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***Council of Europe standards on lustration – including jurisprudence of the European Court of Human Rights – and its implications***

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*Since June 2014 ODF collects analysis and opinions from variety of international experts on the topic of lustration and verification of state public authorities and immediately shares it with the Lustration Committee of Mr Yehor Sobolev.*

*The collected set of analysis will be published by 11th September 2014 in a downloadable digital form.*

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## **1. Introduction**

Beyond a reasonable doubt each state in a period of transition is authorised to take necessary legal steps to protect and secure the ongoing process. At the beginning of the process of transformation the state has a unique chance to start the lustration process in the best moment. In fact, the earlier lustration is started, the better results could be achieved by the state.

In Poland serious problems with implementation of lustration instruments appeared after the collapse of the communist system in 1989. The Lustration process was started practically in 1999, i.e. almost 10 years after the first partially free Parliamentary Elections that took place on 4 June 1989. The first lustration Act was adopted on 11 April 1997.

Nevertheless, whenever the state decides to implement the lustration instruments – or even wider, transition instruments – it must remember about the state's obligations resulting from the fundamental human rights and freedoms.

Ukraine is the Member state of the Council of Europe and ratified the European Convention on Human Rights in 1997. When the state starts works aimed to create instruments of settlements with the past, it should be conscious of obligations resulting from the Membership of the Council of Europe.

The European Court of Human Rights has issued a series of judgments regarding the lustration instruments. Important part of them referred to the Polish lustration instruments. The Court has noted different attitudes and different solutions implemented by the Member states, indicating that there is no uniform approach among High Contracting Parties as to the measures to dismantle the heritage of former communist totalitarian systems. Nevertheless, the Court has never created and presented a list of requirements and obligations imposed on the state at the area of the lustration instruments. Judgments of the European Court of Human Rights do not give full, closed and systematic guidelines how to deal with the lustration. Judgements refer to specific instruments adopted in different countries and only on this occasion they give some general comments on rights and obligations of the state.

## **2. Resolutions of the Parliamentary Assembly of the Council of Europe**

The basic and the most important rules and guidelines how to deal with the transition process with respect for fundamental human rights declared in the European Convention on Human Rights are presented on *the Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe on Measures to dismantle the heritage of former communist totalitarian systems* The Resolution was adopted by the Assembly on 27 June 1996.

The Resolution refers to the issue of dealing with the heritage of the communist past by the countries of the Central and Eastern Europe at the end of the 20<sup>th</sup> Century. However, this document provides with a set of a universal rules and directions, that are found to be up to date from the perspective of other countries in the transition period which have to deal with a similar issues and problems. In consequence, it is highly recommended to analyse and rely on guidelines provided by the Resolution during the process of creating the own way of dealing with the transition instruments.

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The Resolution is an act which formally does not have a legally binding character. As a soft law act, it presents only some good practices, directions and guidelines. Nonetheless, on several occasions the European Court of Human Rights in its judgments referred to the Resolution when examining cases regarding lustration instruments. The Resolution recommends in § 15 to verify whether domestic laws, regulations and procedures comply with the principles contained in the Resolution, and revise them, if necessary, to avoid complaints lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights.

State in the period of transition, while relying on the general guidelines expressed in the Resolution, has to find its own way of dealing with the past. Solutions adopted in other countries may constitute inspiration, but the most important idea – expressed in the Resolution – is that the key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge. This general rule applies to all type of transitional instruments.

The Resolution provides with the following more detailed rudimental rules and guidelines regarding dismantling heritage of the previous regime in a democratic state based on the rule of law:

- [ A democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state.
- [ A democratic state based on the rule of law cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled.
- [ A democratic state based on the rule of law has sufficient means at its disposal, to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, satisfy the desire for revenge instead of justice.
- [ A democratic state based on the rule of law must respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves.
- [ A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has at its disposal means which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

Within framework of transition instruments there are at least two important areas: criminal liability and lustration instruments. They should be implemented and executed simultaneously and do not concur or exclude each other.

At the area of a **criminal liability**, the Resolution recommends that criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended. Passing and applying retroactive criminal laws is, however, not permitted. According to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at

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the time when it was committed. On the same time, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

On the other hand, the Resolution indicates, that the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Such recommendation corresponds with Article 7 of the Convention, which states that its § 1 shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

The Resolution reminds also, that where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt. In consequence, criminally responsible is a person, that gives orders, as well as a person that follow and carry out orders.

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

Some more detailed suggestions on lustration instruments were presented in the Doc. 7568, that had been prepared before the Resolution were drafted. – e.g. that lustration should be focused on threats to fundamental human rights and the democratisation process; its aim is to protect the newly-emerged democracy.

The Resolution stresses that, in general, lustration or even decommunisation measures can be compatible with a democratic state under the rule of law, if several criteria are met:

- [ guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws,
- [ the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed at least,
- [ the aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly emerged democracy.

The Resolution strongly emphasises that revenge must never be a goal of such measures, nor any political or social misuse of the resulting lustration process should be allowed. Lustration laws and similar administrative measures should be focused on threats to fundamental human rights and the democratisation process.

From perspective of human rights, the aim of lustration measure justifies possibility of implementation restrictions in the right to protect the private life or the right to access to the public offices, including even the right to be elected (political rights). Nevertheless, restrictions have to be proportional to the aims of lustration instruments. On the other hand, there are

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never grounds for restrictions in procedural rights, e.g. the right to a court, the right to a fair trial (based on the rule of equality of arms), the right to defence and the presumption of innocence.

The Resolution refers also to **other measures of transitional process**.

The Resolution recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of “crimes” which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

The Resolution welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advised all countries concerned to enable every affected person to examine, upon his/her request, the files concerning them collected by the former secret services.

Furthermore, the Resolution recommended that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, those pension rights should be reduced to the ordinary level.

The Parliamentary Assembly of the Council of Europe in 2006 adopted one more resolution regarding the heritage of communist past. The Parliamentary Assembly Resolution 1481 (2006) on *Need for international condemnation of crimes of totalitarian communist regimes*, adopted on 25 January 2006 is rather of an ideological character and it does not provide with more detailed guidelines.

### **3. The European Court of Human Rights’ jurisprudence on obligations imposed on states that take decision to implement lustration instruments**

The European Court of Human Rights noticed in its jurisprudence, that there is no uniform approach among Member States of the Council of Europe as to the measures to dismantle the heritage of former communist totalitarian systems. In many post-communist countries restrictions have been imposed with a view to screening the employment of former security agents or active collaborators in the former regimes. In Lithuania, persons who have been given the statutory status of “former KGB officers” have been precluded from employment in the public sector and from some private-sector jobs. In Latvia the Statutory Acts prohibit the employment of persons who worked for or with the Soviet security services. In Slovakia persons who collaborated with the Czechoslovak communist State Security Agency and were issued with a negative security clearance could be prohibited from exercising some public functions for a certain period of time.

The Court noted, that in Poland the purpose of lustration proceedings is not 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, since admitting to such collaboration – in so-called lustration declaration – does not entail any negative effects. The purpose is to punish those who have failed to comply with the obligation

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to disclose to the public their past collaboration with those services. The Polish Lustration Act introduced an obligation to inform the general public, in the form of a lustration declaration, of any collaboration with, as well as work or service for, the secret services between 1944 and 1990. Among the most important reasons for such regulation the Polish Constitutional Court pointed to transparency of public life and information about the past of those who carry out public functions. The Lustration Act provides sanctions, if the lustration court finds that the submitted declaration was false. Having been considered a “lustration liar” entails dismissal from public functions exercised by lustrated person and prevents the person concerned from applying for the posts in question for a period of 10 years (presently it is a period of 3 to 10 years). The public functions, which the person who has lied in the lustration declaration cannot exercise, include legal professions such as those of barrister, judge, prosecutor and public servant and political ones such as those of Member of Parliament or President of the Republic of Poland.

As it was already mentioned above, lustration gives the state legal possibility to implement restrictions on exercising the right to protect the private life (declared by Article 8 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms) or the right to access to the public offices, including even the right to be elected (political rights). Nevertheless, the restrictions have to be proportional to the aims of lustration instruments. According to Article 8 of the Convention, everyone has the right to respect for his private life. Section 2 of Article 8 of the Convention provides, that the right to respect for private life can be restricted exceptionally, in accordance with the law if it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The issue of proportionality was emphasised by the Court especially in the Lithuanian cases.

The Court stated, that the applicants’ dismissal from their jobs as private-sector lawyers and their current employment restrictions pursuant to the Act constituted a statutory distinction of their status on the basis of their KGB past, affecting directly their right to respect for private life. Further on, the Court emphasised that the State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service. Moreover, the very belated nature of the Act, imposing the impugned employment restrictions on the applicants a decade after the Lithuanian independence had been re-established and the applicants’ KGB employment had been terminated, counts strongly in favour of a finding that the application of the Act vis-à-vis the applicants amounted to a discriminatory measure.

The Court came to the conclusion, that the respondent Government have thus failed to disprove that the applicants’ inability to pursue their former professions as, respectively, a lawyer in a private telecommunications company and barrister, and their continuing inability to find private-sector employment on the basis of their “former KGB officer” status under the Act, constitutes a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought after.

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On the other hand, on each occasion the Court indicated, that – when implementing lustration measures – there are no grounds for restrictions in procedural rights toward persons subjected to the lustration instruments.

Article 6 of the Convention – declaring the right to a fair trial – states that in the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to Article 6 § 2 and § 3 of the Convention, in the proceedings of a criminal nature, everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Such person must be provided also with the following minimum rights: (a) to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her; (b) to have adequate time and facilities for the preparation of his/her defence; (c) to defend himself/herself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her; (e) to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.

In the Polish cases, the Court recognised that at the end of the 1990s, as well as at the beginning of the 21<sup>st</sup> Century, the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, if a State decides 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.

The Court held that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. The reason for this is that lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely reduced.

The Court accepted that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. However, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case since what is accepted as an exception must not become a norm. The Court considered that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as secret and the decision to maintain the confidentiality was left within the powers of the current secret services, created a situation in which the lustrated person's position was put at a clear disadvantage.

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The Court recalls in the Polish lustration cases – where criminal trial standards established in Article 6 § 3 of the Convention are applied – that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

The Court emphasizes additionally that also within framework of the lustration proceedings requirement of “reasonable time” has to be fulfilled. When the length of the proceedings is excessive, Article 6 § 1 of the Convention is violated in consequence. In the case of *Turek v. Slovakia*, the Court found proceedings lasting 7 years to be excessive length.

As to a procedural requirements, it has to be emphasized additionally that the judicial body authorized to examine the lustration cases has to fulfil the requirements of an independent and impartial court as well as being established by law.

#### **4. Conclusions**

State in a period of transition is authorized and even should implement the lustration measures, as well as prosecute against perpetrators who committed acts that constitute crimes. However, if a state decides to adopt lustration instruments it has to provide with procedural safeguards persons subjected to such measures. At the same time state should construct them in a way proportional to their aims. The restrictions in exercising human rights imposed by the lustration instruments have to be proportional to their aims.

A democratic state based on the rule of law must apply the procedural means of such a state when dismantling the heritage of the previous regime. Such state must at the same time respect human rights and fundamental freedoms.

*For more questions please contact:*

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