

Is it Possible to Devise a Fair System of Lustration?

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LAISVE LINKUTE, JUN 1 2012

Newly emerging democracies of post-communist countries in Eastern and Central Europe had to face many important problems, one of them being their past. Democratic regimes had to figure out what to do with the people who led or collaborated with the communist regimes – they had to deal with the so called ‘torturer problem’ (Huntington 1991: 211). With millions of people associated with the regime as party members, hundreds of thousands being ex functionaries of the internal security services (Guerra 2011) and society politically divided to ‘them’ and ‘us’, the problem was important, emotional and politically sensitive (Huntington 1991: 211). Governments had to find a way that both: suits new democratic regimes and grants justice to society. The options vary from prosecute and punish to forgive and forget (Huntington 1991: 211). The most popular method of dealing with the communist past was lustration. Lustration, according to Appel:

Refers to the process of screening groups of people for previous acts of collaboration under the communist regime (especially acts of collaboration with secret police) and in turn disqualifying members of these groups from holding high level positions in the public sector (2005: 383).

The aim of this essay is to answer the question: Is it possible to devise a fair system of lustration? To achieve this aim, firstly, the theoretical framework will be looked at: how is lustration explained? Next, the arguments for and against lustration will be examined, finding possible problems. Later on, it will be analysed why some countries dealt with former collaborators more harshly than others. Two cases will be compared, Czech Republic and Hungary. The last section will explain other problems that arose in this essay. In the end, this analysis will suggest that it is not possible to devise a fair system of lustration, because every decision has its pros and cons.

Lustration was one of the most popular methods of dealing with the communist past in Eastern and Central Europe. As Grodsky explains: ‘Lustration’s popularity in Eastern Europe hinges on the theory that the qualitative and temporal nature of past abuses has a determinative effect on the type of justice pursued’ (2009: 22). Since in communist states large groups of people were responsible for relatively low-level abuses, criminal trials were considered to be either inappropriate or ineffective (Grodsky 2009: 22). Criminal trials may be the option to punish prominent or representative officials, but how to deal with those who spied on their neighbours, colleagues, family and friends? Most importantly, Williams, Fowler and Szczerbiak find this option (trials) unable to answer the questions: ‘What fair penalty could be devised for this collaboration, which technically was not in breach of any positive law? How should a society embracing liberal ideology and the rule of law deal with those of its members who ‘without being guilty, cannot be called innocent?’(2005: 22). Thus, the controversial response to these questions was lustration.

Lustration has been explained by many scholars, though not all of them explained it fully. Due to the length of this essay, three explanations will be presented. Williams, Fowler and Szczerbiak’s article has been chosen, as the most accurate, critical and adding on theory. The authors acknowledge Huntington’s, Moran’s and Welsh’s explanations and ask how well these frameworks explain lustration. Huntington (1991 cited in Williams et al. 2005) argued that if the leaders of past communist regime were overthrown, then there would be a desire for retribution. On the other hand, if they gave up peacefully, or initiated the reforms themselves, or the transition was obtained by ‘round-table’ talks, then prosecution would be avoided. Hence, prosecutions would be initiated only in Romania and East Germany. Moran (1995 cited in Williams et al. 2005) suggested that if past regime did not allow citizens to emigrate or voice discontent, it is more likely that prosecution would happen. Otherwise, if citizens had the right to emigrate, or

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conditions to express their voice, there would be little desire for retribution. According to his view of point, Poland and Hungary were not expected to deal with the past in the way Czechoslovakia did. Welsh's explanation is more intricate. She, like Huntington and Moran, argues that whether the communist regimes remained severe until the end and whether communist leaders were willing to negotiate a transition to democracy were fundamental (Welsh 1996 cited in Williams et al. 2005). Moreover, she also takes into account the 'politics of the present'. The success of the Communist or their successor parties in the first free elections is central to this. Welsh argues, that the necessary conditions for taking a radical approach to the past were the reluctance of the former regime to bargain with the opposition and their loss of influence after failing in the founding elections. Furthermore, Welsh distinguishes between factors that accounted for early lustration and those that made this issue arise subsequently. After some time, accusations of collaboration with secret police can become a tool in the struggle for political power used by some politicians to defeat their opponents. Thus, politicians' past becomes the main topic of political discussions, instead of other problems the state faces.

Williams, Fowler and Szczerbiak conclude that Huntington's and Moran's explanations cannot fully explain why lustration has been adopted in some countries, particularly Poland and Hungary (2005: 24). Regarding Welsh's explanation, Williams, Fowler and Szczerbiak suggest it should be elaborated in two ways. Firstly, more attention should be paid to circumstances that make lustration a part of political game and therefore this problem reoccurs. Second, the motives and tactics of lustration's proponents account for variations of lustration in different countries. Williams, Fowler and Szczerbiak modify Welsh's framework, developing an approach that stresses post-communist political competition as a factor which explains why lustration was adopted at different times and in different forms (2005: 27). This approach will be used later, as it will be helpful when answering the question why some countries have dealt with the past more harshly than others.

As a theoretical framework has been established, it is high time to look at arguments in favour of lustration and the dilemmas that lustration creates. Proponents of lustration often argue that this process is necessary in order to cleanse the state morally and that the removal of former political forces can prevent the return of communist regime. Lustration is seen as a tool that separates past from the present and rebuilds confidence in the state and its institutions (Grotsky 2009: 25). Thus, lustration is perceived as a means of preserving the state and democracy (Williams et al. 2005: 28). Moreover, lustration is argued to reduce corruption, abuse of power and to be necessary for public safety. This argument lies on the assumption that former collaborators with communist security services were vulnerable to blackmail. There was a lack of control over communist security-service files as thousands of them were destroyed or stolen. Therefore, no one knew for sure who might use them and for what purposes. Former collaborators could be blackmailed and forced to act against the country, otherwise their files would be exposed to the public and ruin their lives. Furthermore, lustration was argued to be a measure to safeguard the exercise of citizens' rights: 'The people could not be fully sovereign, and the democratic transition thus not fully realised if they were denied relevant information' (Williams et al. 2005: 28). Lastly, lustration 'might be considered as a step toward democratic consolidation' (Grotsky 2009: 26). Despite all the arguments favouring lustration, it has its drawbacks too.

Critics often claim that lustration violates the rule of law and human rights (by denying groups access to certain jobs) (Grotsky 2009: 26). The most salient dilemma concerns the evidence of collaboration with secret services. Mostly, evidence relies on secret security service files, which in many instances, cannot be relied on (Grotsky 2009: 26). It has been mentioned before that many of the files were corrupted, or missing. Moreover, in some cases they were sold to, or illegally acquired by private individuals. This could create perfect conditions for misuse and manipulation of files. Furthermore, some informants might have been providing the secret office with false information, only to show their effectiveness. Another lustration dilemma is the automatic assumption of guilt rather than innocence. Involvement with the secret police could have been forced or deceptive (Grotsky 2009: 26-27). The case of Jan Kavan, former Czech dissident, well illustrates the two latter points. Kavan was accused of collaboration and removed from parliament. Later on, he cleared his name and served as Minister of Foreign Affairs of Czech Republic (1998-2002) and President of the United Nations General Assembly (2002-2003) (Yurkovsky 2002). Lustration is argued to be easily politicised, as it targets broad groups of people and can be used as a tool to remove large number of opponents from the political stage.

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Moreover, lustration can reduce state capacity as it eliminates people with the needed skills and some individuals refuse to run in this controversial process. Other arguments include: whether the old are a worthwhile target, whether the application of collective guilt leads to new injustices and what should be the scope of the inquiry (Grodsky 2009: 26-28). Thus, we can see that lustration has its pros and cons. Despite arguments favouring lustration, the ones against lustration cannot be ignored. Most importantly, the fact that lustration can be processed while relying on false evidence makes the process unfair. The next section is going to look at two cases: the Czech Republic and Hungary. It will help us understand how lustration differs in two countries and see that there is no right way to do it.

The Czech Republic has adopted the most radical lustration while Hungary adopted a mild version. Why did the Czech Republic deal with the past more harshly? According to Williams, Fowler and Szczerbiak: 'Czech Republic fit the explanations that focus on the nature of the communist regime, mode of exit and outcome of the first democratic elections' (2005: 24). The previous regime in Czechoslovakia was harsh and orthodox, it collapsed under the pressure of popular fronts in 1989 and in the first free elections opposition scored an overwhelming victory. Therefore, there is no wonder why the new Czechoslovak government adopted lustration so early and preferred a radical version of it. The Czechoslovak lustration law adopted in 1991 was the most systematic example of lustration (Williams et al. 2005: 24). The first lustration law disqualified particular groups from public positions for five years. The law was extended in 1995 for five years and in 2000 indefinitely (Appel 2005: 385). The law required all individuals who hold or apply for positions specified by the law to submit a certificate about his/her work or collaboration with the secret police at the levels listed in the law. Certificates are issued by the Ministry of the Interior (David 2006: 355). Moreover, individuals are required to submit an affidavit, that they do not belong to groups specified by the law. If an individual belongs to any of these groups, his/her employer must terminate his employment or transfer him/her to a position that is not specified by the law. The individual has a right to go to the law about both the certificate and his/her dismissal (David 2006: 335-336). Thus former agents and collaborators cannot hold senior positions in government ministries, the military, the police, the new secret service, or the state-owned media. They also were ineligible to serve as a judge, a state notary, a public prosecutor, the director of a majority state-owned enterprise. Former agents and collaborators were also disqualified from leadership positions in academia though this did not apply for regular professors. It is estimated that the lustration law affected thousands of people, with more than forty thousand posts specified by law. (Apel 2005: 385-386). More than 400,000 lustration certificates were issued, with only 3 per cent of them certifying collaboration (Williams et al. 2005: 25).

Such radical lustration attained strong international criticism. As David points out: 'The indiscriminate nature of exclusion [...] constituted a collective punishment and violated international human rights, namely the right to expression, the right to be free from discrimination and the oft-questionable right to work in public service' (David 2006: 356). However, the absence of case-by-case examinations led to some serious flaws. Categories of those who did not have a clear definition of party membership were annulled. Thus, David notes: 'contrary to expectations, the bulk of the old *nomenklatura* has adapted to the new situation, redefined its identities, reinvented biographies and used different channels (e.g. party financing, privatization funds) to capitalize on its social capital' (2006: 357).

In Hungary, a lustration law was adopted in 1994 after several failed attempts in the 1990s. Williams, Fowler and Szczerbiak notice, that the Hungarian case is a challenge to explanations, because according to its background the country should not have pursued lustration at all. The 'goulash communism' after 1960s was relatively liberal, the regime tolerated some dissent, transition was initiated by the reformist within the communist elite and achieved by compromise and negotiation with democracy proponents and the first free elections were won by the opposition – Hungarian Democratic Forum (Williams et al. 2005: 25). Hence, lustration was not likely to happen. Williams, Fowler and Szczerbiak explain this was caused by 'security and transparency concerns among some liberals, and the pursuit of an anti-communist agenda by malcontents on the radical right' (2005: 34).

The Hungarian lustration in 1994 required senior public servants to be screened in regard to their membership with the communist regime and the Hungarian Nazi party. If a panel consisting of at least three judges find out that an individual collaborated, he is confronted and requested to resign. The person can request to review the process. In case a person refuses to resign, his/her name is published by the official Hungarian newspaper Magyar Kozlony and announced by the Hungarian News Service. (David 2006: 358). The 1994 law required the vetting of minister, deputy ministers, members of parliament, judges, prosecutors, mayors and other local government officials, ambassadors,

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senior military officials, high-level employees in the state media, academic administrators, and the directors of state-owned companies. The occupants of between 10 000 and 12 000 posts were vetted (Williams et al. 2005: 25). The lustration program was curtailed in 1996, when the Socialists regained power. The new legislation affected the most senior posts in the government and state media, lowering the number of jobs subject to lustration to five hundred posts. In 2000, the right regained power and the scope of lustration was expanded again and lustration program was extended until 2004. The Hungarian lustration model was praised for its respect for human privacy. If a panel of judges found that person collaborated, he had an option of resigning to prevent public humiliation (Appel 2005: 386). On the other hand, Hungarian lustration was criticised as 'toothless and ineffective', because there were no sanctions to force people to surrender their office (David 2006: 359). Czech Republic and Hungary adopted two very different lustration models, but both of them were unfair at some point. The next section will look at the other problems that arise from the question and will review the alternatives to lustration.

Two different cases have been compared, proving both of them to be unfair at some point. However, no theory fits all cases. There are many other interesting cases that have not been analysed due to the scope and limits of this essay. In Slovenia, almost no attempts were made to introduce lustration (except the 1999 law investigating judges and candidates to judges, which resulted in many judges taking early retirement), nor other means of dealing with the past (Bohnet 2011: 64). Many questions could be asked: why did Slovenia not introduced a lustration law? How did it manage to look at the future without dealing with the past? These questions lead to one salient question: did radical lustration help or hinder democracy? Both Czech Republic and Hungary are advanced democratic countries, both members of the EU. Radical lustration can have positive as well as negative consequences on society. For example, without a radical approach a sense of paranoia and mistrust might prevail, but on the other hand scapegoating and 'filemania' creates actual paranoia, and the development of a civic culture might become more difficult (Guerra 2011a). Thus, again there is no right answer. Every country had to make its own decisions, and there was no perfect model to follow. There were many options, and until now only two have been mentioned: trials and lustration. Other options include: decommunization, file opening, forgive and forget and truth and reconciliation commissions. 'Decommunisation' and 'lustration' are often used interchangeably, but they have slightly different meanings:

Lustration is understood as ascertaining whether an occupant of or candidate for a particular post worked for or collaborated with the communist security services. Decommunization, on the other hand, refers to the wider removal and exclusion of people from office for having been functionaries of the Communist party or related institutions (Williams et al. 2005: 23).

It is argued that overall decommunization failed, with the exception of former East Germany, where many former informers of the Stasi (Ministry of State Security) have been fired (Holmes 2006: 22-77). Many countries have decided to open secret files, including Bulgaria, Germany, Hungary, Czech Republic and Poland, though access conditions to the files differs greatly. In Lithuania, the files are open to the public and not restricted to any persons, while in Slovenia the files will be open after 30 years of its creation. In most countries people can read the files compiled on them (Montero 2010: 282). However, the problem of reliability remains. Another unpopular option is to forgive and forget. Slovenia did that and Poland had tried, but unsuccessfully. The lustration law in Poland was introduced in 1997. Prior to that, accusations of collaboration with secret police led to the resignations of two Polish prime ministers (Appel 2005: 388). Thus, forgive and forget has the main disadvantage – accusations keep re-occurring every election and become the main point of campaigns – instead of real problems. Another way to come to terms with the past is Truth and Reconciliation Commissions. While this option was extremely popular in Africa and South America none of the countries in Eastern and Central Europe have chosen it. This option is time and money consuming, and that may explain its unpopularity in Eastern and Central European post-communist regimes. Moreover, the problem in Africa was mostly between different ethnic groups as well as black and white communities – and this may explain why it would not work in Europe.

To conclude, this essay tried to find out whether it is possible to devise a fair system of lustration. The first paragraph analysed the theoretical framework of lustration. According to Williams, Fowler and Szczerbiak, lustration is explained by looking at various factors: the previous regime, exit and voice mode, transition to democracy, outcome of first free elections, tactics and motives of lustration proponents and post-communist political competition. Second, arguments for and against lustration were reviewed, finding that even if lustration is perceived as means for

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preserving the state and democracy and necessary for public safety, it also violates the rule of law and human rights, relies on untrustworthy evidence and can become easily politicized. Next, two case studies were examined – Czech Republic and Hungary. Two very different lustration systems were presented together with their advantages and disadvantages, one radical and one mild. The examination led to the conclusion, that it is not possible to devise a fair system of lustration, because it would still be unfair at some point. The last section shortly discussed other problems that arise from the question, whether radical lustration can hinder or help democracy and what other alternatives were available. Overall, it was learned that there is no right answer, because all the options and decisions have their pros and cons. It is important to keep in mind that the examination has been limited due to the length of this essay.

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