken alone<sup>137</sup> (i.e., not in conjunction with Article 14). This refusal thus still arguably leaves the outcome of the challenge on the conformity of the Lithuanian KGB Act *as such* open.

As to the fourth principle, the access/dismissal distinction, it can be reasonably argued that the importance of this distinction as elaborated in *Rainys and Gasparavičius v. Lithuania* is limited only to private-sector jobs and not to employment in public service. Put differently, from the *Rainys* holding that the dismissal from private-sector jobs is a harsher encroachment than the mere prevention from access to employment in *that sector*, it is not possible to infer *per analogiam* that the dismissal from a public-service job is also a harsher measure than the prevention of access to the public service.<sup>138</sup>

<sup>135</sup> And definitely unlike the 2006 Polish Lustration Act [Ustawa z 18 X 2006 o ujawnieniu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz.U.No 218, poz.1592] of 18 Oct. 2006. However, the main part of the 2006 Polish Lustration Act was repealed by the Judgment of the Polish Constitutional Court of 11 May 2007, No. K 2/07. See also M. Safjan, *supra* n. 130.

<sup>136</sup> *Sidabras and Džiautas*, § 60.

<sup>137</sup> But see Concurring opinion of Judge Mularoni and strong dissenting opinions of Judge Loucaides and Judge Thomassen (*ibid.*).

<sup>138</sup> But cf. ECtHR 28 Aug. 1986, Case No. 9228/80, *Glaserapp v. Germany* (rejection of Mrs. Glaserapp's appointment as a secondary school teacher found in conformity with the Convention) on the one hand; and ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt v. Germany* (dismissal of Mrs. Vogt from her post as secondary school teacher found in violation of the Convention) on the other. Both cases involve review of conformity of the 1972 Decree on the Employment of Extremists in the Civil Service (also referred to as the 'Civil Loyalty Decree') with the ECHR. For further details,

To be clear, this paper does not put forth the argument that the Convention contains the right of access to the public service. On the contrary, the ECtHR has since *Glaserapp*<sup>139</sup> consistently held that there is no such right enshrined in the Convention and it is highly unlikely that it will change its mind. But the ECtHR also added that ‘this does not mean ... that a person who has been appointed a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention’<sup>140</sup> and thus the application of Article 8 of the Convention to the lustration cases remains open. Furthermore, the ECtHR might also choose to adopt an autonomous meaning of the notion of ‘public service’ and interpret this notion narrowly.<sup>141</sup> Nevertheless, as long as the ECtHR does not take a clear stance in the lustration cases on the access/dismissal dichotomy, at least as to some of the public-sector posts within the ‘protected positions’, one may argue that this dichotomy is not applicable to the Czech Lustration Acts, since they do not include private-sector jobs. Hence the Czech Lustration Acts survive the fourth principle.

The fifth principle may arguably be set aside on the ground that the holding of the ECtHR that the lustration acts trigger the criminal law part of Article 6 is limited to the 1997 Polish Lustration Act and that the Czech Lustration Acts can still be distinguished from it. First, the Czech Lustration Acts lack strong criminal connotations since they do not use the Code of Criminal Procedure subsidiarily and the course of the Czech lustration proceedings is not based on the model of the Czech criminal trial.<sup>142</sup> Secondly, while the Czech lustration is also directed to a broad group of individuals, the nature of the ‘offence’ is different from typical criminal offences and, most importantly, the purpose of the Czech lustration is not to punish but to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State.<sup>143</sup> Finally, the severity of the employment restrictions applied to those who held one of the ‘suspect positions’

cf. D. Kommers, *supra* n. 53, at p. 229-234; or G. Braunthal, *Political Loyalty and Public Service in West Germany: The 1972 Decree against Radicals and its Consequences* (Amherst, University of Massachusetts Press 1990).

<sup>139</sup> ECtHR 28 Aug. 1986, Case No. 9228/80, *Glaserapp v. Germany*.

<sup>140</sup> ECtHR 26 Sept. 1995, Case No. 17851/91, *Vogt v. Germany*, § 43.

<sup>141</sup> Note that the list of ‘suspect positions’ is rather long and includes also posts in the universities and state media which involve neither security risks nor the exercise of the sovereign state authority. The ECtHR thus might decline to consider these posts as public offices in the strict sense which call for more deferential review (cf. ECtHR 19 April 2007, Case No. 63235/00, *Vilho Eskelinen and others v. Finland*, §§ 57 and 62). Such a judgment would be capable of eroding the Czech Lustration Acts as such.

<sup>142</sup> *A contrario Matyjek* (dec.), §§ 48-51.

<sup>143</sup> *Ibid.*, §§ 52-53 and 56.

under the Czech Lustration Acts is not such as to bring the issue into the 'criminal' sphere.<sup>144</sup> Moreover, the *Turek* judgment did not find the criminal limb applicable to the (Czechoslovak) Large Lustration Act and the *a contrario* argument may be inferred.<sup>145</sup> Hence, the *Engel* criteria<sup>146</sup> for the criminal law part of Article 6 are presumably not met.<sup>147</sup>

However, the availability of procedural guarantees is not limited to Article 6 and thus even if the criminal law part of Article 6 is inapplicable, the sixth principle ('a person affected by lustration must enjoy all procedural guarantees in the subsequent proceedings') still applies on account of the procedural aspect of Article 8.<sup>148</sup> In fact, as I mentioned earlier, it has been argued that the Czech Lustration Acts lack effective remedies and instead of considering the individual circumstances of a particular case, rely merely on the formalistic criteria – inclusion or non-inclusion of the name in the State Security Police files.<sup>149</sup> Therefore, the sixth principle poses a significant threat to the Czech Lustration Acts.

But it is the seventh principle of 'constant review of lustration acts' that is most difficult to tackle, since the 2000 Amendment to both Lustration Acts repealed the time limit altogether. The only way to contest the applicability of this principle is to argue that it was the right to stand for election to the national parliament which was at stake in *Ždanoka*, and that the scrutiny of an alleged violation of Article 3 of Protocol No. 1 is more searching than in Article 8 cases, which the ECtHR rejected and held to the contrary.<sup>150</sup> However, the ECtHR in the end did not find a violation of the right to stand for election in *Ždanoka* and one may only guess whether the Czech Lustration Acts would meet a heightened Article 8 scrutiny. Notwithstanding this ambiguity, the effort to dismiss the applicability of the seventh principle is quite a stretch, in particular when we take into account the fact that the transition to democracy in the Czech Republic was very different

<sup>144</sup> *Ibid.*, §§ 54-55; see also *Ždanoka* [GC], § 122 and ECtHR 1 July 2003, Cases Nos. 55480/00 and 59330/00, *Sidabras and Džiantas v. Lithuania* (dec.).

<sup>145</sup> See also European Commission of Human Rights, 28 June 1995, Case No. 24157/94, *Matejka v. Slovakia* (dec.), where the Commission held that the issue of the positive lustration certificate under the 'Large Lustration Act' cannot be regarded as a criminal charge within the meaning of Art. 6 of the Convention.

<sup>146</sup> These three criteria are the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty (ECtHR 8 June 1976, Cases Nos. 5100/71 and others, *Engel and Others v. the Netherlands*, § 82); see also *Matyjek* (dec.), §§ 43-47.

<sup>147</sup> Note that a recent shift in the case-law of the ECtHR on the applicability of Art. 6 on the civil servants (cf. ECtHR 19 April 2007, Case No. 63235/00, *Vilho Eskelinen and others v. Finland*, § 62), opens the route for challenging the lustration laws also on the 'civil law' limb of Art. 6.

<sup>148</sup> *Turek*, §§ 111-112.

<sup>149</sup> Kühn, *supra* n. 47, at p. 377.

<sup>150</sup> *Ždanoka* [GC], § 115(c) and (d).

from Latvia's 'close-to-civil-law scenario' in 1991 and the special circumstances resulting therefrom in the mid-1990's.

However, one should not conclude too hastily that the Czech Lustration Law does not survive the scrutiny of the ECtHR. On the contrary, one must admit that the absence of clear deficiencies in the Czech Lustration Acts makes it possible to reconcile them with the standards of the ECtHR as they now stand. In the terminology of the ECtHR, the Czech Lustration Acts might still be within the 'margin of appreciation'. But as Bob Dylan sings, 'the times they are a-changing' and, in the case of lustration, they are indeed changing very rapidly. Put differently, the circle is closing and distinguishing the Czech Lustration Acts from their counterparts in Central and Eastern Europe and the ECtHR's jurisprudence becomes more and more difficult. This conclusion is all the more the case if we consider the *cumulative effect* of all seven principles stemming from the ECtHR's jurisprudence (especially the requirement of 'constant review' in conjunction with 'lack of individualisation' argument) and not one by one.

#### SHOULD THE CZECH LUSTRATION LAW BE ANNULLED BY THE CZECH CONSTITUTIONAL COURT?

The previous section concluded that the Czech Lustration Acts would probably still pass the scrutiny of the ECtHR. At the same time, the ECtHR requires that the lustration laws are under 'constant review' on the *national* level. Therefore, the question is *how long* the Czech Lustration Acts can survive this scrutiny. The exact number of years in cases like these is difficult to determine. For instance, in a different context (now former) Justice Sandra Day O'Connor in *Grutter*<sup>151</sup> held that 'we expect that 25 years from now [i.e. from 2003], the use of racial preferences will no longer be necessary to further the interest approved today [in obtaining the educational benefits that flow from the diverse student body].'<sup>152</sup>

In contrast, the Czech Constitutional Court did not spell out the exact number of years in the *Lustration II* case.<sup>153</sup> But I would argue that there are strong indicators that 17 years after the adoption of the Czech Lustration Acts (and almost two decades after the Velvet Revolution), the political situation has changed to such an extent that these Acts should be annulled. State institutions have been purified to a large extent and the risk of subversion or a possible return of totalitarianism is no longer realistic, in particular after joining NATO in 1999 and the European

<sup>151</sup> *Grutter v. Bollinger*, 539 US 306 (2003).

<sup>152</sup> *Ibid.*, 337 (2003). But note that it is disputable whether this statement is a *ratio decidendi* or merely an *obiter dictum* of O'Connor's opinion.

<sup>153</sup> *See supra* n. 54.

Union in 2004.<sup>154</sup> Under these circumstances the deficiencies of the Acts, that have not been addressed by the ECtHR due to jurisdictional bars, outweigh the benefits.

These deficiencies can be easily explained by the examples mentioned in the introduction to this paper. First, high-ranking managers in the state-owned companies or in the public media can easily evade lustration (and subsequent revelation) by moving to positions that are not enumerated in the 'protected positions' of the Large Lustration Act (provided that they enjoy political backing).<sup>155</sup> Secondly, many files of the State Security Police (including the file of the current President Václav Klaus) have been shredded and the information contained therein either is found by accident and often incomplete in a different file (as in the case of a famous singer mentioned in the introduction) or disappeared forever (as in case of one of the files of Václav Klaus). And finally, in view of the nature of the high-ranking positions held during the Communist era, many important figures most likely collaborated with the State Security Police without being mentioned in the State Security Police files.<sup>156</sup> The former Prime Minister who served during communism as the adviser to the president of the State Bank of Czechoslovakia is a prime example.

More in general, whole groups fall outside the scope of the Czech Lustration Acts. It is a well-known fact that the ordinary members of the Communist Party, holders of other important positions not enumerated among the 'suspect positions' in the Large Lustration Act, or simply family members shielded by the people belonging to the previous two groups, did not have to sign the declaration of cooperation with the State Security Police and still enjoyed privileged status in the communist regime. We may collectively refer to these groups as the 'lucky guys'.

In complete contrast to these privileged groups stand those 'unlucky' individuals who were subjected to extortion and/or forced to collaborate. As I have argued earlier, due to the formalistic criteria of the Czech Lustration Acts (the sole decisive criterion for the biggest category of 'suspect positions' is whether a particular name appears in the State Security Police files) these people are positively lustrated, even though they did not provide the State Security Police with any valuable information and irrespective of their motivation or subsequent

<sup>154</sup> Cf. *Ždanoka* [GC], § 135.

<sup>155</sup> A top manager in the Czech Television mentioned in the introduction first moved from the position of programme director of the Czech TV to the position of financial director in Feb. 2007 and only eventually in Nov. 2007 he handed in his notice and thus left the Czech TV entirely (*see Lambert jde z televize* [Lambert Leaves TV], *Respekt*, No. 47/2007, p. 6).

<sup>156</sup> Since by the very nature of their positions they did not have to sign the declaration of cooperation with the State Security Police.

behaviour.<sup>157</sup> With a touch of cynicism, one may refer to them as the ‘collateral damage’ of the Czech Lustration Acts.<sup>158</sup>

The Czech Lustration Acts thus are both overinclusive and underinclusive. Underinclusive since they do not cover many important positions in the communist regime and individuals whose State Security Police files were shredded (or they managed to have them shredded). Overinclusive since they cover persons who co-operated with the State Security Police under duress while there are no grounds for exoneration or time limits. These two major deficiencies are exacerbated by the fact that the State Security Police files are incomplete and unreliable.

As a result, the substantive justice provided by the Czech Lustration Acts is highly selective. This conclusion stands irrespective of what we understand under ‘substantive justice’ of lustration.<sup>159</sup> The Czech Lustration Acts certainly provided no justice to victims of Communism (meaning 1), which is clear from the critical reactions of many dissidents. If we look at the experiences of the former Prime Minister and a top manager of the Czech Television (that are only a tip of the iceberg), justice as retribution or punishment for wrongdoing (meaning 2) failed as well, notwithstanding the fact that supporters of lustration would vigorously deny this rationale for the Czech Lustration Acts. Finally, if we understand justice of lustration as a necessary forward-looking prophylactic measure (meaning 3), this argument lacks empirical basis (in fact, it is debunked by the latest presidential elections in the Czech Republic) and its strength diminishes with time.

It may be also plausibly argued that repeal of the Czech Lustration Acts will have more prophylactic effect than its preservation. In fact, the Lustration Acts put the issue of ‘dealing with the past’ under the carpet since those with a negative lustration certificate are considered ‘crystal clear’ and those with a positive lustration certificate become so stigmatised that they refrain from speaking out. The repeal of the Lustration Acts would thus trigger the open debate on the ‘dealing with the past’ and challenge the black-and-white picture of the life under Communism in the former Czechoslovakia.

<sup>157</sup> This is not intended to trivialise or justify the weakness and wrongdoings of those who ‘merely’ signed (or were forced to sign) the co-operation agreement with the State Security Police, but did not subsequently provide the State Security Police with any information (or provided information of no value). This paper just puts forth the argument that these people often caused *lesser* harm to their fellow citizens during the communist regime than certain groups of individuals mentioned above who are not included within the ‘suspect positions.’ Hence, it is on this ground that their treatment is blatantly unjust.

<sup>158</sup> See also Příbáň 2007, *supra* n. 71, at p. 333 (“The[se persons] were sacrificed so that the vast majority of society loyal to the previous regime for decades could feel morally purified and label all those responsible for their own “suffering”).

<sup>159</sup> I draw the following meanings of substantive justice freely from J. Meierhenrich, *supra* n. 36, at p. 102-103.

Furthermore, the Czech Lustration Acts feed behind-the-curtain coercion of key public servants since it allows those who are in possession of the appropriate State Security Police files to use a person's political past for the purpose of blackmail. This is not paranoia but a serious issue that has not been fully addressed in the Czech Republic.<sup>160</sup> In fact, according to the Polish Constitutional Court, the main aim of the 1997 Polish Lustration Act was to make this coercion impossible.<sup>161</sup> It is thus high time to bring down the curtain and disentangle these bonds.

Coming back to the impact of 'lapse of time', borrowing the language of Justice Jackson from his concurrence in *Youngstown*,<sup>162</sup> we may conclude that any transitional-justice argument is most compelling immediately after the democratic revolution. Its strength diminishes as time lapses and once the state reaches a considerable degree of stability (evidenced, among others, by integration in the supranational entities such as NATO and/or the EU) it is at its lowest. The Czech Republic has clearly reached the third stage.

What does that mean for the Czech Lustration Acts? Before we can answer this question, we must point out the differences between the Czech Charter of Fundamental Rights and Basic Freedoms and the Convention. First, in contrast to the accessory character of the prohibition of discrimination guaranteed by Article 14 ECHR, the Charter contains a self-standing right not to be discriminated against.<sup>163</sup> Secondly, while the Convention does not include the right of access to the public service, the Charter does<sup>164</sup> and the Czech Constitutional Court found it justiciable.<sup>165</sup> As a result, many jurisdictional bars that in the previous chapter saved the Czech Lustration Acts from being a violation of the ECHR are not applicable to the challenge under the Charter. However, the principles distilled from the ECtHR's jurisprudence do apply since pursuant to the consistent case-law of the Czech Constitutional Court the Convention has constitutional status.<sup>166</sup>

<sup>160</sup> It is a recurring theme for the Czech press to speculate who is in possession of the 'lost' State Security Police files and what influence these individuals can exercise on the key decision-making of the Czech State.

<sup>161</sup> Judgment of the Polish Constitutional Court of 10 Nov. 1998, No. K 39/97.

<sup>162</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635-638 (1952) (Jackson concurring).

<sup>163</sup> Art. 3(1) of the Charter which reads as follows: 'Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status' [author's translation]. See also a general principle of equality stipulated in Art. 1 of the Charter, *supra* n. 39.

<sup>164</sup> Art. 21(4) of the Charter which reads as follows: 'Citizens shall have access, on an equal basis, to any elective and other public office' [author's translation].

<sup>165</sup> See, e.g., Decision of the Czech Constitutional Court No. II. 53/06 of 12 Sept. 2006. Furthermore, the Czech Constitutional Court interpreted the right of access to the public service on an equal basis broadly so as to encompass also the dismissal from public office (*id.*).

<sup>166</sup> The 2000 Amendment to the Czech Constitution abolished a specific group of international human rights treaties that were accorded constitutional status. However, the Czech Constitutional

This is a deadly mix for the Czech Lustration Acts. Given the considerable lapse of time and the joining of supranational organisations such as NATO and the EU, the transitional-justice argument leaves the contaminated past far behind. Thus, the restraint exercised by the Czech Constitutional Court in 2001 is no longer justifiable. As said, the Czech Lustration Acts are both overinclusive and underinclusive and they do not allow for any individualization of a particular case. Moreover, the Czech legislature failed to keep these Acts under ‘constant review’. Against the backdrop of ECtHR case-law, the argumentation put forward by petitioners in the *Lustration II* case would be sufficient in 2008. This does not mean that the Czech Republic cannot protect itself against people who might wish to subvert it by require loyalty to the democratic principles from applicants for public service. It must do so on the basis of a statute which is fully compatible with the rule of law.<sup>167</sup>

## CONCLUSION

The Czechoslovak Parliament enjoyed legitimacy to adopt and prolong the Lustration Acts. The courts correctly upheld them in 1992 (*Lustration I*) and 2001 (*Lustration II*). They were more deferential to the legislature than for instance the Hungarian Constitutional Court,<sup>168</sup> which gave priority to legal certainty and privacy concerns.<sup>169</sup> The Czech solution might be criticised but it has also had irrefutable positive effects. Most importantly, it preserved the ‘substantive justice’ so needed after the Velvet Revolution and, in contrast to Poland or Hungary, it forestalled all attempts to broaden the scope of the Czech Lustration Acts.<sup>170</sup>

On the other hand, the Czech approach is demanding and requires what the ECtHR refers to as ‘constant review’. This paper argues that the departure from

Court opined that it is not possible to lower the existing procedural standard of the protection of human rights and thus retained the constitutional status of, among others, the ECHR; see, among others, Decision of the Czech Constitutional Court No. Pl. 36/01 of 25 June 2002, available in English at <[http://angl.concourt.cz/angl\\_verze/cases.php](http://angl.concourt.cz/angl_verze/cases.php)>, visited 17 Aug. 2008.

<sup>167</sup> This was supposed to be the Act on State Service (Act No. 218/2002 Coll., on the service of state employees in administrative agencies and on the remuneration of these employees and other employees in administrative agencies of 26 April 2002), which should have replaced the Czech Lustration Acts. But the Czech legislators missed the opportunity to adapt the Czech Lustration Acts to the demands of the rule of law and left them untouched.

<sup>168</sup> Decision of the Hungarian Constitutional Court of 24 Dec. 1994, No. 60/1994 AB. For details of these two contrasting positions, see Robertson, *supra* n. 9.

<sup>169</sup> See Robertson, *supra* n. 9, or E. Barrett, P. Hack and Á. Munkácsi, ‘Lustration as Political Competition: Vetting in Hungary’, in A. Mayer-Rieckh and P. de Greiff (eds.), *supra* n. 71, p. 259.

<sup>170</sup> It might suggest that even though the Czech Lustration Acts were in certain aspects very comprehensive, its ‘settings’ were better adjusted to the needs of Czech society than were the comparable Acts in other central and eastern European countries to their societies.

the standard rule-of-law principles is no longer justified since the unique circumstances of the transition to democracy in the Czech Republic that existed in 1991 and the following years have disappeared. Although the Acts probably still pass the ECtHR's scrutiny, they now violate the Charter and should therefore be annulled.<sup>171</sup> What is more, the repeal of the Czech Lustration Acts would contribute to the maturation of democracy in the Czech Republic.



<sup>171</sup> This paper focuses predominantly on the *judicial* review of lustration laws, but there is still an option (and from the democratic point of view an even more desirable one) that the Czech Lustration Law will be reviewed and repealed by Parliament. However, this scenario is highly unlikely since no democratic political party wants to be labelled as 'pro-communist'. Any attempt to repeal the Czech Lustration Law is also blocked by the immediate media outcry that reflects the symbolic value of lustration for a significant (or just loud?) part of Czech society.