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The Right to Know the Past in Hungary

Transitional societies, like the Hungarian necessarily face with the past in general, and the legacy of human rights violations in the previous regime in particular. This paper contends that the full consolidation of democracy can only be successfully completed if there is political will to tackle the necessary process of dealing with the undemocratic past. What this process exactly is and what it aims at is best rendered by two German words, for which no direct translations exist in English: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*.[1]

This paper argues that Hungary has not yet fully succeeded in the task of honestly and seriously working through its totalitarian past, and that the way in which a country is dealing with the information on their past has a detrimental impact on the process of democratic consolidation. Hungary's handling of the past have thus undermined the emergence and strengthening of aspects necessary for the consolidation of democracy on the behavioural and attitudinal levels, such as trust in democratic institutions. In this context, the importance of a generalised public disclosure of the secret police files is underlined.

There are two aspects of this process, which are relevant to the topic of the right to know the information on the past: a) lustration of public officials; b) access to the files of the previous secret police.

Lustration

One of the great challenges to transitional democracies and the rule of law represent the different kinds of non-criminal administrative sanctions, the joint aim of which is to purg from the public sector those who served the repressive regime. The idea behind these processes is the prevention of human rights abuses through personnel reforms by excluding from public institutions persons who lack intergrity, or at least by informing the general public, especially the voters about the past of those who run for a public position. In the latter cases (milder forms of lustration), the only sanction is the publication of the data on the involvement of the public officials in one of the repressive institutions, for instance the secret police of the previous regime. Besides lustration in former communist countries the processes to exclude abusive or incompetent public employees in order to prevent the recurrence of human rights abuses and build fair and efficient public institutions is a general characteristique of countries emerging from conflict or athoritarian regimes. Recent examples include UN vetting efforts in El Salvador, Bosnia and Herzegovina, Liberia and Haiti, but also the „Debaathification" process in postwar Iraq. As the Secretary General's Report on The Rule of Law and Transitional Justice in Conflict and Postconflict Societies puts is: „Vetting usually entails a formal process for the identification and the removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."[2]

But we cannot forget that there have been many transitions in which there has been not vetting or lustration, not even of most important rule of law institutions (e.g. Spain, Chile,

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[1] These expressions have normative connotations, as they not only describe a process, but also imply the positive effects this process will entail. The former may be translated by 'working through' or 'treating' history; the latter by 'coping, dealing, coming to terms with' or, even more precisely, 'overcoming' the past.

[2] UN Doc. S/2004/616, p. 17.

Argentina, Guatemala, South Africa), and also in East-Central Europe, besides the more extensive vetting and lustration procedures, as the one in the Czech Republic and East Germany (the former German Democratic Republic, GDR), there have also been transitions with very modest and sector specific vetting as in Poland, and Hungary. During the revolutionary changes in East Germany, as well as in Czechoslovakia, after the 1989 Velvet Revolution vetting and lustration has to be taken as part of the broader politics of decommunisation which targeted exactly the personal aspect of the whole process of postcommunist political and legal transformations.[3]

The *Hungarian lustration law* was adopted also after a long hesitation early in 1994, toward the end of the first elected government's term of office, and similarly to the Polish case included a compromise solution to the issue of the secret agents of the previous regime's police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the president, government ministers, members of parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in state universities or state-owned companies, as well as a specified list of other high government officials). Each of these people would have to undergo background checks in which their files would be scrutinized to see whether they had a lustratable role[4] in the ongoing operation of the previous surveillance state. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgement in the specific case. If the person accepted a judgement against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of parliament was already underway, the law was challenged by a petition to the Hungarian Constitutional Court. The Court handed down its decision in December 1994[5], in which parts of the 1994 law requiring "background checks on individuals who hold key offices" were declared unconstitutional. In its decision the Court outlined key principles of the rights of privacy of the individuals whose pasts are revealed in the files as well as the rights of publicity for information of public interest. The most important declaration of principle in the decision of the Constitutional Court is the following: "The court declares that data and records on individuals in positions of public authority and those who participate in political life - including those responsible for developing public opinion as part of their job - count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional state, or belonged to state organs that at one time pursued activities contrary to the same." Article 61

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[3] See Jiri PRIBAN: *Oppressors and Their Victims. The Czech Lustration Law and the Rule of Law*, in: Mayer-Rieckh, Alexander and Greiff, Pablo de (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. pp. 308-346.

[4] The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.

[5] 60/1994 (XII. 24) AB. See the English translation of the decision in László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press, Ann Arbor, 2000. pp. 306-315.

of the Hungarian Constituiton provides an explicit right to access and disseminate information of public interest.

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the state-party regime),[6] but also constitutionally, because it represented the clash of two constitutional principles: the rights of informational self-determination of individuals (in this case, the spies) and the rights of public access to legitimately public data by everyone (including those who were spied on). Before the lustration case, both principles had been upheld in strong form. The lustration case, however, pitted the two principles against each other.

Taking the whole range of issues, from the constitutionality of the lustration process to the continued secrecy of the security apparatus files, the Constitutional Court attempted to balance a range of interests. First, the Court held that the maintenance of this vast store of secret records was incompatible with the maintenance of a state under the rule of law, since such records would never have been constitutionally compiled in the first place in a rule-of-law state. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as the agents. Disclosing the files to an interested public also would mean disclosing information of great personal importance to the individuals mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic state. As a result, more information about such public persons may be disclosed from the security files than would be permitted in the case of persons not holding influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of persons. With this, the Court placed the problem back in the hands of the Parliament as a "political issue," with the instructions that the Parliament is free neither to destroy all the records nor to maintain the absolute secrecy of them, since much of what they contain is information of public interest.

The Court also found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional muster. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionaly arbitrary. In particular, the Court found that the category of journalists who were lustratable was both too broad - by including those who produced music and entertainment programs - and also too narrow - by excluding some clearly influential journalists who worked for the private electronic media. Either all journalists, and other public figures who have as part of their job influencing public opinion must be lustrated or none may be, the Court held. Parliament could choose either course. The Court did not, however, find the extention of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, "participate in the shaping of the public will" are acceptable candidates for lustration, as long

[6] For example, the Prime Minister and the Speaker of the Parliament in the term between 1994-98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly got informational briefings from the secret police.

as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority state-owned businesses was declared unconstitutional, however, since these persons "neither exercise authority nor participate in public affairs," according to the Court. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons because the procedures to be applied to the clergy did not include as many safeguards as those applied to others.

The decision of the Constitutional Court shows correctly that a lustration law can have two goals, depending on the historical moment. At the beginning of the transition, full lustration might have served to mark the irreversability of the change and the ritual cleaning of the society. But more than five years after the "rule-of-law revolution," the better constitutional goal may be found in specifying the circle of freedom of information through a rule-of-law lustration. The behavior and the past of those people who are now prominent in political public life are appropriate for the public community to know. The lustration of the prominent representatives of the state is constitutionally reasonable, but the publicity of the full agent's list is not, the Constitutional Court argued.

The new lustration law, LXII/1996, which was approved by the parliament in July, 1996 specifies that only those public officials who have to take an oath before the parliament or the president of the republic or who are elected by the parliament are to be subjected to the lustration process. This takes care of the problem outlined by the court of an excessive scope of lustratable officials. According to the amandment ordinary court judges, public prosecutors, and majors are excluded from the lustration. After the change of goverment in 1998, the centre-right conservative governing parties in 2000 adopted Act XCIII, which extended significantly the list of those who should go through lustration compared to the modification in 1996 and the original law of 1994. The amandment extended the scope of vetting of the media beyond the level of editors, to "those, who have the effect to influence the political public opinion either directly or indirectly", and was also applicable to commercial television, radio, newspapers and Internet news agencies.[7]

Soon after the change of the goverment in 2002, it was disclosed that the that time Prime Minister Péter Medgyessy had served as a top secret officer of the former III/II directorate (counterintelligence) of the communist-era Ministry of Interior. The scandal showed that the legislation in force was inadequate to ensure the purity of post-transition public life, since it concerntrated exclusively on the domestic surveillance unit of the Hungarian secret police (former III/III directorate). But there were other units also, that engaged in spying on Hungarians living abroad, or on foreigners living in Hungary, or on those who served in the military, and those secret police units are not covered by the law, despite a public protest by a number of leading figures insisting that the lustration law cover all spying activities. This problem was subject of a complaint before the Constitutional Court, but it was rejected in 1999. Under the weight of intense press coverage of the Prime Minister's case and opposition pressure, in 2003 the government tabled an amandment of the lustration law involving every former directorates, and also planned to extent the lustration to the churches, by arguing if media representatives are liable for lustration, there is no constitutional reason why the leaders of churches are not. But finally the draft law was rejected by the parliament.

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[7] See Elizabeth BARRETT, Péter HACK, Ágnes MUNKÁCSI: *Lustration As Political Competition: Vetting in Hungary*, in: Alexander Mayer-Rieckh and Pablo de Greiff (eds.): *Justice As Prevention. Vetting Public Employees in Transitional Societies*. Social Science Research Council, New York, 2007. pp. 180-220.

Access to the Files of the Secret Police

As the case of the Hungarian statutory regulation has shown, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. In the other countries thes issues were regulated separately. Concerning the wideness of accessibilty one can detect different models within the countries in East Central Europe. Poland, as well as the first Hungarian solution provided limited access to the victims. The most important limit is the name of the spy, which in these models is not disclosed for the victims. The unified Germany, which was the very first country in the history opening the state archives of the secret police, provided unlimited access to the victims concerning the data on the agent as well, and to government agencies to request background checks on their employees. The law enected by the Hungarian parliament in 2003 besides following the German way by providing access to victims on their spies also opened the files for the general public concerning the data of public figures. But the widest access is provided by the similar statutory regulation of the Czech Republic and Slovakia, where – with the necessary protection of third persons' personal data – the secret police files are accessable for everyone.

The *Hungarian* Constitutional Court's mentioned decision on the constitutionality of the 1994 lustration law also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.[8] The new law enected in 1996 did create a "Historical Office," responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose is to put into effect the prior decisions of the Constitutional Court.

As a consequence of the Hungarian Prime Mister's mentioned scandal in December 2003 the parliament adopted the Act V of 2003, which established a new Public Security Services' History Archive, and brought together all the documents of all of the security service directorates in this one location. The new law creates the opportunity to reveal the personal past of individuals in public office. Anyone can request the files of those people who are currently in public office or had been in public office. The category of public office is not well defined in the law but has been taken to include anyone who serves (or served) in positions of executive power or the media. Indeed, it can be interpreted very broadly. In the case of those in public office, some very limited information found in the Archive about an individual's relationship to any of the security service directorates (not just III/III) can be published. Only since 2003 has it been possible for individuals to request that the identity of the agent (i.e., the real person behind the codename) be revealed.

[8] Since this is an unusal power of the Hungarian Court, it deserves a bit of explanation. The Court can declare the Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

In May 2005 the Hungarian parliament passed an amendment to the Act V of 2003, which intends to open all of files of the former secret police, including the names of the agents not holding any public office. Another provision of the enected law entitles the Archive to make a lot of information public through its website without any personal request. The President of the Republic before promulgation sent the law to the Constitutional Court for preliminary review. In his application the President used the argument of the Court in its 60/1994. AB decision, saying that only the past of public officials represents a data of public interest, which can be published even without the consent of the person, but to disclose information of ordinary people not holding public officies would violate their right to informational self-determination. In its 37/2005. AB decision the Constitutional Court using its previous arguments declared the law as unconstitutional, which therfore did not enter into effect.

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After the 2010 Parliamentary elections, and especially after the new Fundamental Law came into force in 2012, Hungary became an illiberal democracy. This constitutes a new, hybrid type of regime. What happened is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way, liberal democracy is functioning. One of the many reasons of this backsliding is certainly the failure to face with facts and reasons of both totalitarian regimes through enforcing the right to know the information on the past.