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SIMILARITIES, DIFFERENCES, APPLICABLE STANDARDS”**

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REPORT

**“LUSTRATION: THE EXPERIENCE OF CZECHOSLOVAKIA/
THE CZECH REPUBLIC”**

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The presentation focuses on the lustration experience of Czechoslovakia and the Czech Republic.¹ Since some of the aspects of this topic, namely the interesting decisions rendered by the Constitutional Courts of Czechoslovakia and the Czech Republic, are discussed in the contribution by Ms Kateřina Šimáčková from the Constitutional Court, this presentation only deals with the legal framework and its implementation in Czechoslovakia/the Czech Republic. The first part of the presentation describes the Czechoslovak/Czech model of lustration. The second part identifies certain characteristic features of this model and gives a short assessment of these features. The presentation adopts a narrow definition of lustration, as this has been used in the national debate. It thus solely concentrates on the vetting of the elites of the former regime, not on other forms of transitional justice (criminal prosecutions, disclosure of files of the communist secret services, restitution, rehabilitation etc.).

The Czechoslovak/Czech Lustration Model

The lustration acts were adopted still under Czechoslovakia, which made the country one of the very first to introduce such legislation. Another specificity consists in that there have been two lustration acts – called the Great Lustration Act and the Small Lustration Act, respectively. The former, the *Great Lustration Act* (hereafter “GLA”) was enacted in October 1991,² about two years after the Velvet Revolution bringing about the end of the communist regime in Czechoslovakia. The GLA applied in the whole territory of Czechoslovakia. It barred certain categories of people from holding a range of positions in the state administration, the armed and security forces, constitutional courts and state-owned enterprises (so called protected positions). The categories of excluded people encompassed, among others, officers and collaborators of the State Security Service, high officials of the Communist Party, members of the People’s Militias or students of certain high schools (so called suspected positions). Some changes have been later brought to the Act by amendments and by the decisions of the Czechoslovak/Czech Constitutional Courts.

The Great Lustration Act was originally adopted for five years and was thus to remain in force till 1996. In 1996, however, despite the veto of the then president Václav Havel, the scope of the application of the GLA was extended till 2000, And in 2000, the time limit on the application of the Act was abolished altogether. That means that the Great Lustration Act is still in force in the Czech Republic. In Slovakia, on the contrary, the scope of the application of the GLA was not extended and the Act thus expired in 1996. The second piece of lustration legislation, the *Small Lustration Law* (hereafter “SLA”) was enacted in June 1992,³ only for the Czech part of Czechoslovakia. It is very similar to the GLA, it is just specifically designed to apply to certain positions within the Ministry of Interior, the Police and the Penitentiary Service. The categories of people excluded from occupying these positions are almost identical as under the GLA. The SLA also had its scope of application repeatedly extended and is still applicable, and applied, in the Czech Republic.

On the practical level, the two lustration acts operate in a similar way. They foresee a range of protected positions. Those who held these positions in 1991-1992, when the GLA and SLA entered into force, or who have stood as candidate for any of these positions since then, have had to undergo a screening (or vetting) procedure. During this procedure, they have had to produce two documents – a so called lustration certificate and a personal statement. The

¹ Czechoslovakia dissolved on 31 December 1992, the Czech Republic, together with the Slovak Republic, came into existence on 1 January 1993.

² 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.

³ Zákon č. 279/1992 Sb., o některých dalších předpokladech pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Sboru nápravné výchovy České republiky.

lustration certificate indicates whether a person was or was not an officer or a collaborator of the State Security Service during the Communist period. The positive lustration certificate, indicating that the person was an officer or a collaborator, entails the prohibition for this person to hold any of the protected positions. The certificate is issued, at the request of the candidate or the institution for which s/he wants to work, by the Ministry of Interior, after the consultation of the State Security Service files, which are nowadays administered by the Archive of Security Service under the Institute for the Study of Totalitarian Regimes. The personal statement is a unilateral act produced by the holder of the post or the candidate in which s/he declares that s/he was not a high official of the Communist Party, a member of the People's Militias or a student of certain high schools. The requirement of producing the two documents only applies to those born after 1 December 1971. There is no exact data on the number of persons who have undergone the screening procedure. The estimates revolve around 400-500.000 persons, out of whom about 5% have been positively lustrated (and could not hold the public position).

The Characteristic Features of the Czechoslovak/Czech Lustration Model

The second part of this presentation identifies several characteristic features of the Czechoslovak/Czech lustration model and gives a short assessment of these features. First of all, in the Czechoslovak/Czech model, lustration has always been understood in a narrow sense. It is a tool of transitional justice aimed at protecting a newly democratic state from threats posed by the elites of the former totalitarian regime and at preventing a return of such a regime, by excluding these elites from the public life. In Czechoslovakia/the Czech Republic, lustration has never encompassed criminal or anti-corruption agenda. This narrow understanding was predominant during the first wave of lustration, which took place in the countries of Central and Eastern Europe after the fall of communism. It also served as one of the main justifications of this wave, drawing attention to the temporary, exceptional nature of lustration introduced simply to help achieve de-communisation. With the passing of time, this justification obviously loses its persuasive character.

Secondly, the Czechoslovak/Czech lustration model belongs to what scholars such as Roman David call exclusive personal systems of lustration. In his book on lustration,⁴ David distinguishes between exclusive, inclusive, reconciliatory and mixed personal systems of lustration. Exclusive systems prevent persons associated with the past regime from holding certain positions in the state apparatus of the new regime. Inclusive and reconciliatory systems seek to reintegrate these persons, giving them the second chance. They do so on the condition that the persons reveal the truth about their past involvement in the non-democratic regime (inclusive system) and that the truth is then verified (reconciliatory system). Mixed systems combine elements of these various systems. Out of the four, the exclusive system – opted for in Czechoslovakia/the Czech Republic – is the strictest one and constitutes the most radical departure from the past. This is not necessarily good or bad as there is no hierarchy between the various systems. The choice mostly depends on the political traditions of the country and the way in which transition to democracy takes place. Countries in which transition was negotiated tend to favour inclusive or reconciliatory systems (Poland, Hungary). Countries, in which revolution took place, even if it was a Velvet revolution, tend on the contrary to opt for the exclusive system as Czechoslovakia/the Czech Republic did.

⁴ David, Roman: *Lustration and Transitional Justice. Personnel Systems in the Czech Republic, Hungary, and Poland*, University of Pennsylvania Press, Philadelphia, 2011, pp. 27-39.

The first two characteristic features of the Czechoslovak/Czech lustration model are rather neutral in nature. The remaining three features are more controversial. One is the excessive formalism and the lack of individualization. Under the European standards,⁵ lustration should be based on individual liability and on the presumption of innocence. This has not been truly the case in Czechoslovakia/the Czech Republic. Individuals could be excluded from the access to public positions based solely on their membership in certain organizations or on the inclusion of their names into the files of the communist State Security Service. Whether the inclusion was warranted or not and whether the individuals concerned did actually commit any wrong, has not been verified. It is interesting to note that in many cases, when the inclusion in the files and/or the positive lustration certificate based on this inclusion has been challenged in courts, the applicant has won the case. This questions not only the reliability of the files but also the wisdom of relying on them in the lustration process.

The fourth characteristic feature of the Czechoslovak/Czech lustration model, which is probably the most striking, relates to the time scope. The two Lustration Acts have been in force for almost 25 years now. Under the European Standards, the maximum period should be 5 years. The Czechoslovak Constitutional Court held in 1992 that the law *"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"*.⁶ Whether we embrace the first approach, with a clear time-frame, or the second approach, leaving more space to consider local conditions, it is clear that the aim pursued by lustration – that of protecting the new democracy and preventing the return of communism – has already been achieved in the Czech Republic. And if it has not, then the Lustration Acts have not probably worked very well in the first place. The continued existence of the Lustration Acts has become particularly problematic since the entry into force, on 1st January 2015, of the Act on the Civil Service,⁷ since the latter was supposed to contain a complete set of criteria for holding public positions. This has however not happened and the two Lustration Acts have remained applicable alongside the Law on the Civil Service.

The last, equally controversial characteristic feature of the Czechoslovak/Czech lustration model pertains to the lack of regular judicial review.⁸ The Great Lustration Act in its article 18 foresees the possibility to challenge the decision on the dismissal. This possibility, however, is only open to those already having the position, not to those standing as candidates for the position. One could expect that as the positive lustration certificate, on which the exclusion of the person from the access to public positions is based, should, as a document issued by an executive organ, be subject to the review in the administrative courts. Yet, in 1993, the Constitutional Court stated that the certificate could not be considered an administrative decision and, as such, it does not lend itself to such a review. So far, most of the positively lustrated persons have sought remedy in civil courts, by means of the complaint for the protection of personality, honour and dignity. They argue that by issuing a document indicating their cooperation with the communist State Security Service, the Ministry of Interior has offended their honour and dignity. Some individuals have used this legal way to challenge the reliability of the files of the State Security Service. As already noted, such complaints have been largely successful.

⁵ Resolution by the Parliamentary Assembly of the Council of Europe 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, 27 June 1996.

⁶ Czechoslovak Constitutional Court, Opinion 03/92, 26 November 1992.

⁷ Zákon č. 234/2014 Sb., o státní službě.

⁸ Sokol, Tomáš: Stále citlivé lustrace, *Právní rádce*, 28. 3. 2006.

Concluding Remarks

The presentation shows that the Czechoslovak/Czech model of lustration is interesting to study and quite original in many aspects. It has certain comparative advantages, for instance a precise and narrow understanding of the concept of lustration. At the same time, it also reveals certain shortcomings, most importantly the excessive formalism, the unlimited time scope of application, and the unavailability of regular judicial review. These strengths and weaknesses should both be taken into account by anyone who researches the Czechoslovak/Czech model of lustration and even more by those, who see this model as a source of inspiration for their own attempts to purify the society after a political change and break with a non-democratic past. Thank you for your attention.